

**OCCUPATIONAL SAFETY
AND HEALTH STANDARDS BOARD**

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**SUMMARY
PUBLIC MEETING/PUBLIC HEARING/BUSINESS MEETING
March 18, 2010
Costa Mesa, California**

I. PUBLIC MEETING

A. CALL TO ORDER AND INTRODUCTIONS

Chairman MacLeod called the Public Meeting of the Occupational Safety and Health Standards Board (Board) to order at 10:00 a.m., March 18, 2010, in The Council Chambers of the Costa Mesa City Hall, Costa Mesa, California.

ATTENDANCE

Board Members Present

Chairman John MacLeod
Jonathan Frisch, Ph.D.
Bill Jackson
Jack Kastorff
Guy Prescott
Willie Washington

Board Members Absent

Board Staff

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

Division of Occupational Safety and Health

Deborah Gold, Senior Safety Engineer

Others present

Steve Johnson, ARC-BAC
Wendy Holt, CSATF
Tim Tritch
Paul Cambria, Attorney
Deborah Gold, DOSH
Molly Henness, LAT
Diane Duke, Free Speech Coalition
Lisa McPartland, Saddleback Church

Kevin Thompson, Cal-OSHA Reporter
Cristina Rodriguez-Hart, RHIG
Terry Thedell, SDG&E
Jay A. Weir, AT&T
Peter Riley, DOSH
Larry Pena, SoCal Edison
Angelina Armani, FSC
Nicole Piot-Komonapalli, Saddleback Church

David Mech, Dave Pounder Productions
Melanie Dzierba, Pink Cross Foundation
Peter Kerndt, LA Dept. of Public Health
Mark Roy McGrath, UCLA School of
Public Health
Whitney Enepram, AIDS Healthcare Fnd.
Shelly Lubben, Pink Cross Foundation
Michael Weinstein, AIDS Healthcare Fnd.
Madelyne Hernandez, Frmr. Adult Actress
Yane Gracile, XBIZ

Steven Dzierba, Pink Cross Foundation
Brian Chase, AIDS Healthcare Foundation
Robert Kim-Farley, LA Dept. of Public Health

Jane Steinberg, LA County STD Program
Darren James, Former Adult Actor
Jan Meza-Merritt, Former Adult Actress
Julian Rivera, Lakeview Professional Service
Dan Leacox, Greenberg Traurig

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

Mark Roy McGrath with the Reproductive Health Interest Group at UCLA, stated that in November 2009, there was a symposium at the UCLA School of Public Affairs that included performers, producers, and public health advocates. The broad consensus was that the proposed regulations requiring condoms in the adult film industry would be a significant barrier to reduce workplace hazards. This echoes recommendations from the World Health Organization that the condom is the most reliable and effective method to prevent sexually transmitted diseases (STDs).

At UCLA, the Reproductive Health Interest Group conducted a health survey among adult film performers, and the results indicated that the performers are very anxious about their health and they do what they can within their limited agency to protect it. Most performers either prefer to use condoms or would not mind using condoms. Adult film industry spokespersons claim that condoms are an optional choice, but performers have indicated that they would be denied work if they exercised their right to this choice. Additionally, performers have submitted contracts that they have been required to sign. The language of these contracts attempts to exempt production companies from liability should a performer contract a work-related infection.

Since condoms are, for all intents and purposes, not optional, this risk is not voluntarily assumed by performers. Representatives from the adult film industry insist they can self-regulate, and they have an effective surveillance system. However, production companies in Palm Springs and San Francisco do not participate. In addition, these same production companies have engaged in practices that have endangered performers—openly soliciting members of the general public over the internet to have sex with performers for filming purposes. These same filming productions can include a single performer having sex with as many as 50 individuals. Mandatory condom use would

significantly reduce workplace infections in these scenarios. Additionally, affordable editing software is available to readily digitally remove condoms if required by the producers.

Industry spokespeople have also indicated that regulation would drive production out of state. Indeed, many high-risk genres are already produced in Eastern Europe. However, it is in our capacity to protect citizens of California engaged in this line of work. The measures being sought today are reasonable and cost-effective. Condoms are, for all intents and purposes, free from a variety of public health sources.

Bryan Chase, Assistant General Counsel with the AIDS Healthcare Foundation, stated that the adult film industry has an odd relationship with California law. California is one of only two states in the country where it is clear that it is legal to produce hard-core pornography, so when it comes to the rights that are employed under California law, the adult film industry is pretty happy with the state. But California also has some of the strictest workplace protections for employees in the country, and when it comes to fulfilling their responsibility to protect their workers, the adult film industry is not happy with California law at all and has chosen to flout California law and ignore the laws that are intended to protect workers from the threat of infection while they are on their job.

The producers of adult films even go so far as to often require performers to sign contracts allegedly waiving their protections under California workplace laws. While those familiar with the law are aware that contracts purporting to waive worker protections are not legal or enforceable in California, a lot of employees in the adult film industry are young, unsophisticated, and unlikely to be familiar with the nuances of California employment law. When employers take advantage of young workers and try to deceive them into thinking that they have waived rights that they enjoy, the state needs to step in and clarify the fact that all workers in California enjoy the right to be protected from harm, damage, and disease at work.

Cal-OSHA exists to protect all workers. The adult film industry cannot continue to enjoy the protection and the rights of California law while not taking the responsibility that California law requires. The adult film industry cannot continue to pretend that exposing young to the threat of STDs, exposing young people to gonorrhea and chlamydia as a condition of working is acceptable. The adult film industry cannot continue to profit by harming its workers.

Mr. Chase closed by asking the Board to adopt the proposed petition decision, and ultimately, to amend the standards to make it absolutely clear that all workers, including workers in adult film productions, are protected from the threat of disease.

Dr. Frisch asked how creating another regulation solves the problem of adult film producers flouting California law. Mr. Chase responded that the existing standards for blood borne pathogens were not designed with the adult film industry in mind. It is obvious that they cover the adult film industry because they cover all industries in

California. However, the regulations requiring gloves, goggles, and similar protections seems to imply that the reasonable precautions that are outlined in the standards are geared towards other industries. Since the adult film industry does different things than those in the medical industry or those who are picking up hazardous waste, it makes sense to give them regulations that they can more easily follow and are less likely to flout.

Shelly Lubben, Executive Director of Pink Cross Foundation, stated that she is a survivor of the porn industry. As a former porn actress, she has suffered much at the hands of the porn industry and their illegal activities and hazardous work conditions. She was subjected to being forced into scenes with several male performers while there was blood, feces, urine, and seminal and vaginal fluid all over her body. These conditions are common on the sets while the performers are working. At times, the performers are made to stand on piles of rags. Most of the scenes are filmed in private homes where there is no one to monitor what goes on, and there are no advocates on the set for the young performers.

Ms. Lubben stated that she and the Pink Cross Foundation have helped more than 50 performers leave the adult film industry, and hundreds more have shared their stories. The performers report that agents are often forcing performers to do scenes or threatening them with cease and desist papers or blacklisting if the performers ask to use condoms.

Ms. Lubben stated that she contracted herpes, an incurable STD, while working as an adult film performer. In addition, she contracted human papillomavirus, one of the most prevalent STDs in the industry, for which the industry does not test. This later led to Ms. Lubben's contraction of early cervical cancer, during which she had half of her cervix removed.

She asked that the Board convene an advisory committee to develop a standard that would protect this segment of California workers.

Paul Cambria, an attorney who has represented a number of major production houses in the adult film industry and General Counsel of the Adult Freedom Foundation, stated he has been consulted about the effects of the existing Cal-OSHA regulations and those that have been proposed. He stated that the industry as a whole has been effectively using medical testing for over 15 years, and there have been five cases of human immunodeficiency virus (HIV), the last of which did not occur in the adult area. That number is far below the national average. This low average was achieved without mandating condoms but instead relying upon medical testing by companies.

California producers cannot economically compete with out-of-state or international producers who are not mandated to use condoms or dental dams. These producers cannot remove condoms from movies during post-production in a cost-effective manner. This is a frame-by-frame process which would place the producers in California at an economic disadvantage. He stated that placing California producers in the position of mandating

condoms and other protections will result in the less-responsible producers going underground, and the more responsible producers will relocate out of the state or they will purchase from others who are not bound by the California regulations. This will result in little or no protections for adult workers, as compared to what exists now and what can be improved upon, which is enhanced medical testing.

Cal-OSHA cannot impose regulations on the world, and this is a world market. Producers from other places will be able to produce movies with which California companies cannot compete. As a result, if the object is to protect workers, we are better off with reasonable and workable regulations in the State of California which will at least protect workers rather than to drive the business and production out of the state, where there will be no protections. In that case, we have totally abandoned the workers, because in that case there will be no protections. The only way that workers can be protected is if production remains in California and the workers remain in California. Once they leave California's borders, we have done them no service.

Jan Meza-Merritt, a former adult actress, stated that during her time in the adult film industry, she contracted herpes and chlamydia. Adult Industry Medicine (AIM) only feels it is necessary to test for HIV, chlamydia, and gonorrhea. There are many other STDs that a performer can catch and spread in the adult film industry, and the tests are only mandatory every 30 days. Once a performer does his or her next scene, the test that was just performed becomes null and void. During the 30-day waiting period, an unprotected adult film worker can catch and spread many STDs unknowingly.

As a performer, she did a scene with 25 men. She had been told that she would not have to do the scene with all 25 men, that she would be completely protected and safe, and that all of the men in the scene would be screened. That turned out to be false; she had to do the scene with all 25 men, and it was not until after the film was completed that she discovered that not all of the men were adult film performers, some of them were fans or had answered an ad in the local valley newspaper. She had semen, saliva, and sweat all over her, and people wanted to take pictures with her, which is how she discovered that some of the men were fans.

She has been on sets where the female performers have joked about taking a "seven-day vacation" because they have contracted chlamydia and it takes seven days for the medication to be effective. She has been on sets where there were blood- or semen-soaked towels or wipes laying on the floor rather than in a biohazard container, and no one did anything about it. She has been on sets where the house or the rental unit is not clean and a less than healthy workplace.

Ms. Meza-Merritt is in full support of the proposed petition decision, and she knows of many other women in the adult film industry who may be too scared to speak up, but this issue hits home for them as well. It is imperative that the adult film industry is made to protect its workers.

Madelyne Hernandez, a former adult performer, stated that she had done over 100 scenes in addition to performing on internet sites. She has worked for every company in the porn industry, and she has contracted STDs, including gonorrhea and chlamydia. While she was still very new to the industry, she had to do a scene with 75 men. She did not know that her agent was aware of the number of male performers to be included in the scene. She was told that there would only be five or six men, and when she arrived at the set, there was a long line of men. She called her agent crying and begging to be released from doing the scene. Her agent told her that she would be blacklisted and unable to work if she did not do it. At the time, she needed money, and her agent told her that the directors and producers would take care of her. She was given cocaine and alcohol to get her through the scene. The 75 men in the scene were not adult performers but they had answered an ad in *LA Weekly*. They ejaculated on her face, in her hair, in her mouth, and there were no condoms used. She was so distraught and intoxicated at the end of the scene that she had to be carried to the shower in a chair, which was also filmed. She became addicted to drugs and alcohol, and she went to AIM for help, but they did not help. She recalled drinking alcohol with AIM employees while they were drawing her blood. She asked that the Board adopt the proposed petition decision.

Michael Weinstein, President of the AIDS Healthcare Foundation (AHF) and the Petitioner, stated that AHF does not believe that the lives of the young people in the adult film industry are expendable or disposable, which is why they submitted the petition. AHF has seen the damage that unprotected sex in pornography has wrought on its clients, and AHF believes that the State of California has a responsibility to regulate these workplaces as they do every other workplace in the state.

There are some that would have the Board believe that because these workplaces involve sex, these workers should not be protected. They believe that the right of self-expression takes precedence over the safety of these workers. AHF strongly disagrees. Adult film performers should not have to trade their health and safety in order to work any more than a construction worker should be asked to work without a hard hat.

Many politicians have avoided this issue because they are squeamish about dealing with sexual matters. The result has been thousands of STDs in this industry. This industry has boldly flouted the blood borne pathogen laws of California and the United States using the excuse that these regulations were intended for medical settings. Therefore, it is critical to end any opportunity for this industry to avoid compliance by promulgating specific regulations suited for this industry.

As for the argument that producers will move out of state should a regulation be enacted, AHF has already filed sanitary usage complaints against companies in Florida, and AHF is currently investigating filing similar complaints in Nevada, Arizona, and New York. In addition, California is the only state in the union in which adult films are not considered prostitution. Therefore, the ability of this industry to operate in other states is severely limited and constantly at risk. In any case, AHF will follow them anywhere they go.

At the heart of this matter is the industry's contention that testing is a substitute for condoms. There are legal brothels in Nevada, and those brothels have mandatory testing programs and mandatory condom use. As a result of those laws, there has not been a single case of HIV in that industry since those laws became effective in the 1990s, and there have been extremely low rates of STDs. The reality is that testing, while desirable, is not a substitute for barrier protection. To be clear, AHF is not against pornography, it is not their goal to make it illegal; the issue under consideration is the narrow issue of whether or not the current regulations are sufficient to protect these young people and whether there should be an advisory committee to recommend stiffer regulations that can, in fact, protect these performers.

Dr. Frisch stated that in its petition, AHF has defined adult films in a very specific manner to include some multimedia, and one of the struggles with this issue is who is actually exposed. It seems that it is being based on the end product rather than the activities that lead to the exposure. He asked whether there are other occupational settings in California where sex is an activity that is considered part of employment. Mr. Weinstein responded that he was unaware of any other workplaces that have any legal protection. However, in Los Angeles County, there are a number of commercial sex venues where people pay for admission but they are not employed as sex workers. Los Angeles County has regulations in place to govern those venues.

Dr. Frisch asked whether there are theatres at which sex is part of the performance. Mr. Weinstein responded with his understanding that paid sexual activity outside of film content is illegal. He further stated that he knows of no instance where people are paid to have sex that has the protection of the law outside of the adult film industry.

Darren James, a former adult performer, stated that he was involved in the 2004 (HIV) outbreak. The industry needs to be reconstructed. He stated that there is a lot of sexual activity between the scenes and after the scenes. A test provides a false sense of security, but no one knows what the other performers are doing behind the scenes or outside of the workplace setting. A performer cannot be aware of everyone with whom his or her partner has had sex and whether those partners have been tested. Condoms in conjunction with testing would be a big step toward prevention, and the need for both must be constantly communicated to the young people coming into the industry. Educating the performers is also an important element.

Tim Tritch, former AIM Healthcare Laboratory Representative, stated that while he was never an employee of AIM, he did spend a lot of time there, and he met several of the performers. He stated that every day in the adult film industry, performers are exposed to STDs. Every day, someone in the adult film industry catches an STD. There is a strong need for the State of California to address these issues. He expressed thanks to AHF for submitting the petition.

In the adult film industry, there is a lot of sex occurring off-set and between scenes. There is a 30-day testing period for the performers, and before working in the adult film industry, a performer must have documentation of testing that is no more than 30 days old. If a performer arrives on a set with a test that is 20 or 25 days old, and they have had unprotected sex with multiple partners, who in turn have had sex with multiple partners, that test may no longer be accurate. Performers are repeatedly exposed to STDs; AIM does a fine job of testing for gonorrhea and chlamydia, but there is a whole host of other STDs to which performers are exposed including herpes, HPV, and pelvic inflammatory disease.

The industry does not pay for the testing; the performers pay for their own tests. If a performer catches an STD, they pay for their own treatment. He stated that freedom of expression is not free, and if the cost of a producer's freedom of expression is the health and well-being of the people employed to produce that expression, the producer should at least share in that cost. It is not just a financial cost, but also a human cost. It is a human toll that is being imposed on these people. They may be there voluntarily, but there are unscrupulous people in the industry. The holes in the system as it currently exists are too big and do not provide any protection to the performers. This is a workplace safety and health issue, and the specific workplace issues must be addressed. There are no preventive measures provided. AIM Health Care does a fine job as a harm reduction program, including treating STDs and notifying partners when a patient tests positive, but they do not provide prevention. Testing is not a substitute for prevention. Mr. Tritch stated that the producers like to say that the industry is self-regulating, but when questioned closely about who performs the regulation, the answer adds up to nothing.

He asked that the Board adopt the proposed petition decision that the Division convene a representative advisory committee—including industry producers, performers, and health care organizations—to examine the issue of possible regulation in further depth. He also urged those in the industry to actively participate in the advisory committee.

David Mech, an adult film performer, producer, and director and President of Dave Pounder Productions, stated that he began performing in adult films approximately ten years ago. When he stated that he preferred to use condoms, he was told that he could not work. He stated that he did not need the money, but he enjoys performing in adult films. However, most performers that go into the business, particularly females, are in dire situations and need money quickly. They are not in a position to demand condom use. In addition, agents are not paid until the actress does the scenes. If an actress demands condom use, she is going to get less work than an actress who does not, and the agent will make less money.

Mr. Mech eventually began directing and later producing, and he found the same situation. When he started producing films for other companies, he was told not to use condoms. Even as a producer wanting to use condoms, he is limited in the amount of work he can get. With his own products, he can use condoms, but when producing for other companies, he is told not to do so.

If there were a regulation requiring condoms in conjunction with testing, it would address the issue of being able to work, both for performers and independent producers. He stated that Mr. Cambria was partially correct—if the Board were to adopt a standard, most production would move out of state. However, the revenue that would be lost is not necessarily very significant, because the companies are still domiciled in California. Thus, a domiciled California internet company producing content in Florida must pay the costs for the performers and the director, but the revenue from selling that product will go to the company in California, and taxes on that revenue will be paid in California.

He stated that mandatory condom use is not yet the world standard, it has to start somewhere. If California adopts a condom regulation, Florida and other states would likely follow. He stated that production of adult films will not go out of the country for several reasons. The first is that there is a large demand for American girls, and most performers do not last long in the business. Many girls do one scene, it is not a very good experience for them, and they leave the industry. The performers that have been in the business for several years are in the minority. An 18-year-old girl who wants to enter the adult film industry will balk if told that she has to obtain a passport and go to Singapore to make a film. She is more likely to work as an escort, and although it is illegal, condom use is more prevalent.

Mr. Mech further stated that there is a production company in Florida that will hire girls off the street for films. They do not want to test these girls because they want to shoot the scene immediately, so they will use a condom. He stated that a friend of his who works for a local health department indicated that it is actually safer to not test and use a condom than it is to test every 30 days but not use a condom. He echoed Mr. James' point about where and with whom performers are having sex between scenes or in their off-hours. Although the industry self-regulates and tests for chlamydia, gonorrhea, and HIV, there are a number of other STDs, including herpes and hepatitis. He stated that because the industry does not test for hepatitis, it is possible for a performer with hepatitis to continue working and spreading the disease to all partners. Thus, in addition to condom use, the testing should be expanded to include herpes and hepatitis.

He also stated that many companies will not use condoms because of aesthetic values, indicating that the films will not sell if condoms are used. However, one of the longest-running, largest production companies is Wicked Pictures, which is a condom-only company. There are non-condom companies going out of business on a regular basis, while Wicked Pictures survives. Condom films may sell less, but not so much less that it will put a company out of business. In addition, if condom use were mandatory, it would become the norm in the industry, as is testing for STDs.

Dr. Frisch asked about the relationship between the actors and the production company, whether it is an employer-employee relationship, an independent contractor relationship, or cash-under-the-table relationship. Mr. Mech responded that a production might choose to make a performer an exclusive contract performer, which would mean that he

or she would only work for that company. The company then is that performer's employer, and they pay the employment taxes, etc. Other performers are independent contractors, who pay for their tests and treatment. These independent performers are typically represented by an agent. He expressed the opinion that all the performers should be employees of someone, whether it is a production company or an agency. In mainstream entertainment, everybody is an employee of somebody; there are no independent contractors, and that arrangement should exist in the adult film industry as well.

Chair MacLeod reminded speakers that the question before the Board this afternoon will be whether or not to establish an advisory committee, not adopt a regulation. He stated that it would not be necessary to repeat points that had been made by other speakers, as those points are currently in the record.

Ignacio Hernandez, policy consultant for the Free Speech Coalition (FSC), stated that the symposium mentioned by Mr. McGrath was not a symposium in the traditional sense that it was open to the public. It was by invitation only, and people from FSC were not invited and actually were precluded from attending. He stated that the challenge before the Board and throughout the industry is that it is difficult to define a consensus in the industry. He stated that there is a consensus that the industry really does care about the health of its workers, not just its performers, but also the on-set workers. He stated that the legislature did consider mandating condoms after the 2004 outbreak, and there was an extensive informational hearing on the subject. The conclusion of that informational hearing was that there does not have to be an exclusive, sole remedy for preventing STDs; there are other opportunities and other strategies, and testing has been a large part of that. He raises that because, if there is an advisory committee, it must move forward from that perspective of not a single, sole, exclusive remedy of mandatory condoms. He stated that the performers who are independent contractors may work for several different companies in the same month, unlike in mainstream entertainment. However, there are still protections in place for those independent contractors. Testing has been working. The performers that are in the industry now provide the best perspective. The advisory committee should include current performers and those who are actually stakeholders.

Angelina Armani, an active performer in the adult industry, stated that adult performers are entertainers of a fully safe and legalized multi-billion dollar industry. She has worked with multiple companies with her choice of performing with multiple people as a contract star for Digital Playgrounds and as an independent worker. From her experience of almost two years, she has never participated in or witnessed any unlawful behavior with her producer, director, or any on-set worker that would jeopardize her health or safety.

Before a performer can shoot any upcoming film, the Adult Industry Healthcare Foundation recommends and requires that all performers are to be tested every 28 days. These tests require a blood test screening for HIV as well as a urine test checking for

chlamydia and gonorrhea. It takes approximately two days to receive test results, which can be emailed directly to the performer. AIM is a non-profit organization that encourages healthy practice and lifestyles of performers. Due to AIM's superior knowledge and support, Ms. Armani has never contracted an STD in two years of active performing.

Her experience on set has always remained a positive and respectful environment. From Day One in this industry, she has never been told that she is not her own boss, and any other woman has the same capacity to work under those circumstances. It is a woman's right, not a privilege, to determine who she decides to work with and what company she will work for. If at any point a performer chooses not to work with another person, there are never questions asked. Any performer has the right to check their partner's current test without question.

The industry has protected Ms. Armani's safety and is continuing to protect the safety of other performers as long as they comply with the health and safety procedures that are advised. Such health procedures highly recommended and offered by AIM for women are taking three HPV shots over the course of six months in prevention of the human papillomavirus. It is up to the performer to do so. AIM gives pap smears to women every six months; it is up to the performer to follow up. The industry also recommends that any tested performer does not have any sexual activity with people who are not tested and who are not in the industry. She asked the Board to consider the positive steps taken by the adult film industry, as they are always willing to progress.

Dr. Howard Aaron Aronow, the Associate Clinical Professor of Neurology at the Keck School of Medicine at USC, stated that as a recognized expert on the neurological complications of HIV and all infectious diseases, he has been taking care of and advising as to the best practices of treatment of HIV and STDs in the United States and Los Angeles for 30 years.

As to HIV, there has not been a single case of HIV as a result of transmission within the adult movie industry in Los Angeles County since 2004. Only one isolated case that was detected extremely early and resulted in the immediate cessation of the performer from working within the industry and with no transmission within the industry. Rigorous testing methods repeated monthly or at more frequent intervals along with education and counseling have resulted in this lack of HIV transmission within the adult film industry in California.

He has reviewed the current counseling, testing, and treatment protocols utilized by AIM Healthcare and has found them to be thorough and successful in the rapid and early detection of HIV, STDs, and viral hepatitis. A review of AIM's reportable STDs and HIV reveals a lower than the overall tested general population prevalence for STDs within Los Angeles County. For example, of well over 10,000 tests per year for each reportable STD in 2004, gonorrhea was found in 2.3% of all tests and chlamydia was found in 3.6% of all tests. These are lower than the Los Angeles County overall general

population of tests. Since 2004, the number of individual tests performed has increased as the number of STDs has decreased.

While heavily weighted by testing of performers within the adult film industry, these tests included many from the general population who do not work within the adult film industry. Further, a portion of the positive test results are based on excessive individuals who retested prior to the completion of therapy for a given STD and this results in some inflation of the prevalence of STDs within this population. AIM Healthcare provides services to all people, including those that perform in the adult film industry, and is an invaluable resource within and outside the State of California.

While other clinics such as AIDS Healthcare Foundation perform HIV testing and counseling, no clinic or entity other than AIM has the trust, experience, and proven track record amongst adult film performers. If there is to be an advisory committee convened with regard to blood borne pathogen safety standards in the adult film industry, it must consist of experienced stakeholders including AIM Healthcare and should not be dominated by any individual or entity.

Dr. Frisch asked whether it is fair to say that an individual who may participate once or twice in this activity would not be tested repeatedly and would not have a good sense of their HIV status. In other words, there was testimony earlier that indicated that there are many people that may do one movie or one scene; those people would not be part of the routine monitoring. Dr. Aronow responded in the negative.

Dr. Frisch asked whether those performers are tested for months after they have done that one movie or one scene. Dr. Aronow responded in the affirmative, stating that they have the option to complete testing.

Dr. Frisch asked who pays for the follow up testing. Dr. Aronow responded that the individual performer pays for it.

Dr. Frisch suggested that because these performers may choose to have the follow up testing and treatment at a clinic other than AIM Healthcare, it would be a good idea to include an epidemiologist on the advisory committee in addition to clinic personnel.

Diane Duke, the Executive Director of the Free Speech Coalition, stated that as the trade association for the adult film industry, FSC represents the stakeholders in Cal-OSHA's workplace safety issues from performers to producers. She stated the industry is extremely complex and often misrepresented. The adult entertainment industry is a legal, vital part of California's economy.

The people in the adult entertainment industry take workplace safety very seriously. Because of the demand, FSC created a workplace safety manual a while ago that has been made available to everyone in the industry and the vendors. In addition, within that workplace safety manual, FSC knew that the blood borne pathogen plan was a much

bigger issue. So with the general part covered in the workplace safety manual, FSC then put together a group of people to study the blood borne pathogen plan and see if there was a way to take the procedures and best practices being used within the community and put them into “OSHA speak,” so that there would be written protocols to follow.

The industry understands the importance of workplace safety and has successfully implemented workplace safety and risk reduction procedures for years, and it is eager to comply with California state standards. The adult entertainment industry is held to the same standards for blood borne pathogen plans as medical clinics. Goggles and latex gloves may have been standard in those medical clinics, but they are not in high demand in adult movies.

FSC is eager to work with Cal-OSHA to develop industry appropriate standards for the adult production. Due to the controversial content of their productions, the adult entertainment industry makes for an easy target for many individuals and organizations, with personal, political, and religious agendas. As the Board considers an advisory committee to review blood borne pathogen standards for the adult entertainment industry, Ms. Duke urged the Board to put aside the sensational posturing of industry individuals and organizations and consider the real issue at hand—workplace safety and risk reduction standards for California adult productions. The stakeholders are Californians who work in the adult entertainment industry: adult producers, performers; those who work on the adult production sets such as the cameramen, the grips, and the personal assistants; performer’s representatives such as attorneys, agents, and AIM Healthcare as their medical provider; and FSC, the trade association.

If the Board decides to move forward with the advisory committee, Ms. Duke encouraged the Board to create a committee that will foster positive, constructive conversation between and amongst the stakeholders. Furthermore, the leader or facilitator of that committee must be able to separate his or her personal feelings and opinions about the films and the subject matter from the task at hand, to treat the adult entertainment industry with the same deference and respect as afforded to other vital, legal industries that support California’s economy and quality of life.

Dr. Robert Kim-Farley, currently serving as the Director of Communicable Disease Control and Prevention of the Los Angeles County Department of Public Health, stated that since 2003 the County of Los Angeles has consistently gone on record to support increased state regulation of the adult film industry to decrease the significant public health risks to performers to occupationally acquired HIV and other STDs through: requiring condom use for all high-risk sexual encounters; setting screen requirements for STDs by the state with screening costs paid by the industry and offering vaccinations for appropriate preventable conditions; mandating education and training of all adult film industry performers; and monitoring to ensure compliance with state and local health departments paid for by the industry. It has also been the consistent position of the department that screening alone is not sufficient for preventing the spread of STDs including HIV. Through disease monitoring, we know that rates of STDs, such as

chlamydia and gonorrhea, are over seven times higher in the adult film industry than found in the general population and up to one quarter of performers are diagnosed with an STD over the course of one year.

After the HIV outbreak in 2004, the Division of Occupational Safety and Health (Cal-OSHA) determined that the blood borne pathogens standard applied to this industry. The standard requires the use of barrier protections such as condoms, medical monitoring requirements to pay for HIV STD testing and hepatitis B vaccine to be paid by the employer, a confidential medical record for each employee, an exposure control plan, and worker health and safety training. In many adult film industries, it is still business as usual with low rates of condom use and high risk sexual practices such as unprotected, prolonged, and repeated sexual acts with multiple sexual partners over short periods of time. These practices increase the likelihood of acquisition and transmission of STDs. In addition, performers are required to divulge confidential health information such as HIV STD test results to their employer as a condition of work.

While it is believed that the adult film industry relies on monthly, voluntary STD testing of performers, this system is inadequate for preventing and spreading disease. The department, therefore, supports the proposed decision of the Standards Board regarding Petition 513 to convene an advisory committee to consider possible amendments to Title 8, Section 5193 of the blood borne pathogen standard as recommended by the petition and the Board staff. Clarification of the required protections for performers in the adult film industry along with language that improves the ability of public health departments to conduct disease control activities will go a long way towards improving the health of adult film performers, their partners, and the larger community.

David Mech returned to state that contract girls such as Ms. Armani represent less than five percent of the total adult film performer population. Contract girls are what all girls in the business aspire to be. Their contracts are negotiated beforehand, they make a fixed, limited, usually small number of movies per year, and they select their partners. It is a very good job in the adult business. Most of their time is spent doing promotion and marketing. The clear majority of performers are the independent contractors that spoke earlier in support of the petition. In addition, there is no difference between the testing and protections before and since the 2004 HIV outbreak. He stated that if a performer does only one scene and leaves the business, there is no follow-up. Mr. Mech further stated that no one in favor of the petition is advocating the use of latex gloves and goggles. They are asking for condom use for vaginal and anal penetration, and basic things that people do in everyday life. He emphasized that he is an active performer shooting scenes in California, and that a lot of active performers do support the petition.

Angelina Armani disputed Mr. Mech's assertion regarding the work schedule of a contracted performer. She was under contract to Digital Playground for one year, but she is currently an independent contractor and has been working for multiple companies. Last month alone, she worked for five different companies. As far as the follow up on the pap smears and the other tests, it is up to the performer to check on the test results. It

is also the performer's responsibility to take extra precautions for safety procedures and standards.

C. ADJOURNMENT

Chair MacLeod adjourned the public meeting at 11:31 a.m.

II. PUBLIC HEARING

A. PUBLIC HEARING ITEM

Chair MacLeod called the Public hearing of the Board to order at 11:44 a.m., March 18, 2010, in The Council Chambers of the Costa Mesa City Hall, Costa Mesa, California.

Chair MacLeod opened the Public Hearing and introduced the first item noticed for public hearing.

1. TITLE 8: **CONSTRUCTION SAFETY ORDERS**
Division 1, Chapter 4, Subchapter 4, Article 10
Section 1590
Use of High Visibility Apparel—Private Roads and Off-Highway Situations

Mr. Manieri summarized the history and purpose of the proposal, and he indicated that it was ready for the Board's consideration and the public's comment.

There was no public comment on this matter.

Mr. Jackson asked whether there are similar orders in other sections of Title 8, expressing concern that if there are similar orders, the language should be amended to be consistent with this proposal or refer employers to this proposal. Mr. Manieri responded that, to his knowledge, there are no similar safety orders.

Chair MacLeod introduced the next item noticed for public hearing.

1. TITLE 8: **CONSTRUCTION SAFETY ORDERS**
Division 1, Chapter 4, Subchapter 4, Article 11
Section 1599
Traffic Control—Number of Flaggers

Mr. Manieri summarized the history and purpose of the proposal, and he indicated that it was ready for the Board's consideration and the public's comment.

There was no public comment on this matter.

Ms. Hart summarized the history and purpose of the petition and indicated that the proposed decision was ready for the Board's adoption.

MOTION

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

Dr. Frisch asked whether the regulations should be included in another section of the GISO, given that some of the STDs are not really blood borne pathogens. Ms. Gold responded that the issue has been discussed, and part of the issue is that some of the same control measures are going to protect against both blood borne and non-blood borne diseases. Some of these diseases, such as syphilis, are both blood borne and spread through other human contact. It was determined that, at this point, an advisory committee could be convened based on the blood borne pathogen standard, and if a separate section needs to be proposed as a stand-alone, it could be developed. The Division feels that Section 5193 is a good place to start.

Dr. Frisch stated that part of the confusion that may exist with respect to compliance is the placement of the standard. Some people may be under the misapprehension that if it is called a blood borne pathogens standard, it does not apply to them. He encouraged Ms. Gold and the Division to give further consideration the use of the blood borne pathogens title and placement.

He also stated that there had been a great deal of discussion today about testing versus condom use versus other methods of control. It appears that the real issue under consideration is engineering controls versus administrative controls. Condoms are an engineering control, a way of preventing exposure to certain diseases in the first place, while testing is an administrative control analogous to the testing done for other conditions such as asbestos exposure after the fact. Part of the debate that will ensue during the advisory committee needs to be pushed back to the exposure issue rather than the industry. The question is not about the industry involved; the question is the particular acts and exposures that are resulting to employees or to workers and preventing those exposures.

Dr. Frisch further stated that it is going to be very important as we move forward on this issue, even before we start inviting people to participate in an advisory committee, that we have a clear understanding of what the employer-employee relationships are in relation to Cal-OSHA regulations. That relationship needs to be clearly defined before we proceed. Ms. Gold responded that many of these issues have already been considered since the 2004 outbreak, and DOSH has spoken with the Division of Labor Standards Enforcement (DLSE), since the relationship is more within their purview, and DLSE's response consistently has been that most of these performers are, in fact, employees and that the California test for employee versus independent contract is different than the federal test. A performer may well be an independent contractor under the IRS tax code

and yet still come under California labor law. This is sorted out in each inspection on an individual basis.

As in other industries where the employment status may be an issue, DOSH obtains information and refers the issue to the DOSH lawyers to discuss who really is an employee in a given situation. In most of the inspections, DOSH has found someone who is an employee. The approach to the adult film industry all along has been that the performers are all employees. It is not DOSH's job to make judgments on what the industry is, it is DOSH's job to protect employees from hazardous exposures as best they can.

The blood borne pathogens standard itself is almost 20 years old, and the epidemiology upon which that standard is based is older than that, and there is now more information about blood borne pathogens such as HIV, particularly sexual transmission. One of the reasons DOSH thinks it is appropriate to have an advisory committee is so that some of the experts like Dr. Kim-Farley and others who have been dealing with this issue can come in and identify medically justified approaches that will protect workers.

Dr. Frisch stated that input from people like those performers and former performers who had testified today would be valuable in the advisory committee because, while they may not be experts in the creation of regulations, they understand the practical aspects of this business.

Mr. Kastorff asked whether there were workplaces similar to the adult film industry in which an expanded blood borne pathogens standard would be appropriate. Ms. Gold responded that DOSH had explored that question, and while there are other workplaces, such as exotic dance establishments or theatres, where performers are doing lap dances and things of that nature, legally there is no sexual contact between the performer and the patrons. The issues have been material left behind by the patrons in condoms or not in condoms on the floor, in the bathroom, etc., and people exposed to those materials. It is wise to draw this as broadly as possible, and DOSH is hoping to hear from other employees who may be exposed. The original standard was drawn with the idea of dealing with insemination clinics and similar places where sperm would be solicited in a medical setting.

Mr. Washington expressed concern that some of the people who had spoken this morning are not aware of how people are selected to be a part of the advisory committee. He expressed further concern that the Division may not be able to contact all those who may be interested in participating. From what he heard today, the employer-employee relationship is going to be central to this issue. There are a number of agents and the use of agencies, all of whom are unregulated with no responsibility toward the employee. This may cause another issue to be raised with DLSE. Ms. Gold responded that anyone who is interested in participating is welcome to email her directly at dgold@dir.ca.gov and let her know that they want to be notified. The notice of the advisory committee meeting will be posted on both the DIR and the Board's websites.

She went on to state that the talent agents are regulated by DLSE. Talent agents do have a role to play in this, and DOSH has been trying to work with DLSE to address some of these issues such as those indicated by the young woman who said that she had not been supported by her agent. While it is not DOSH's job to investigate that particular case, DOSH has been trying to raise this issue in general with DLSE, which licenses all talent agents in the State of California.

For approximately five years, DOSH has been exploring this industry and trying to get an understanding of all of the people who are acting in this industry and what they are doing with the sole purpose of trying to protect the employees in this industry and to address significant health concerns. Ms. Gold agreed with Mr. Washington that we need to be sure that all of those people get involved in this process. If the Board adopts the petition decision, DOSH is going to use the advisory committee as an opportunity to try to pull the information from all of the different sources available.

Mr. Prescott expressed concern about the independent contractor issue, stating that unless there is an employer-employee relationship, anything the Board enacts has no jurisdiction. He stated that if the Board adopts the petition decision and if the Division convenes an advisory committee and develops a proposed regulation, it will be imperative for him to be able to see that there is an employer-employee relationship to ensure that the Board and the Division do have jurisdiction in this instance. He asked that, as part of the overall rulemaking package, the specific Labor Code regulation or other relevant information be included so that everyone can see whether an independent contractor is or not an employee, regardless of their IRS status.

He also expressed concern about additional regulations for any industry that are going to burden the employer who is already attempting to comply. However, there is a very large portion of this industry that is underground, and no matter how many rules and regulations are adopted, without enforcement, they will do no good. It appears that the current regulations are enforceable, as indicated in Ms. Gold's evaluation.

He originally was not in favor of adopting this petition decision, but he has changed his mind as a result of the testimony heard this morning. He stated that the one thing that was heard over and over again is the educational portion of this. Without that educational portion, it appears that there is a large segment of this industry that does not know what the employee rights are, and that needs to be a portion of this moving forward.

Ms. Gold stated that part of this is trying to get the regulation to be more amenable to the environment. For example, the hepatitis B vaccine is a three-shot series that occurs over a six-month period, and it is difficult to say when people are going to be involved in a set of scenes for a period of a week or a similar arrangement. There is discussion to be had with the industry about how this regulation can be applied, without reducing the protections for the employees, in a way that will be more friendly to the industry and let

them conduct their business in a way that is safe and healthy for the employees and meets the regulatory parameters.

Mr. Prescott stated that, although it is outside of the Board's authority, the idea of licensing the producers is a very good one.

Chair MacLeod stated that it is incumbent upon the Division to put together a fair and balanced advisory committee, recognizing the fact that they are not going to be able to satisfy everybody's desires in terms of what is fair and balanced. He did express confidence in Ms. Gold's ability to do so, based on her previous work on other standards. He also stressed the fact that not everyone can be on the advisory committee. Ms. Gold responded that for the past few years, the Division has been having advisory meetings where everyone can come and have their voices heard, with the exception of the expert committee on PELs. If they are not getting the participation they need from a particular segment of stakeholders, they may tailor the meeting to that particular segment. In the case of this issue, the open meeting concept may work better.

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

C. PROPOSED VARIANCE DECISIONS FOR ADOPTION

Mr. Beales stated that the recommendation in all of the cases on the consent calendar is that the variances be granted, and the Board is requested to adopt those decisions.

MOTION

A motion was made by Mr. Jackson and seconded by Dr. Frisch to adopt the consent calendar as modified.

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

D. OTHER

1. Legislative Update

Mr. Beales stated that there is only one matter that is not on the written update in the Board packet. AB 2254 and AB 390, both by Assembly Member Amiano, have to do with marijuana, and they appear to be identical. The part of both bills that is of possible interest to the Standards Board has to do with a proposed amendment of Labor Code Section 6404.5, which concerns smoking in the workplace. Mr. Amiano wishes to structure that provision of the Labor Code so that marijuana smoking as well as tobacco smoking is prohibited in enclosed, confined areas of the workplace. He proposes to word the Labor Code provisions so that designated smoke areas remain for tobacco smoking and are not expanded to also pertain to marijuana smoking. There is an existing provision of the law that says notwithstanding Section 6309, the Division shall not be

required to respond to any complaint regarding smoking of tobacco products in an enclosed space at a place of employment unless the employer has been found guilty pursuant to another subdivision of Section 6304.5, and Mr. Amiano would change that so that a marijuana smoking as well as a tobacco smoking complaint does not result in an automatic duty of the Division to investigate.

2. Executive Officer's Report

Ms. Hart stated that there is nothing new to report outside of the Calendar of Activities and a reminder that Board staff will present a demonstration of the Title 8 indexing at next month's meeting.

3. Future Agenda Items

None identified.

E. CLOSED SESSION

Pursuant to Government Code Sections 11126(e)(1) and (e)(2)(A), the Board met in closed session to discuss the following pending litigation: Bautista, et al. v. State of California, et al., Los Angeles County Superior Court Case No. BC418871. No action was taken.

F. ADJOURNMENT

Chair MacLeod adjourned the Business Meeting at 12:26 p.m.