

**OCCUPATIONAL SAFETY
AND HEALTH STANDARDS BOARD**

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**SUMMARY**
PUBLIC MEETING/PUBLIC HEARING/BUSINESS MEETING

October 15, 2009
Oakland, 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., October 15, 2009, in the Auditorium of the Harris State Building.

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
Tom Mitchell, Senior Safety Engineer
Leslie Matsuoka, Associate Government
Programs Analyst
Chris Witte, Executive Secretary

Division of Occupational Safety and Health

Len Welsh, Chief
Steve Smith, Principal Safety Engineer

Others present

Greg Allaire, Carpenter
Marcia Dunham, PG&E
Amy Wolfe, AgSafe
Cindi Sato, CEA
Rick Ragsdale, State Fund
Joan Gaut, CTA
Wendy Holt, CSATF

Garth Patterson, Heat Relief Solutions
John McCoy, Lakeview Professional Services
Pat McDermott, Davey Tree Surgery
Pilar Gonzales
Chris Walker, Cal SMACNA
Steve Johnson, ARB-BAC
Greg McClelland, Western Steel Council

Russ McCrary, Ironworkers Trust Funds
Charlie Tusto, Arch Insurance
Guadalupe Sandoval, CFLCA
Don Bradbury, Monarch Kneis Insurance
John Buciburl, CWGA
Josh Wylie, Beutler Corporation
Rigoberto Rios, WCGF, Inc.
Lidia Rodriguez
Rufino Ventura
Lorenzo Morales
Eduardo Ramirez
Samuel Valadez
Pedro Sastre
Alberto Ledema
Alma Alvarez, CRLA
William Krycia, DOSH
Terry Thedell, Sempra Energy
Jerry Shupe, Hensel Phelps Construction
Ken Clark, ASSE/Willis Insurance
Rudy Avila, Sun World International, LLC
Bill Messner, So Cal Edison
Lauren Mendonsa, USD PILP
Peter Robertson, CalTrans
Joan Cuadra, Proteus
Sid Wolf, Davey Tree Company
Kevin Lancaster, Veen Firm
Greg Rainey, O.C. Jones & Sons, Inc.
Julie Trost, CA Conf. of Mason Contract Assns.
Lorajo Foo, WorkSafe
Amalia Neidhardt, DOSH
Bruce Wick, CalPASC
Howard Rosenberg, UC Berkeley
Jodi Blom, CFCA
Cory Bykoski, Dynalectric
Willie Nguyen, DOSH
Margaret Wan, Kaiser Permanente
Bo Bradley, AGC of California
Patrick Bell, DOSH
Chris Badger, City of Santa Rosa

Ben Laverty, CSTC
Marti Fisher, Cal Chamber
Carl Borden, CFBF
Perry Churchill, Bragg Crane
Lesa Carlton, CWGA
Juan Calderon, WCGF, Inc.
Reyna Castellanos, Dolores Huerta Fndn.
Guillermina Gonzalez
Moises Lopez
Lucinda Hernandez
Isidro Jaimes
Charity Nicolas, Contra Costa County/PASMA
Mary Lynn Rogers, FedEx
Silas Shawver, CRLA
Neil Tsubota
Milu Herron, EUCA
Kevin Bland, Attorney
Steve Phillips, Hensel Phelps Construction
Joe Garcia, Jaguar FLC, Inc.
Randy Weissman, CalTrans
Edward Calderon, Shea Homes
Eric Brown, SCE
Tina Kulinovich, Fed OSHA
Jay Weir, AT&T
Michael Smith, WorkSafe
Dave Harrison, Operating Engineers Local 3
Aaron Campbell, UC Davis
Bill Taylor, PASMA
Mateus Chavez, UFW
Rick Delao, CWA
Anne Katten, CRLA
Steve Hooper, Unger Construction
Rudy Lopez, County Line Framing
Dan Leacox, Greenberg Traurig
Erika Monterroza, DIR
Judi Freyman, ORC
Rosa Breenhalgh, Armstrong & Associates
Elizabeth Treanor, Phylmar Regulatory Roundtable
Ben Clymagor, Western Range Associates

B. OPENING COMMENTS

Chair MacLeod stated that today is the Great California Shakeout, a day designated to focus on earthquake safety. He stated that at 10:15 a.m. there would be an earthquake drill, and asked the attendees to stay at their seats and protect their heads and necks when the drill was sounded. He then asked Dr. Frisch to make a few remarks regarding earthquake preparedness.

Dr. Frisch stated that the Shakeout and other activities related to the 20th anniversary of the Loma Prieta earthquake are important in the safety world. He stated that the Loma Prieta earthquake was considered moderate; the earthquake killed 63 people, caused fires in the marina district of San Francisco, and caused over \$10 billion (in 1989 dollars) of damage. Scientists have predicted that it is virtually certain that a strong and deadly earthquake of magnitude 6.7 or more will strike one of California's major faults within the next 30 years, and there is a 63% chance of a 6.7 plus earthquake on one of the Bay Area faults in the next 30 years. The Shakeout is an opportunity for people to reflect on what they would do in the event of an earthquake and to take measures to prepare for a large one, including considering what could fall and hurt them, where their families might be, and how they might contact family members during an emergency. He stressed the importance of having an earthquake preparedness kit at home, in one's car, and at work. He stated that there are many resources and checklists for assembling an earthquake preparedness kit at internet sites such as www.shakeout.org.

Chair MacLeod shared his personal experience during the Northridge earthquake in 1994, equating the shaking to a paint-mixing machine in a hardware store. He also stated that there were a number of aftershocks, which occurred up to 30 days after the earthquake.

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.

C. ADJOURNMENT

Chair MacLeod adjourned the public meeting at 10:09 a.m.

II. PUBLIC HEARING

A. PUBLIC HEARING ITEM

Chair MacLeod called the Public Hearing of the Board to order at 10:09 a.m., October 15, 2009, in the Auditorium of the Harris State Building.

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

1. TITLE 8: **GENERAL INDUSTRY SAFETY ORDERS**
Division 1, Chapter 4, Subchapter 7, Article 10
Section 3395
Heat Illness Prevention

Mr. Smith 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.

The previously announced earthquake drill occurred immediately following Mr. Smith's briefing.

Terry Thedell, Health and Safety Advisor for Sempra Energy, stated that Sempra is supportive of enforcement of the existing Heat Illness standard for all applicable California employers as well, and it recognizes the special safety and health concerns of agricultural workers, but it concludes that the proposal is the third round of proposed emergency measures under consideration that would not reduce the frequency of heat illness, as it again does not address enforcement of the existing provisions of the current standard.

Furthermore, these proposed measures continue to confuse outdoor agricultural work with non-agricultural outdoor work and add an additional regulatory burden on employers with a good record of years of heat illness prevention. Sempra observes that agricultural operations are only a subset of all outdoor places of employment; yet the proposal under consideration treats heat illness requirement as if all outdoor employment was agricultural with minor exceptions of alternative cooling measures that are available to non-agricultural employers.

This proposed heat illness standard continues to confuse agricultural with non-agricultural places of employment with high heat provisions. In essence, Sempra is unclear on what is considered practical versus feasible regarding observing employees for alertness and signs of heat illness. Sempra has a number of employees who work alone outdoors as meter readers, linemen, loaders (?), and biologists, and during periods of the day they are beyond direct observation of their supervisors. Finally, in the Initial Statement of Reasons, the Division has implied that all outdoor employers are experiencing an increase in heat related illness.

Sempra challenges this indication as a California employer of hundreds of employees working outdoors in coastal, inland, and desert conditions in Southern California year after year with very few cases of heat-related illness and no upward trends. The most recent information from 2008 and the results of the first three quarters of this year still show very few cases. This year, Sempra has had only three heat-related instances. This indicates that while Sempra is not perfect, it has redoubled its efforts to keep its employees mindful of heat illness. Sempra is perfect, however, in never having a heat-related fatality in the millions of man-hours spent working outdoors over the years.

Sempra supports enforcement of the existing heat illness standard, but it is trying to understand how the proposal increases compliance with the existing standard. Furthermore, Sempra understands and applies the provisions of the existing heat illness standard, but by adding more provisions to the standard, they become academic to the work culture and increase the regulatory compliance burden without improving the safety of employees. Sempra asks the Board not to confuse agricultural and non-agricultural outdoor work and adopt an appropriate regulatory response to heat illness for the overall California work extremes and not assumptions of an emergency for all non-agricultural employers. What is needed is more enforcement of what is already on the books.

Dr. Frisch asked whether Mr. Thedell or Sempra was involved in any way in the development of the language of the proposal. Mr. Thedell responded that Sempra's only contribution was the comments made in response to the Notices of Emergency Proposals that were distributed to the public.

Dr. Frisch then asked, for clarification, whether Mr. Thedell or Sempra had been involved in any point prior to those public notices in the construction of the proposal. Mr. Thedell responded in the negative.

Marti Fisher, Policy Advocate for the California Chamber of Commerce, spoke on behalf of the Chamber and a coalition of 19 organizations in California (the Coalition), stated that the Coalition shares the Division's commitment to maintaining and ensuring the safety of outdoor workers in clarifying the regulation. However, the Coalition feels that more prescriptive and new regulations are not going to increase compliance among employers that are not complying with the existing regulation. The Coalition has diligently and thoughtfully reviewed the proposal, and at this time, it opposes the proposal in its entirety unless the Coalition's concerns are addressed.

The Coalition supports the deletion of the preventive recovery period, as the term is contradictory. One cannot prevent illness and recover from the illness at the same time. The Coalition supports the clarification of the shade requirement, but there are concerns with the proposed language regarding drinking water. There is no definition of "fresh and pure," and the difference between "fresh and pure" water and potable water is not clear.

The Coalition is concerned about the shade-up requirement at or above 85°; in most outdoor workplaces, that can be reasonably achieved. However there are many instances in which it is not feasible or it is not safe to have shade erected at all times. Thus, in order to support the proposal, the Coalition would require a provision that would exempt situations in which it is infeasible or unsafe to have shade up at all times and to be able to erect shade upon request. The Coalition is concerned about the ambiguity and the vagaries of the high heat provisions and requests an opportunity to work with the Division to clarify how those provisions are to be implemented and how employers would actually comply with those provisions.

The Coalition is concerned with the portion of the training provisions indicating that an employee would not be able to perform outdoor work until the employee has been trained in the heat illness provisions. The Illness and Injury Prevention Program is very specific about training being provided employees regarding the work that they are to perform and all the hazards of the workplace. Creating a separate training timing provision would create too much of a liability for employers.

Dr. Frisch asked Ms. Fisher whether the Chamber or the Coalition were involved in crafting the language of the proposal other than comments made at the two previous Public Meetings regarding the adoption of an emergency heat illness prevention standard. Ms. Fisher responded that although the Coalition members and the Chamber had had discussions with the Division, they had not been involved in drafting the language.

Elizabeth Treanor, Director of the Phylmar Regulatory Roundtable, read her written comments into the record.

Bruce Wick, Risk Manager for the California Professional Association of Specialty Contractors (Cal PASC), stated that Cal PASC realizes that heat illness prevention is a very serious issue. Since 2005, when the existing standard was originally adopted, Cal PASC

members have worked really hard to be in compliance with it. However, there are instances in construction where to have shade up at all times when it is 85° or higher is infeasible, and those circumstances must be taken into consideration in the current proposal.

Maria Gonzalez read her written comments into the record.

Cory Bykoski, Safety Officer for Dynalectric, stated that his company's first goal is always to ensure the safety of its employees, and it does everything possible to ensure that they go home in the condition they came in. The lack of feasibility language in the current proposal is a problem. He displayed a photo demonstrating the hazard presented by shade structures erected at the side of the road. A semi-truck drove past; the wind generated by the truck lifted the shade structure, and one of the support poles went through the windshield of a passing vehicle. The photograph showed the windshield of that vehicle with a hole approximately three inches in diameter. In addition, the pole went through the seat of the car on the passenger side; if someone had been sitting in that seat, he or she would have been impaled. The previous day, a crew had a shade structure erected, a semi-truck passed by, and the canopy of the shade structure came loose and blew into the street, causing drivers to maneuver away from it. While Dynalectric wants to take care of its employees, sometimes these structures create a greater hazard to both employees and the general public.

Dr. Frisch asked Mr. Bykoski to explain the alternatives to shade used in cases where it is infeasible to erect a shade structure. Mr. Bykoski responded that the first thing his company does when it gets to a job location is assess the ability to erect a temporary shade structure. If they are unable to erect a temporary shade structure, they will try to erect a permanent structure that provides the required shade, such as the side of a building. All supervisors are trained in first aid and CPR, and they are always onsite with the employees. There is always someone on the jobsite with an available truck, and all of the jobsite trailers are air-conditioned. If an employee were to become ill, the supervisors have the training to treat that individual onsite, and a plan is in place. The supervisors can also transport the individual to the trailer, where he or she can sit in the air-conditioned trailer, and the supervisor will continue monitoring that individual's health.

In response to a comment by Dr. Frisch, Mr. Bykoski indicated that his company has implemented other administrative controls in lieu of providing immediate access to shade.

Dr. Frisch then asked whether Mr. Bykoski had been involved or consulted in the construction of the regulatory language for the proposal. Mr. Bykoski responded in the negative.

Bo Bradley, Director of Safety, Health, and Regulatory Services for the Associated General Contractors of California (AGC), submitted photos demonstrating examples of situations in which it would be infeasible or unsafe to erect a temporary shade structure. She stated that most of these situations occur in road work, and employers use alternatives such as working early, rotating crews, cool ties, and air conditioned trucks. The difficulty lies in having the shade up at all times for these jobsites. There is no difficulty erecting shade at fixed construction sites, but the construction industry needs some flexibility for sites where it is not feasible or would create a greater hazard to erect a shade structure.

Dr. Frisch asked whether Mr. Bykoski's description of the administrative controls used in lieu of erecting shade is consistent across the construction industry. Ms. Bradley responded affirmatively.

Dr. Frisch then asked whether AGC was consulted in the construction of the language for the proposal. Ms. Bradley responded that although AGC had not crafted language, it has provided comments and examples. There had been no advisory committee.

Alma Alvarez, a Community Worker with California Rural Legal Assistance (CRLA), stated that she conducts field investigations as part of her job. She stated that she has found water containers in which there are mold, leaves, or sand, and some of the containers are broken, or there are no drinking cups. Workers sometimes have to drink directly out of the 10-gallon container, or they have to create a drinking container. Workers have told her that although there is water, it is ten minutes away. For example, grape and chili rows are approximately two miles long, and it will take a worker carrying two buckets full of produce ten minutes to reach a shade structure or water container. Breaks for workers are ten minutes at a time; thus, if it takes ten minutes to walk there and ten minutes to walk back, there is no time to rest or get a drink of water. Although these workers are entitled to these breaks, it costs workers money to take a break if they work under a piece rate or a quota system. They are afraid of losing their jobs if they fall behind their quotas or if they are working on a piece rate basis and making less than minimum wage.

Most of these workers have not been trained to recognize the symptoms of heat stress, and they do not know what the symptoms are. They do not know that when they have a headache or begin to feel dizzy that something may be wrong, but if they fall behind their quotas, they will be fired. Workers also have reported that although there is shade, there is no ground cover, and they must sit or lie on the hot ground. The cooling effect of sitting under the shade structure is offset by having to sit on hot dirt.

This past summer, temperatures in the Central Valley reached as high as 110° and 112°, and working directly under the sun can make the temperature feel about 15° higher. Although there were no reported incidents of heat-related deaths this year, workers reported fainting and other symptoms of heat-related illness. One woman fainted in June, but because it happened approximately 30 minutes before the end of the shift, no medical treatment was provided, and no ambulance was called. She was told to sit down and drink some water because the shift was ending. She went home, and she went to the hospital. So there may not be any official reports of heat-related incidents, but that does not mean that they are not happening.

Most workers that report any type of injury will be fired, will not be hired back into the system, and will be blacklisted. Thus, most of these workers are afraid of reporting injuries. If foremen and supervisors are not trained to recognize the physical symptoms of heat-related illness, they will not know that a worker who falls behind or complains of dizziness or headache may be suffering from heat illness.

Dr. Frisch stated that water contaminated by mold, leaves, or sand cannot constitute potable water. Ms. Alvarez agreed.

Dr. Frisch then stated that the existing regulation requires potable water, and water contaminated by mold, leaves, or sand is a violation of that requirement. He stated that nothing in the proposed standard or in the language provided by CRLA address the compliance issues that are evident, and noncompliance will continue to be a problem while people are afraid to report injuries or to identify circumstances in which injuries can occur. Ms. Alvarez responded that the burden should not be on the worker to ask for breaks or cool-down periods; they should be mandatory.

Dr. Frisch asked whether there should be an agriculture-specific standard rather than a general industry standard. Ms. Alvarez responded that the standard should be applicable to all industries because agricultural workers are not the only employees at risk of heat-related illnesses, construction workers and utility workers are affected as well.

Dr. Frisch responded that construction workers and utility workers are not employed on a piece-rate basis, and they are not subject to many of the same conditions faced by agricultural workers. Ms. Alvarez responded that she could comment only on her area of expertise, which is agriculture.

Dr. Frisch asked whether CRLA was involved in the drafting of the language for the proposal. Ms. Alvarez responded that she, personally, had not been involved.

Reyna Castellanos, representing the Dolores Huerta Foundation, stated that while working on ground crops such as chilis, tomatoes, and broccoli, farm workers do not have access to shade by sitting under the vines or under a tree during their break-times, such as the required ten-minute break or lunch break. When they take their ten-minute breaks or their lunch period, they are forced to sit in the sun. If they are not provided with shade sufficient for everyone on the shift, they have no choice but to sit in the sun. If they are not sitting in the shade, she asked, is it considered a break? Thus, it would be reasonable for every worker to have access to shade rather than 25% of the shift. Currently, agricultural workers have to take their lunch break by the restrooms because that is the only shade available to them at times.

A number of farm workers spoke of the conditions in the fields, stating that some employers do not provide shade, and they are told by employers that if they do not like the conditions, they can leave the job. Their comments were translated by Ms. Alvarez.

- Eduardo Ramirez
- Pedro Sastre
- Samuel Veladez
- Moises Lopez
- Alberto Ledesma

Dr. Frisch asked whether all of the workers on a shift take their breaks at the same time. Mr. Ledesma responded affirmatively, stating that they take a break in the morning at approximately 9:00 or 9:30 a.m.

- Lorenzo Morales

- Lucinda Hernandez
- Lidia Rodriguez
- Guillermina Gonzalez
- Rufino Ventura
- Isidro Jaimes

Steve Johnson, Director of Safety and Compliance Services for the Associated Roofing Contractors of the Bay Area Counties (ARC-BAC), expressed support of the comments submitted by the Cal Chamber Coalition.

Rudy Lopez, Risk Manager for County Line Framing, stated that the existing regulation is effective, and it is incumbent upon the stakeholders to comply with the existing regulation.

Silas Shawver with CRLA stated that while more effective enforcement is needed, the proposal is an improvement on the existing regulation. For example, the shade provision in the existing regulation has been interpreted by some employers to mean that as long as the shade is accessible by request, they are in compliance. However, there are some serious loopholes, one of which is that there is no right to access the shade for more than five minutes at a time. If the intention of the standard is to prevent heat illness, there has to be a provision where people can take regular breaks in the shade and recover from the heat. One of Mr. Shawver's concerns with the current regulation is that he cannot tell a worker that he or she has a right to take a rest period in the shade; it must be requested from the employer. Even if it is requested, the worker is allowed only five minutes for a rest period. The trigger temperature is too high, and the high heat procedures should be triggered at a lower temperature as well. Water must be not only potable but also palatable; it must not smell or taste bad. A regulation must allow people to access shade and water without having to ask special permission or having to know their exact physical needs. In agricultural work, there is often no set break time, and there is no requirement for employers to make sure employees are taking breaks.

Dr. Frisch stated that many of the violations described by the farm workers who testified are beyond the scope and capacity of the Board, they are disturbing, appalling, and disheartening, and they are circumstances violating the existing regulation. There were numerous requests for more enforcement, and Dr. Frisch asked how adopting a more stringent regulation will improve enforcement. If employers are not complying with the existing law, they will not comply with a new one. These employers are not people who do not understand what it means to comply with the regulation, these are people who are willfully not treating their employees with respect, and the Board cannot fix that. Mr. Shawver responded that increasing the amount of shade, and being able to tell workers that they have a right to use the shade during their breaks will be much more effective than the current interpretation, which is that workers have to ask to rest in the shade. A stronger standard will make it easier to identify employers that are not in compliance, and workers will have a better understanding of their right to use the shade during their breaks.

Chair MacLeod stated that his understanding of this morning's testimony is that if a worker were to request shade or water, that worker would be fired. He asked how the Board could rectify that. Mr. Shawver responded that there are some employers who are really bad and fire people for all kinds of reasons. There are going to be situations where people are going to be fired for

asking for anything; that is common, but if there is stronger protection available to everybody without having to ask for special permission to use the shade, workers will have more access to shade.

Chair MacLeod then stated that there had been several requests for more inspections, and Cal-OSHA had indicated in June that they are at their limit in terms of what they are able to do to provide inspections in agricultural areas. He asked what the Board could do about that. Mr. Shawver responded that CRLA does outreach to workers and distributes materials from Cal-OSHA. They try to collect information that helps Cal-OSHA to be more efficient in their targeting so when they go out on sweeps or looking for violations, they are more likely to find the places of greatest violations, and CRLA would continue doing that, as well as working to publicize changes and significant improvements in the law that will create greater awareness and help Cal-OSHA to do its job better. Mr. Shawver agreed that that would continue to be an issue and a challenge.

Chair MacLeod stated that one of the concepts that have been discussed is to have specific Agriculture Safety Orders under Title 8 reform, and he stated that he continues to believe that the idea has merit and should be done. He stated that he has been attending these Board meetings for nearly 15 years, and this is not the first time this has been discussed. It is very frustrating to try to solve problems that are potentially unsolvable by the Board. He asked whether Mr. Shawver felt that there should be Agricultural Safety Orders, and asked if CRLA could revisit the issue of having regulations focused on an industry that is very different and separate from general industry. Mr. Shawver responded that although he works exclusively in agriculture, it seems the risk for heat illness exists for all industries. Many industries have the shade up, and they are working in more stable locations, so many times it will be less of a transition to comply with the existing regulation.

Chair MacLeod stated that crops are not grown in the shade. Mr. Shawver agreed, but he stated that there are solutions to the problem of providing shade for the workers. Although he sees a lot of problems in agriculture, he does not see them as exclusively agricultural problems. He is not in a position to determine which industries should be included in a regulation and which should not, because that is not his field of expertise.

Mr. Prescott stated that he is appalled by some of the stories he has heard today, but the unfortunate reality is that the majority of them dealing with piece work and pricing is outside of the Board's jurisdiction. In the area over which the Board does have jurisdiction, however, most of the conditions described were violations of the current standard. He asked how the additional standards without any additional enforcement are going to make a difference. Mr. Shawver responded that there are going to be continued enforcement problems and there are going to be employers who violate the law. However, when Cal-OSHA told employers this summer that shade has to be up at 85°, more shade was provided. As for the piece rate problem, if there is a regulation that requires mandated rest periods for people during high heat periods, which does not currently exist, more people would take rest periods that are not taking them now because of the work pressure or the financial incentive. There are many workers who would benefit and be safer with those types of changes.

Mateus Chavez with the United Farm Workers Union (UFW), stated that ten farm workers have died since the existing regulation was adopted, and while Cal-OSHA has made progress, it is not enough because farm workers are still dying. It will only be enough at the point that farm workers are not dying. Although he recognizes that some of the issues are beyond the realm of the Board, the existing regulations do not go far enough because workers do not have the ability to easily elect representation to enforce the existing laws. It should be easier for workers to join a union, because Cal-OSHA does not have the manpower to enforce all of the laws, and workers need to have the ability to have someone speak for them. There are over 80,000 farms in California, and Cal-OSHA does not have the ability to reach all of them. The UFW's position is that a solution to this problem is the passing recent legislation SB 789, which was recently vetoed by the Governor.

Mr. Prescott asked whether UFW would be supportive of having separate agricultural standards as has been discussed. He asked whether that entire industry is different enough that it should have a separate set of standards outside of general industry. Mr. Chavez responded that UFW is currently engaged in a lawsuit against Cal-OSHA, and he has been asked to leave all comments of this type to the attorneys.

Mr. Prescott asked whether UFW had any contact with the Division in drafting the language of the proposal under discussion. Mr. Chavez responded that he could not answer that question.

Chair MacLeod asked whether UFW provides any training with workers and employers regarding the existing regulation. Mr. Chavez responded that he believes UFW does provide training, but he could not answer with certainty.

Dave Harrison, Special Representative for Operating Engineers Local No. 3, summarized his written comments, stating that if the two requested exceptions were added, Local 3 would support the proposal. He stated that he was not asked to participate in drafting the proposal language.

Mr. Prescott asked whether Local 3 had asked to be involved with the rulemaking after the June meeting. Mr. Harrison responded affirmatively. Mr. Prescott asked whether that request was granted, and Mr. Harrison responded in the negative.

Dr. Frisch stated that in the proposed language, there is an exception for alternative methods of cooling, and he asked whether there is something about that exception that is insufficient. Mr. Harrison responded that he thought that exception had been removed. He was informed that it had not been removed.

Chair MacLeod called a brief recess at 12:10 p.m. and reconvened the hearing at 12:24 p.m.

Kevin Lancaster, an attorney with the Veen Firm, PC, stated that a lot of science went into the development of this proposal. Whether or not any of the interested groups had an opportunity to participate in the development of this proposal, the Division has done an incredible job of making it widely known that this proposal was being developed. He stated that meetings had been held all over the state, and no one has been excluded or prevented from speaking. Therefore, when he hears some of the stakeholders say that they have not been given

an opportunity to draft the language, that may be legally true, but in terms of providing an opportunity for public comment by all of the stakeholders identifying their issues relating to the proposal, he wanted to ensure that the Board appreciates the extent to which the Division has allowed any stakeholder to provide public comments, no matter how ill-informed their views may be.

He stated that although there had been comments from agricultural workers, the Board had not yet heard from construction workers, boilermakers, or any of the trades that work outdoors, and he did not want the Standards Board to think that the only people exposed to the hazard of heat illness are agricultural workers. The injury and illness prevention program analysis of the hazard, the training, the remedial measures, and everything else that relates to the issue of heat illness is industry wide. There is not a special heat that is an agricultural heat; the sun that is cooking the workers picking broccoli is not different from the sun that cooks boilermakers or construction workers. He stated that the work performed by the Division over the last eight years to come up with any kind of a standard that makes any sense at all has been an effort at developing a single standard that applies to all outdoor workers; indoor workers have been excluded.

He stated that there are two classes of employers: The willful employers that violate a statute or regulation willfully, knowingly, inhumanely, immorally, and illegally; and those who, through neglect or ignorance, are not in compliance. He stated that some of the supervisors that are the people in the front lines of implementing the existing standard at the agricultural level are ill-informed. The common theme over the eight years of developing the standard from the stakeholders is what employers are supposed to do and when they are supposed to do it.

He stated that what has been learned from the scientific perspective is that it is impossible to have wet bulb and dry bulb temperature equipment out in the field, and a health and safety engineer cannot be out there calculating heat loads, because that was the complaint about getting started with the heat illness standard eight years ago. He stated that bright lines were needed as a way to tell people that are not scientifically equipped to make these determinations as to what to do and when to do it, which is what the stakeholders requested.

He stated that he supports the proposal because it is manageable, and there are bright lines. The Board has commented that it cannot do anything about enforcement. Mr. Lancaster wanted to clarify that enforcement is taking place, the Division is pulling people out of other areas and sending them out to perform enforcement of the heat illness standard. Shade is not available when it is in the truck, it is available when it is on the site and it is up. It is easily visible when it is erected. Requiring certain conduct of employers will protect workers. He stated that piece rates are not the only disincentive to comply with the standard; there is also intimidation at work.

He summarized by saying that a lot of work has gone into the proposal, the stakeholders that have spoken today have spoken many times in the process of drafting these amendments, and he supports the proposal as written.

Dr. Frisch stated that Mr. Lancaster had made an assertion that there is a practice to buy a shade structure, put it in the truck, and leave it in the truck. He asked how that constitutes an employer being ill-informed about the requirement. If the employer bought a shade structure, he obviously

knew it was required. He stated that it is hard to believe an employer is ill-informed if he has complied in some way with the regulation, and yet he is failing to use the tool he has purchased; that is completely contrary to itself. Mr. Lancaster responded that it is, and he explained that he had used that example in the context of the issue of enforcement. He stated that there are two types of employers: the willful and the ill-informed. Dr. Frisch stated that there is a third type, which is the compliant and well-informed employer. Mr. Lancaster stated that compliance and enforcement was the context of his comments about buying the shade and keeping it in the truck. His interpretation of Dr. Frisch's question is that there might be some reluctance to make a rule if the rule could not be enforced. He was trying to address the issue that having a requirement that the shade be up would help in the efficiency of enforcement finding either the well-informed and willful or the ill-informed employers.

Dr. Frisch stated that the point he was trying to make about enforcement is that the Board is determining not whether to create a regulation but to change one that already exists. Thus, he needs to understand why the change is necessary. If the Division is already at the limits of enforcement, and it is already finding hundreds of companies that are out of compliance, it does not seem like a new regulation is needed, but the existing regulation needs to be enforced.

He stated that Mr. Lancaster had made the assertion that science went into this proposal, and he asked Mr. Lancaster to explain the science behind the 85° trigger temperature. Mr. Lancaster responded that in order to have a true measure, an accurate scientific measure, of when to implement specific precautionary measures, the need for technology is too high to impose it on employers. To actually have dry bulb and wet bulb temperature requirements in the field is impractical. Dr. Frisch asked again for justification of the 85° temperature. Mr. Lancaster responded that 85° was a measure that at least was prophylactic in its ability to anticipate where danger from heat would arise.

Mr. Prescott stated that Mr. Lancaster had indicated there had been stakeholder meetings all over the state where people had had opportunities to contribute to the proposal. He asked which meetings Mr. Lancaster was referring to, because Mr. Prescott was not aware of any. Mr. Lancaster responded that there had been heat advisory committee meetings in Sacramento, San Francisco, and Los Angeles. Mr. Prescott asked whether those meetings were for the existing regulation and not the current proposal. Mr. Lancaster responded that the meetings had been held in connection with the existing regulation, not for the proposed changes.

Michael Smith of WorkSafe stated that Dr. Frisch's question to Mr. Harrison cleared up the question as to whether non-agricultural employers have an exception to the shade requirement; that exception is present in the proposal. It is good that the proposal has a trigger temperature that provides a bright line, but there should be a reflection of the medical realities of heat illness. He recommended the written comments submitted by Alicia Gonzalez-Flores, a medical student at UCSF for more information on those medical realities. He stated that he could not vouch for the methodology of the Division's research that talked about how compliance with the existing standard has gone from the 30% range to the 80% range, but the fact that there has been an increase is a reflection that the Division's education and enforcement efforts have paid off to a certain extent. Although 100% compliance is always desirable, it is undeniable that there has been an improvement in compliance among employers throughout the state. To the extent that there are bright lines in the proposal with regard to shade, the 85° trigger temperature is a bright

line, it does not put the onus on employees to make the request, and if shade is not up at that temperature, the Division can cite the employer. The improvement will not happen overnight, but as the experience with the existing regulation has shown, the improvement will be continuous. He also stated that the trigger temperature should be lower; the study performed for Cal-OSHA in 2006 demonstrated that heat illness can occur at temperatures as low as 75°, so the triggered temperature should be lowered to that level with high heat procedures triggered at 85°.

Aaron Campbell, representing the Western Center for Agricultural Health and Safety at UC Davis, stated that he has not seen any evidence supporting the trigger temperature of 85°. He stated that UC Davis has made efforts to get support for a research study of heat illness. During the time he has spent in the field in the last two years, he has seen many employers that take care of their employees, but the potable drinking water issue has come up many times.

Chris Baker with the City of Santa Rosa Utilities Department stated that the shade provision would be difficult to meet in his line of work because the work is very mobile. In addition, there is often not enough space to get the equipment in and do the job without having a great effect on traffic, and having to erect a shade structure in a temporary traffic control situation presents a number of issues, including the necessity to elongate the traffic control set-up, distracting passing motorists, and having the shade structure blown away by a passing truck. He stated that the 85° and 95° trigger temperatures provide good guidelines because he can pay attention to weather reports and plan for those temperatures.

There are crews that go from intersection to intersection, opening or exercising (closing and opening) valves, so they are mobile. They are not at one site for more than ten or fifteen minutes, and setting up a shade structure for that short a period of time would be infeasible. Mr. Baker also expressed concern about emergency responders, asking when and where police and firefighters would erect shade structures at accident scenes or when fighting fires. The CalTrans manual for traffic control and the MUTCD both provide guidelines for emergency work, short duration work, and mobile work; those manuals also acknowledge the increased vulnerability when a crew is setting up traffic control. He asked that the Division examine the definitions for short duration work, mobile work, and emergency work, and develop alternate measures for heat relief in those situations.

Mr. Prescott thanked Mr. Baker for his comments, which illustrated the need for an exception to the shade requirement.

Dr. Frisch asked whether workers are able and allowed to take a break if they are not feeling well. Mr. Baker responded affirmatively, stating that workers are trained to seek out shade when they start feeling any symptoms of heat illness, and they are to stay in the shade until they feel good enough to go back to work.

Dr. Frisch also asked whether it was Mr. Baker's experience that other cities have similar concerns. Mr. Baker responded affirmatively.

Anne Katten with CRLA expressed support for the idea of a trigger temperature, although it should be 75° instead of 85°, which is supported scientifically. The National Weather Service's

heat index dictates that the temperature be adjusted by 15° if one is working in full sunlight, which means that a 75° ambient temperature meets the threshold for extreme caution.

Agricultural workers, in particular, do not feel comfortable taking a voluntary break, so they need to have access to shade during regular breaks that are specified and scheduled. The American Congress of Industrial Hygienists has developed a threshold limit value (TLV) that specifies hourly breaks above certain temperature-humidity thresholds, which are used by both the Navy and the Army. She further stated that there should be a method of compensating piece-rate workers so they will not be financially penalized when they take breaks or cool-down periods.

In addition, the proposal should contain a separate emergency response section that clearly states the obligation to provide immediate first aid in the shade and emergency medical transportation, which is especially important for the smaller, less sophisticated employers who may not understand the necessity from reading the proposal as currently written. Delays in the provision of first aid and emergency medical care are the difference between life and death or permanent organ damage and full recovery.

She further stated that there is a need for all workers, whether outdoor or indoor, to be protected from heat illness. One thing that is different in agriculture versus construction is that in construction, there is a clear chain of responsibility, where some of the subcontractors do not adhere to safety requirements, the general contractor is responsible. The logical analogy to that in agriculture would be to hold the grower or the property manager is responsible if the farm labor contractor does not adhere to requirements.

Dr. Frisch thanked Ms. Katten for addressing the science of a trigger temperature, and he asked whether there is a feasibility issue in agriculture that would be different at one trigger temperature versus another. Ms. Katten responded that she has not heard of any examples in agriculture where it would be infeasible to provide safe shade.

Dr. Frisch asked whether it is unreasonably difficult for agricultural employers to erect shade structures. Ms. Katten responded that the usual procedure is to erect pop-up structures, and they would have to move during the day so they are close to the workers, but it is not unreasonably difficult to do so.

Bill Taylor, Safety Manager for the City of Anaheim representing the Public Agencies Safety Management Association (PASMA), summarized his written comments.

Amy Wolfe, Executive Director of AgSafe, expressed support for the proposal, stating that the clarifying language provides the level of detail so frequently requested at AgSafe trainings. By adding this language, the Board is equipping employers with a clear set of parameters to follow, and as a result, helping to ensure the minimization of heat related illness and injury.

Dr. Frisch asked whether AgSafe would support the proposed changes with a lower trigger temperature. Ms. Wolfe responded affirmatively, stating that the issue is having clarity, regardless of the details of that clarity.

Chair MacLeod asked whether the AgSafe membership includes farm labor contractors. Ms. Wolfe responded affirmatively. Chair MacLeod then asked for Ms. Wolfe's reaction to the testimony presented by the agricultural workers regarding their experiences. Ms. Wolfe responded that because AgSafe is a voluntary membership-based organization, they are working with those individuals who are seeking to be compliant and to do the right thing for their employees.

Mr. Kastorff stated that the Board had heard a number of horror stories this morning. He asked Ms. Wolfe whether she would agree that they come primarily from noncompliance with the existing regulation rather than partial compliance. Ms. Wolfe stated that she was not equipped to answer the question accurately. She stated that the stories told this morning were atrocities, describing conditions that are completely unacceptable. However, they are also an illustration that in every industry there are bad apples that tend to generate perceptions of universal failure to comply.

Mr. Prescott asked whether there had been a major change in compliance this year as opposed to previous years. Ms. Wolfe responded affirmatively, stating that her opinion is based on the number of people that have signed up to take courses with AgSafe. The fact that there has been such tremendous demand for education on the part of all segments of the industry to want to understand and to know how to reasonably implement compliance with the regulations is an indication of a desire to be compliant.

Don Bradway, Safety Manager for Monarch-Kneis Insurance Services, stated that the term "suitably cool" is not adequately defined in the proposal. Similarly, the term "fresh" is nebulous. Mr. Bradway cited the example of the bottled water that he keeps in his truck. He may have bought it a month ago, but it is still fresh because it has not been opened. The applicable terms should be "clean" and potable. Water is not used primarily to cool the body but to keep it hydrated, so the temperature is not of primary importance. The training provisions should be timely. If an employee receives heat illness prevention training only at the time he or she starts the job, and that is in winter, heat illness is not going to be a concern. Training should be mandatory at the beginning of the heat season. He stated further that there should be a separate regulation for agriculture.

Lorajo Foo, Legal Director for WorkSafe, stated that the current regulation, in subsection (d)(4), states that except for employers in the agricultural industry, cooling methods other than shade (e.g., use of misting machines) may be provided in lieu of shade if the employer can demonstrate that these measures are at least as effective as shade in allowing employees to cool. She stated that this provision of the existing regulation allows alternatives and allows the employer to choose more effective measures. Thus, when employers use examples of the havoc that will be wreaked and of the safety problems that are going to occur with the new regulation, it is nonsense. The new regulation is not going to revise the current regulation in terms of the exception for non-agricultural employers. The new regulations are not going to require police officers or firefighters to erect shade structures. The new regulations will not force employers to come up with measures to protect workers from heat that will create other safety hazards. The testimony about the construction industry or other mobile workers is nonsensical when one realizes that the existing regulation allows all employers outside the agricultural industry to come up with various means of protecting workers from illness.

Mr. Prescott stated that the concern is that a misting machine cannot be hooked up for a mobile work crew. Ms. Foo responded that misting machines are used as an example; it means “including but not limited to” misting machines, and employers are well aware of how to protect their workers. There are many methods to do so, and a rule does not need to spell out every single alternative. Mr. Prescott then asked that if he, as an employer, had a written procedure that said shade would not be erected because it is not feasible, but in lieu of that other measures would be taken (such as sitting under a tree or in an air-conditioned truck), would Ms. Foo consider that exception to be covered under the exception. Ms. Foo responded affirmatively.

Mr. Prescott stated that the Division does not. Mr. Welsh disputed that, stating that this question had been raised at the last meeting, and he said that it could be handled through policies and procedures given the current provision in the regulation.

Charity Nicolas, Assistant Risk Manager for Contra Costa County and the President of PASMA North, expressed opposition to the proposal as written and support for the changes recommended by the City of Santa Rosa, PASMA South, and the City of Anaheim. In addition, she expressed concern about the proposal with regard to employees working alone in the field or working in small groups, in particular regarding the provision of shade and observing employees for signs and symptoms of heat illness. She stated that the term “potable water” in the existing regulation is sufficient, and “fresh, pure, and suitably cool” is vague.

Dr. Frisch asked Ms. Nicolas to describe the alternate, administrative procedures in place for individual employees in the field in the case of high heat situations. Ms. Nicolas responded that the existing regulation requiring shade to be accessible is sufficient, if employees are trained in the importance of having shade available, whether that shade is in their vehicle or under a tree. Dr. Frisch asked whether all of Ms. Nicolas’s employees carry communications devices. Ms. Nicolas responded affirmatively.

Joan Cuadra, Safety Trainer for Proteus, Inc., stated that for the last couple of years the heat illness trainings directed primarily at farm labor contractors have trained approximately 5,000 workers. Because of the standard, she asks people in the field who has been trained about the standard, and approximately 30% of the workers will affirm that they have been trained during that year. She asked that the proposal state clearly that the water should be clean, because many of the crew bosses live in areas where they cannot drink the water from their faucets, yet they are filling the water cisterns for their crews from their own homes. In addition, she asked that the proposal state clearly that the water should be very close to the workers so they can access it readily. Many times there is no shade or water available to workers because of a lack of enforcement. She also stated that there is a lack of low-literacy training material available. Although there has been an improvement in the training materials, many crew bosses are given the responsibility to train their crews, and they may have a second-grade education or no education themselves. It is difficult for someone with a limited education to have materials written at a higher level and ask that these materials be used to train workers. She further stated that shade should be available for at least 50% of the workers in the field during a shift, and 100% is preferable, so all the workers can take their breaks and lunch periods in the shade. It is not unreasonable for an employer to erect three or four canopies at a worksite.

Chris Walker, speaking on behalf of the California Association of Sheet Metal and Air Conditioning Contractors (SMACNA), expressed support for the written comments submitted by the Cal Chamber Coalition. He stated that the atrocities described by the farm workers are mostly violations of the existing standard, and whether it makes sense to winnow down in further detail various regulations when in fact there is no assurance that it is not going to result in any increased worker safety.

Ed Calderon, Safety Manager for Shea Homes, expressed support for the existing regulation, stating that his company only hires contractors that are in compliance. If they are not in compliance, they are not hired.

Peter Robinson, Senior Safety Officer for the California Department of Transportation (CalTrans), stated that the existing regulations mirrored what CalTrans had already been doing for decades with positive results. CalTrans educates employees on heat-related illness at the beginning of the hot season, and they train their desert employees year-round. Included in that training is the importance of staying well-hydrated, including drinking water in the morning before work. He stated that the shade requirement is not feasible for a mobile work force, and some of the alternative methods mentioned previously are not feasible for CalTrans. For example, not all of CalTrans's trucks have air conditioning, and some of the trucks that do have air conditioning are diesel trucks. Air Quality Management District does not allow diesel-fueled trucks to idle unless it is an emergency. Allowing an employee to sit in an air-conditioned truck as an alternative to shade is considered a preventive measure, not an emergency. The trigger temperatures provide good, bright line guidance for employers and trainers. Mr. Robinson expressed support for any measures that will make the existing standard more enforceable.

Mr. Baker returned to refute Ms. Foo's contention that his and others' concerns regarding the infeasibility of erecting shade structures for mobile work crews are ridiculous. He agreed with Mr. Robinson's statement regarding the idling of diesel trucks. He stated that the particulate filters required by the California Air Resources Board (CARB) require cleaning because the particulates build up inside them. One of the ways to clean them is to hook them into 440 volts of power to burn off the particulates. If the diesel vehicles are idling, the particulates are going to build up more rapidly, requiring more frequent cleanings, which consumes more power and costs more money. The filters themselves cost \$6,000 to \$7,000, and they have a finite life span. The more often they are filled and cleaned out, the shorter that life span will be. In addition, idling normal, gasoline-powered vehicles to run the air conditioner presents a problem on "Spare the Air" days, which typically are days on which the temperature exceeds 95°. He summarized by stating that alternatives to shade are not always easy to provide.

Guadalupe Sandoval of the California Farm Labor Contractor Association (CFLA), summarized his written comments.

Mr. Prescott asked whether CFLA would be supportive of separate regulations for the agricultural industry, not solely for heat illness but also for other issues that are unique to the industry. Mr. Sandoval responded that he has worked in a lot of different industries, and heat illness does not stop at the door of agriculture. He stated that a general industry regulation is necessary, but he does not know very many agricultural employers that would argue that a

specialized standard for agriculture is necessary. The proposal should contain provisions that would make it feasible for any employer that has outdoor workers.

John McCoy, Safety and Environmental Consultant for Lakeview Professional Services, stated that this is not an issue of needing new regulations or more regulations or amended regulations; the issue is training, which is as important as, if not more important than, enforcement. In addition, training must be frequent and tailored to the literacy level of the employees, and they must be trained in basic matters.

Kevin Bland, representing the California Framing Contractors Association and the Residential Contractors Association, expressed support for the comments submitted by the Cal Chamber Coalition. He stated that the feasibility exception supported by the Coalition is a shade by request exception. It is not an exception to the provision of shade, it is an exception to shade being up, and it does not mean that shade cannot be made available nor does it mean that the employer cannot choose to use an alternate method. It is merely an exception for cases in which shade being up at all times is not feasible or not safe.

Joan Gaut of the California Teachers Association, expressed concern regarding heat illness inside. She stated that she was concerned that it had not been included in the proposal. Although schools have shade and water outside, there are schools in the state that have been constructed for air conditioning that are left with windows that do not open when they run out of money for construction. Teachers and children, therefore, are in rooms that reach temperatures well above 95° with no cooling methods available. She asked that the trigger temperature be lowered from 85° to 75°.

Chair MacLeod call for a brief recess at 2:02 p.m. and reconvened the meeting at 2:15 p.m., asking for Board member comments regarding the heat illness proposal.

Dr. Frisch expressed thanks to all of the people who had presented comments. He stated that many of his questions and issues have to do specific language in the proposed standard. He expressed concern that the proposal seems to be more and more divergent to other standards within Cal-OSHA standards related to the provision of drinking water, and he would like to make certain that the requirements for drinking water are the same in all of the regulations to avoid confusion regarding the definition of potable drinking water. In addition, Dr. Frisch expressed concern about the cost statement in the Statement of Reasons, which indicates that there is no cost to state agencies resulting from the proposed changes. He expressed discomfort with that statement in light of the additional supervision and training and enforcement activity that will be required. He stated that there is also an indication that there will be no cost to private persons or businesses as a result of the proposed changes.

There is a proposed requirement for the provision of shade for 25% of the employees on a shift, and while Dr. Frisch does not object to the provision, he would like to understand the basis for the requirement. There have been a lot of proposals related to how people are positioned in the shade, whether they are touching each other, whether they are standing, sitting, or lying down, and whether they are sitting in the dirt. These are all very legitimate concerns, and further explanation of how that number was reached would be appreciated.

Dr. Frisch also stated that he did not understand what was meant by observing employees for signs and symptoms of heat illness or what the qualifications of those doing the observing were to have. He stated that if close supervision is necessary, then it is necessary for all employees, not just for those who may be new to the job or not acclimated to the weather.

Dr. Frisch agreed with Mr. McCoy's assertion that training should be required all year round, and expressed difficulty with the language indicating that "no employee or supervisor shall begin outdoor work to which this section applies," stating that he was unsure whether that meant when the trigger temperature was reached or exceeded or any outdoor work. Amending that language could resolve the issue of when training needs to occur. He further stated that there is an emergency requirement that has been inserted in the training section, and he expressed concern that a requirement for something the employer needs to do is in the training section of the proposal. If emergency procedures are required, they need to be set out in a separate section.

He expressed concern regarding the provision requiring an employer to monitor weather reports, stating that he is unsure whether that means the employer should simply watch the weather forecast the night before to determine what the temperature will be or if something more is required.

Dr. Frisch also expressed concern about the lack of an advisory committee, not so much because people did not have any input into the proposal but because the opportunity for discussion of varying points of view and for the development of this revised proposal. It really was not provided when the emergency regulations were established, and there has been no venue since then where people with differing points of view are able to sit down and come to agreement on how to create a workable solution. He stated that the comments received indicate that employers want to do the right thing, but one-size-fits-all may not work in this case, noting the fundamental differences in the way agriculture, construction, and other outdoor work is done. Such a proposal might eliminate many of the concerns expressed during the hearing.

He referred the Division to the letter received from the CIHC, which proposed a performance-based standard for non-agricultural industries. Although that proposal is not without difficulty itself, it may be a good approach to take to address some of the concerns that have been expressed today. In addition, there had been a reference to the ACGIH TLV for cool down times. He stated that regardless of the approach taken, the Division should ensure that it has examined the available science and base its recommendations on that science.

He further stated that everyone has heard him ranting about putting up shade when it is hot, and many organizations are putting it up regardless of the temperature, which makes him feel better that not all employers are ignorant and noncompliant. He distributed the Heat Index (Apparent Temperature) Chart demonstrating the general effect of heat index on people in higher risk groups and the likely symptoms at various temperatures distributed by the National Oceanic and Atmospheric Administration (NOAA). The key point is that at 90°, the general effects are sunstroke, heat cramps, and heat exhaustion possible with prolonged exposure and/or physical activity. He then stated that exposure to direct sunlight can increase the heat index by up to 15°, which means that 90° minus 15° is 75°. Therefore, if the trigger temperature is not going to be 75°, it needs to be reasonable and rational. The only rationale for a higher trigger temperature that he could think of was the number of days per year that the temperature exceeds that

temperature. Based on that rationale, he researched temperature data for 11 stations in the state of California for which there was 100 years of data, checking for the average number of days per year the temperature exceeds 75° or 85° and the average number of days per year the temperature is between 75° and 85°. His concern is that if there is going to be a trigger temperature, that trigger should be set at a temperature that is low enough to truly be protective, and that number is not 85°.

Mr. Kastorff expressed the opinion that there is consensus among the Board members and probably stakeholders that the fatalities and other problems related to heat illness primarily come from noncompliance, not from inadequate regulations. If the employers had been following the existing regulation, there would probably be fewer fatalities. He stated that although the proposed revisions are acceptable, he has questions about a trigger temperature that Dr. Frisch had just addressed. In the spirit of compromise, he suggested that those stakeholders who would prefer a trigger temperature of 85° have the burden of supporting that position. He stated that Dr. Frisch had made a very good argument for a trigger temperature of 75°. Mr. Kastorff's only concern about trigger temperatures is that there are employers who will not do anything until the temperature reaches the trigger, and he disagrees with that position. There were over 13 written comments received before the meeting, and they were not all duplicates or form letters. In addition, there were over 40 oral comments during the Public Hearing, which means that there are a total of more than 55 comments. That cries out for an advisory committee.

Subsection (4)(e) states that unless the employee indicates at the time of hire that he or she has been performing similar outdoor work immediately prior, close supervision of the employee is required. This provision is subject to dishonesty on the part of the employee, because the employee may fear not being hired if such heat exposure has not occurred.

Mr. Prescott stated that the Board was told by the Division that there would be an advisory committee before this proposal was noticed for Public Hearing, and it is a shame that there was not an advisory committee because the comments received were very similar in nature, and today's meeting could have been much shorter had there been a dialogue with stakeholders. He stated that no one from construction and labor has been involved in the development of this rulemaking, although they had requested to be included, and he is extremely upset that labor, with the possible exception of agriculture, has been shut out of having any input into this proposal. He agreed with the other Board members that if at all possible, an advisory committee should be convened. Having a dialogue across the table is of utmost importance to ensure that the resulting proposal is something that can be moved forward.

The suitably cool portion of the water requirement is troublesome. He stated that his concern is not so much whether the water is too hot, but whether it is too cold. If the water is too cold, it can be even worse for an employee who may be overheated. Section 3457 already outlines the water requirements for the agriculture industry, and the word potable in the current proposal is sufficient. He agrees that there is some well water in agriculture and other areas where employers may be putting less than desirable water in the containers, and the definition of potable water should be consistent throughout the requirements.

He further expressed concern regarding the feasibility of the shade requirement. The Board's responsibility is to ensure that regulations are enforceable, reasonable, and understandable. If a

regulation is not reasonable because it is not feasible, there is a problem with that regulation. He is very concerned about the high heat procedures. In construction, there are a lot of mobile crews that work without supervision. He asked how a supervisor would supervise a landscaping crew that he sees in the morning to provide instruction, and he does not see that crew again till the afternoon. He would like to see some changes in the language to include such situations.

He stated that there has to be an exception for the shade requirement for situations in which having the shade up is infeasible or unsafe. There was some conversation earlier in the hearing that the Division and he have some different thinking on how subsection (d)(4) applies. That was meant to be an exception for areas where having the shade up creates a greater hazard or it is infeasible. There were a number of examples of infeasibility. He understands that there are areas where employers need to have shade up, but it is not reasonable to put one group of employees in an area of higher hazard in order to afford another group of employees protection when it is not necessary. Mr. Prescott voted against the emergency standard in June because that exception was missing, and if it is missing in the final proposal presented for adoption, he will be forced to vote against it again. He will not put one group of employees at higher risk to help another group.

Mr. Washington expressed concern that in order to protect a specific group, the proposal is applicable to all outdoor workplaces. He stated that the requirement for shade to be complete, i.e., allowing a person to sit in complete shade, would require an employer to supply not only a shade structure but also chairs for the employees to sit. Thus, the 25% makes sense, as there is nothing stating that all workers on a shift must take their breaks or lunch periods at the same time. He expressed concern that if an employer must use methods other than shade structures for cooling, that employer must be able to demonstrate that the alternate method is as effective as shade. For example, as a building is being erected and begins to provide shade by itself, construction workers will take breaks and lunch periods in that shade, and Mr. Washington expressed concern that an enforcement inspector may view that as a violation of the shade requirement. Mr. Washington also expressed concern that the requirement for potable water should have a consistent definition throughout the standards. Simply put, potable water is water that is fit to drink.

The bottom line is that the proposal needs to follow basic common sense. Shade and water should be located where workers can easily access them, and the water must be drinkable. To have three levels of safety for a heat illness standard does not make sense. If there is going to be a shade requirement, the shade should be up when it is expected to be hot, period. He stated that California is the poster child for over-regulation in terms of penalties associated with the workplace. To the best of Mr. Washington's knowledge, California is the only state that has criminal penalties associated with violations of the occupational safety and health regulations.

The provisions requiring observation of employees for signs and symptoms of heat illness places obligations on people who are ill-trained or ill-equipped to handle those responsibilities. Some of the symptoms described depend upon skin tone, which is fine for people who are pale, but Mr. Washington expressed concern that it may be more difficult to determine whether a person with a dark complexion is suffering from heat illness. Many of the symptoms are difficult for safety professionals to recognize, let alone a foreman who has a high school education or less. He

expressed a strenuous objection to this provision, as it places a burden on people who may not be equipped to fulfill that obligation.

Mr. Washington also expressed concern about the provision requiring a written program including heat illness prevention to be present on the jobsite. He stated that not only would the employer have to have a regular injury and illness prevention program (IIPP) including heat illness prevention and treatment, but the employer would also be required to have a separate heat illness prevention and treatment plan for each jobsite.

Mr. Jackson stated that he does not think all employers are evil, and he does not think all employees are too ignorant to take care of themselves. Most of the testimony heard today appears to be about noncompliance. He cited Ms. Treanor's example from a couple of months ago that if it were discovered that people were not wearing seatbelts in their cars, the way to fix that problem would not be to require that they wear helmets too. Changing a rule that is not being adequately complied with or enforced is an attempt to solve a problem that would be solved with compliance with existing regulation.

Some of the text of the proposal, because it was not vetted by an advisory committee, leaves a lot to be desired. Dr. Frisch has done an admirable job of persuading the Board about the potential value of a lower trigger temperature. If there is some science or explanation in the rulemaking record that explains where the 85° temperature came from, it would be helpful. Subsection (d)(2) is, for all intents and purposes, the same as the existing standard to provide shade when an employee requests it without regard to the temperature. Now, however, the definition of shade has been amended to include any natural or artificial means that does not expose employees to unsafe or unhealthy conditions, which encumbers employers with an additional responsibility of determining whether providing the shade makes it unsafe. The definition seems to, in some circumstances, make it impossible for the employer to provide the shade that is mandated if it is not safe. There are some circles in the language that were not discussed; they would have been discussed if there had been an advisory committee.

He expressed concern about the term "practicable" and the high heat procedure requirements about observing employees and reminding employees without any explanation regarding how frequently those observations and reminders should be provided. There is no method for an employer to determine whether he or she has done the right thing. The training requirement to train all employees about the hazards of heat illness whether or not they are going to be exposed to a heat illness situation seems unnecessary. He expressed concern about the requirement for an employer to designate an individual to be responsible for something that he or she cannot possibly have a handle on every day, all day long.

He stated that he is disheartened that, when the Board met in Los Angeles in July, several of the Board members suggested that the proposal go back to an advisory committee. It seems reasonably clear that the emergency that prompted the original call for these changes has, in part, subsided. It is nearly Fall, and the temperatures are dropping.

It is time that the Board direct the Division staff to go back, convene a representative advisory committee, vet all of the ideas in the proposal, and reach consensus before bringing it back to the Board. It is entirely possible that if the problem of noncompliance is an agricultural problem, in

which case the proposal should address the problem in agriculture, unless there is some showing that the problem exists somewhere else. He suggested in July that the proper way to develop a rulemaking package was to convene an advisory committee, take input from the regulated community and the stakeholders, and present a package where there was already consensus. To write a regulation in private, force it on all employers with outside places of employment, and then sort out who is really right sometime in the future is not the way the Board should do business.

Chair MacLeod stated that all of the concerns or comments that the Board has identified are now available for review, and he did not have much to add. He then asked Mr. Welsh if he wished to respond to the comments he has heard today.

Mr. Welsh stated that there would never be consensus on this issue. The Division could have an advisory committee to add more discussion, but there would never be consensus. He has been trying since 2005 to get that consensus, but it is just not there. He finished by stating that the Division would do its best.

Mr. Washington thanked Ms. Alvarez for providing translation services for the farm workers who had spoken.

B. ADJOURNMENT

Chair MacLeod adjourned the Public Hearing at 3:04 p.m.

III. BUSINESS MEETING

Chair MacLeod called the Business Meeting of the Board to order at 3:04 p.m., October 15, 2009, in the Auditorium of the Harris State Building.

A. PROPOSED SAFETY ORDERS FOR ADOPTION

1. TITLE 8: **GENERAL INDUSTRY SAFETY ORDERS**
Division 1, Chapter 4, Subchapter 7, Article 47
Section 4086
**Momentary Contact Devices for Portable Power Driven
Augers**
(Heard at the August 20, 2009, Public Hearing)

Mr. Manieri summarized the history and purpose of the proposal and indicated that the package is now ready for the Board's adoption.

MOTION

A motion was made by Dr. Frisch and seconded by Mr. Prescott that the Board adopt the proposal.

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

B. PROPOSED VARIANCE DECISIONS FOR ADOPTION

Mr. Beales requested that the Board approve the items on the consent calendar and adopt the proposed decisions. The one decision marked as a draft has been signed and mailed out, and the proposed outcomes are as stated in the proposed decisions.

MOTION

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

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

C. OTHER

1. Legislative Update

Mr. Beales stated that the legislative session and the Governor's time for signing the recently passed bills has lapsed. The final result is as follows: The man-lift bill has been signed by the Governor. AB 221, which does not directly affect Cal-OSHA but does ensure that certain training meets Cal-OSHA standards, was signed by the Governor. AB 838, the indoor heat illness bill, was vetoed by the Governor. AB 1312, which had to do with defibrillators, was vetoed. AB 1561, which has to do with further Division and Appeals Board reports, was vetoed by the Governor.

2. Executive Officer's Report

Ms. Hart stated that at the last meeting, she had indicated that staff was reviewing applications and conducting interviews for the vacant Associate Safety Engineer position. She further stated that one candidate was offered and accepted the position; on October 26, Martin Tamayo would be joining the Board staff as an Associate Safety Engineer, working under Michael Manieri. Mr. Tamayo comes from CalTrans most recently, and prior to that position, he worked at the State Compensation Insurance Fund.

3. Future Agenda Items

Mr. Prescott requested that Petition 507, which deals with the modification of diesel equipment exhausts, be placed on the November agenda. He stated that there have been numerous meetings among the Division, Board staff, CARB, and the Governor's office, and finally the previous morning, the Petitioners were included in such a meeting, which started off with the Governor's staff telling people how the meeting would end. Petitioners are grudgingly acceptable of this at this time; however, there are mixed emotions about it. Mr. Prescott would like it on the Board's calendar so it can be discussed publicly.

D. ADJOURNMENT

Chair MacLeod adjourned the Business Meeting at 3:10 p.m.