

Special Study on California Occupational Safety and Health Appeals Process

General comment: A number of the Special Study findings pertain to practices of the Appeals Board and are followed by recommendations that Cal/OSHA take action to correct the perceived deficiency. It is important for all to recognize that there is no direct route available for an executive branch agency like Cal/OSHA or OSHA itself to alter the practices or case law of a court that is part of a judicial branch or any other adjudicatory body that operates under authority independent of the executive branch, as is true of both the Appeals Board in California and the Occupational Safety and Health Review Commission that reviews OSHA appeals.

Accordingly, while OSHA may operate under the premise that it must identify and call for changes in a state’s adjudicatory process that may argued to create an effectiveness issue for the purposes of the OSH Act, it must acknowledge that even if the state plan administrator were to agree completely with this premise, there would be no direct route by which the administrator could order a corrective measure to be made. As is the case with OSHA vis a vis the Review Commission, the tools available consist of litigation, a resource intensive endeavor whose outcome is never certain, communication with stakeholders for the purpose of raising awareness, and the political process.

Cal/OSHA and the Appeals Board do not agree on some issues and disputes between them have been and will continue to be the subject of litigation as was the intent of both the OSH Act and the California Occupational Safety and Health Act. How decisions to litigate are made is a matter of legal judgment, and Cal/OSHA has made and will continue to make its best judgment on the advisability of proceeding to litigation in each individual case. In addition, the power of working with stakeholders to engage in discussions with a body like the Appeals Board should not be ignored or minimized. California law requires the Appeals Board to hear comments from the public at its monthly meetings and discussions in this context have produced and will likely continue to produce significant and positive change.

#	Findings	Recommendations	Proposed Response
1	<p>In its decisions OSHAB is not defining “serious hazard” or interpreting “substantial probability” consistent with Federal OSHA interpretations, OSH Review Commission, and with Court of Appeals decisions. The “more likely than not” construct used by OSHAB is not consistent with the intent of the OSH Act nor the requirements of Section 18 that a State Plan must provide a program of standards and enforcement that is at least as effective as the OSHA program.</p>	<p>Cal/OSHA must take appropriate action – administrative, judicial, or legislative – to ensure that OSHAB’s interpretation of “serious hazard” is consistent with and at least as effective as the Federal definition.</p>	<p>Agree in part, disagree in part.</p> <p>Action: California will ensure its program is "at least as effective as" (not "equivalent") to Fed/OSHA. California enacted AB2774 on September 30, 2010 which statutorily re-defines a serious violation and prescribes standards for the investigation and resolution of these violations.</p> <p>This legislation represents the culmination of a dialog with stakeholders initiated by Cal/OSHA over two years ago about how to address differences between the California approach and the federal approach.</p> <p>The Special Study mischaracterizes the approach of the Appeals Board by stating that “when evaluating the classification of serious violations, OSHAB requires Cal/OSHA to present empirical data showing a substantial probability that an injury or illness is “more likely than not to be serious.” Where the state and OSHA, and Cal/OSHA and the Appeals Board have parted company in the past is over how to define “substantial probability” and “serious physical harm”.</p>

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2	Writs of Mandate on OSHAB Decisions and DARs that result in loss of citations, citation classifications, or penalties are not being filed by Cal/OSHA in many cases where warranted.	Cal/OSHA must select sufficiently strong cases for appeal that would set precedent to challenge OSHAB decisions and practices regarding the classification of violations as serious in order to ensure that California meets the criteria in 29 CFR 1902.37(b)(14), which states: Wherever appropriate, the State agency has sought administrative and judicial review of adverse adjudications. This factor also addresses whether the State has taken the appropriate and necessary administrative, legislative or judicial action to correct any deficiencies in its enforcement program resulting from an adverse administrative or judicial determination.	<p>Agree in part, disagree in part. Cal/OSHA does not disagree with the proposition that it should seek legal review in the courts of adverse Decisions After Reconsideration (DARs) of the Appeals Board, where it is concluded that such action is likely to achieve a beneficial result. It has done and continues to do this, the most recent example being the filing of an appeal in Granite Construction, Denial of Reconsideration, 07-R5D1- 3611 (June 2010).</p> <p>DOSH has also taken administrative action to address issues of this nature through its stakeholder meeting process, one outgrowth of which has been AB 2774.</p> <p>Action: DOSH will continue to seek legal review of matters it deems appropriate for such action and to take other administrative action as opportunities arise to make improvements.</p>
3	The rules of evidence used by OSHAB prevent many serious hazards from being appropriately classified without the use of "Expert" testimony and relevant medical training on specific injuries. Federally, expert testimony is not always required to establish whether a hazard is serious. In some cases, expert testimony may be needed, but the OSHAB appears to be applying a test that far exceeds well settled law in both the OSHRC and Federal courts.	Cal/OSHA must take appropriate action – administrative, judicial, or legislative – to ensure that OSHAB's test for acceptance of compliance officers' testimony is as least as effective as the test at the federal level and results in a similar classification of violations as serious.	<p>Agree in part, disagree in part. California law has recently changed with the signing of AB2774. New Labor Code section 6432(g) provides clarifying guidance binding on the Appeals board on the sufficiency of competent compliance officer testimony to establish each element of a serious violation.</p> <p>While there is disagreement on parts of the finding, moving forward under the new law makes this disagreement immaterial.</p>
	Cases have been identified showing an extreme standard of evidence to prove classification of violations where the Compliance Officer's ability to identify, evaluate, and document conditions in the workplace are not considered.	[See recommendation #3]	See Responses 1, 2, and 3.
	A medically qualified person(s) is necessary to sustain violations based on exposure and "work relatedness" under the current Appeals process.	[See recommendation #3]	See Responses 1, 2, and 3.
4	OSHAB's reduction of penalties including those for violations of 342(a), result in Cal OSHA's having a significantly lower percentage of penalty retention rate post content (<i>sic</i>).	Cal/OSHA, using all available appeal resources, must select sufficiently strong cases for appeal that would set precedent regarding retention of penalties overall and a minimum penalty for violations of 342(a).	<p>Disagree.</p> <p>The EFAME states that the California penalty retention rate is substantially lower than it actually is. In fact, our request to IMIS for these data shows that Cal/OSHA's remaining penalties are higher for each year moving forward. In FFY 2007, 2008 and 2009 the Cal/OSHA retention rate is 48.1%, 52.5% and 60.6% respectively. Cal/OSHA's 3-year average rate is 53.3%. This compares favorably with the Federal rate of 58.5% and is the exact opposite trend that is shown in the EFAME, Table 8. We would like to discuss this issue further with OSHA to determine how OSHA obtained these data.</p> <p>Regarding penalty "retention" in general, this issue is affected most heavily by how well serious violations</p>

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			<p>stand up on appeal, and this in turn is affected by the clarity and reasonableness of the standards applied to adjudication of appeals of serious citations as well as the quality of the inspection work product supporting the citations. AB 2774 and the new training measures that have been implemented by DOSH should fully address these concerns.</p> <p>DOSH must make its own decisions about how to allocate its resources, and these in turn depend in part on the certainty of success on appeal of legal issues to the courts.</p> <p>DOSH does and will continue to take an appellate posture consistent with its resource capabilities and legal judgments about the most effective strategies to rectify “perceived” problems.</p> <p>Regarding 8 CCR section 342(a), this regulation requires reporting of <i>every</i> workplace fatality, serious injury, or serious illness, and each of these reports obligates Cal/OSHA to conduct an inspection in response. This is different than the OSHA program requirements resulting in differences between case comparisons. The OSHA counterpart only requires reporting and an inspection in response when the number of fatalities, serious injuries or serious illnesses is <i>three or more</i>.</p> <p>DOSH has conducted stakeholder meetings to discuss making amendments to section 342, and it will be proceeding to propose such amendments, which will help to clarify some of the issues regarding section 342 penalties.</p>
5	Cal/OSHA field staff do not have sufficient legal training or background to present cases at hearings.	Cal/OSHA must take appropriate action to assure that their enforcement actions are appropriately defended at contest either through attorney representation or, if necessary, through a system where Cal/OSHA field staff are trained and provided with adequate access to technical and legal resources to ensure at least as effective presentation of cases to OSHAB.	Agree in part, disagree in part. We fully recognize the need for robust training in this area and have already established a program to provide it. DOSH established a new training program, which addresses these issues, in January of this year. Please see Responses to EFAME Findings 44 and 45.
6	OSHAB schedules multiple cases for the same Cal/OSHA staff member on the same day or in the same week without consideration for the time each party indicates is necessary to present their case.	Cal/OSHA must take appropriate action – administrative, judicial, or legislative – to address the problems associated with over scheduling of cases and assure that CSHOs or attorneys have adequate time between scheduled dates to prepare for upcoming hearings. If CSHOs are to continue to present their own cases, Cal/OSHA must provide adequate legal and administrative support to help them review the case file and prepare to testify.	Agree in part, disagree in part. OSHAB has changed the calendaring practice previously in place that allowed the backlog to be eliminated, and this finding is no longer an issue.

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7	<p>OSHAB's notification system is inaccurate and inefficient, Reconsideration Orders are unclear on the specific issue(s) being reconsidered and notifications are not always sent to the correct Cal/OSHA office.</p>	<p>Cal/OSHA must take appropriate action to assure that the system for hearing contested cases includes a method of notification that ensures clear, concise, accurate and timely notification to parties involved in the appeals process and is at least as effective as the OSHRC method.</p>	<p>Disagree.</p> <p>The general statements in the finding and recommendation are not consistent with case and quantitative information OSHAB has. OSHAB scheduled 1,823 hearings in 2009 and there were no occasions where DOSH staff missed a hearing attributable to "hearing notification issues."</p> <p>OSHAB has requested specific information from OSHA on these assertions. Once the requested information has been received, a complete answer will be provided.</p>
8	<p>Prehearing conferences are not recorded, some stipulated agreements are rejected by ALJs and hearings convened, decisions are amended through the Decision After Reconsideration process and Furlough Fridays have affected the amount of time ALJs have to hear cases and issue Decisions.</p>	<p>Cal/OSHA must take appropriate – administrative, judicial, or legislative – action to assure that all parties are afforded opportunity for hearings in an appropriate manner consistent with the OSH Act including following the protocols outlined in the policies and procedures "Gold Book"; formally documenting the Pre-hearing conferences; and developing a system which results in timely and objective ALJ hearing procedures and decisions.</p>	<p>Disagree</p> <p>OSHAB already records all pre-hearing conferences. OSHAB ALJs are bound to act impartially and fairly by numerous statutes and Board regulations, including the Administrative Adjudication Code of Ethics (Govt. Code § 11475 et.seq.), which incorporates relevant Codes of Judicial Ethics applicable to court judges, Department of Industrial Relations' "Incompatible Activities Statement," its "Conflict of Interest Regulations," and the Board's Regulations (Title 8, CCR §§ 350.1, 352, 376.1, and 385).</p> <p>Also there is no "backlog of Decisions".</p> <p>OSHAB has requested additional information from OSHA on these items. It is not possible to fully consider these items until the requested information is received, at which time a fuller response can be made.</p>
9	<p>Prehearing conferences are not recorded, some stipulated agreements are rejected by ALJs and hearings convened, decisions are amended through the Decision After Reconsideration process and Furlough Fridays have affected the amount of time ALJs have to hear cases and issue Decisions.</p>	<p>Cal/OSHA must determine whether the problems associated with the current system of having CSHO's defend their own cases during contest can be corrected. (See Recommendation #6). If not, they should utilize Cal/OSHA attorneys during the entire appeals process including settlements as is done in the Federal Program and most other OSHA-approved State Plans.</p>	<p>Agree in part, disagree in part.</p> <p>See response to finding 5. Resources place limits on how many attorneys DOSH can hire, and it must be kept in mind that each attorney hired means a compliance officer who could have been hired was not. DOSH has to make its best judgment about the degree to which compliance officers and other staff can operate without direct representation by an attorney and operate accordingly.</p>

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10	ALJs follow the OSHAB regulations (Gold Book) for amending Cal/OSHA citations.	Cal/OSHA must take appropriate action to establish the necessary rules and/or practices with OSHAB that allow amendment of citations in a manner at least as effective as Federal case law and OSHRC procedures - including amendment for technical errors and to conform with evidence presented. Cal/OSHA should also take steps to assure that case files contain accurate information, especially regarding company name and standards cited, through staff training and improved case file review, and fully utilize all appeals processes when citations/cases are vacated for minor technical errors.	Disagree OSHAB disagrees with the finding and recommendation. The Board's practice and procedure provide for amending citations before a hearing and, when good cause is demonstrated and prejudice is not established, during a hearing and, after a hearing, in order to conform to proof or to correct technical, clerical errors. OSHAB requested specific case information where OSHA claims an ALJ has not allowed a reasonable amendment. OSHA has not yet provided this detailed information and therefore it is not possible to fully reconcile this with the information that OSHAB has available to it. Upon receipt a more complete response can then be provided.
11	Witness availability has affected the outcome of appealed cases.	When an appeal does occur, Cal/OSHA should consider witnesses availability when determining whether settlement is warranted. Utilize informal conferences as a means of lowering the appeals rate and more successful retention of citations including violation classifications and appropriate penalties.	OSHAB Disagrees. Witness availability is a crucial issue and has been the subject of much discussion in stakeholder meetings. In response, the Appeals Board has agreed to increase the number of venues it makes available for appeals, which most stakeholders believe has a direct impact on witness availability. OSHAB has requested additional information from OSHA on these items. It is not possible to fully consider these items until the requested information is received, at which time a fuller response can be made.
12	Cal/OSHA's Informal Conference policies do not encourage informal settlement and are not similar to the Federal Program.	Cal/OSHA must discontinue the automatic 50% reduction of proposed penalties based on an assumption of future abatement. Cal/OSHA should adopt policies on informal conferences that are at least as effective as federal policies.	Agree in part, disagree in part. Penalty amounts and credits are set by regulation. DOSH has had extensive discussions with stakeholders about amending its penalty regulations and intends to address through rulemaking the issue of the abatement credit as well as a number of other issues. DOSH does not believe its informal conferences are less effective than OSHA's.
13	Through its practices Cal/OSHA is effectively extending the 15 working day contest period established by statute by 10 days by accepting contests by phone, allowing 10 additional days for submission of documentation regarding the grounds for contest, and allowing the use of a "check-off box" form, in lieu of a written submission, for the filing process.	Cal/OSHA must determine whether this practice is in accordance with State Law and evaluate how these practices affect their contest rate. The State should determine whether the adoption of contest, informal conference, and settlement procedures more in line with statutory requirements and Federal practice would resolve many of the issues identified in this report. Absent a determination to change these practices, the State must submit a plan change supplement for Federal review, documenting its entire appeals process with a detailed comparison to the Federal program showing how it is "at least as effective," and a legal opinion that it is in accordance with State law.	Disagree. Our legal review indicates the Board's Notice of Contest procedure is compliant with Labor Code section 6601. In all of the public discussions we have had with labor and management stakeholders over the years, this issue has never been raised. No explanation has been provided of what rationale leads OSHA to contend that allowance of an additional 10 days for an employer to perfect an appeal with documentation, if the 15-day deadline to "notify" the appeals board of intent to appeal has been met, will have a negative impact on program effectiveness. We cannot find such a rationale.