

**OCCUPATIONAL SAFETY  
AND HEALTH STANDARDS BOARD**

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**SUMMARY**  
**PUBLIC MEETING/PUBLIC HEARING/BUSINESS MEETING**  
**September 15, 2011**  
**Sacramento, California**

**I. PUBLIC MEETING****A. CALL TO ORDER AND INTRODUCTIONS**

Chairman John MacLeod called the Public Meeting of the Occupational Safety and Health Standards Board (Board) to order at 10:00 a.m., September 15, 2011, in the Auditorium of the State Resources Building, Sacramento, California.

**ATTENDANCE****Board Members Present**

John MacLeod  
Bill Jackson  
Jack Kastorff  
Guy Prescott  
Willie Washington

**Board Members Absent**

Dave Thomas  
Hank McDermott

**Board Staff**

Marley Hart, Executive Officer  
Mike Manieri, Principal Safety Engineer  
David Beales, Legal Counsel  
Chris Witte, Executive Secretary

**Division of Occupational Safety and Health**

Deborah Gold, Deputy Chief, Health  
Steve Smith, Principal Safety Engineer  
Joel Foss, Acting Principal Safety Engineer  
Pat Bell, Senior Safety Engineer

**Others present**

Dave Harrison, Operating Engineers #3  
Steve Johnson, ARC-BAC  
Joan Gaut, CTA  
Mark Roy McGrath, AHF  
Marti Fisher, Cal Chamber  
Chris Anaya

Robert Massey, General Dynamics NASSCO  
Mark Stone, EPIC Insurance Brokers  
Cory Friedman, WorkSafe  
Paul Myers, Sacramento County  
Dan Leacox, Greenberg Traurig  
Justin Manganiello, UCSD Law School

**B. OPENING COMMENTS**

Mr. MacLeod indicated that this portion of the Board's meeting is open to any person who is interested in addressing the Board on any matter concerning occupational safety

and health or to propose new or revised standards or the repeal of standards as permitted by Labor Code Section 142.2.

**Mark Roy McGrath**, Public Health Policy Consultant for the AIDS Healthcare Foundation (AHF), presented comments regarding Petition File No. 513 requesting a revision of Section 5193, Bloodborne Pathogens specific for the adult film industry. On behalf of the petitioner, Michael Weinstein, President of AHF, Mr. McGrath thanked the Division and the Board for its continued interest in this matter, and in particular, he thanked Deborah Gold and Peter Riley for their efforts that are continually protecting marginalized workforces.

On June 7, an advisory committee discussed draft proposed language to amend the California Code of Regulations specific to the adult film industry. This effort was intense, and the language drafted was detailed, thorough, and ground-breaking and will likely meet the requirements of Federal equivalency.

Besides petitioning this Board, AHF has been engaged in a broad range of activities for workers in this industry. It has motions in front of two committees of the L.A. City Council requesting they come up with mechanisms to better protect this workforce. It had a unanimous resolution passed by the L.A. City Council asking that the Legislative Analyst request that Cal-OSHA and the Los Angeles Department of Public Health come to a written agreement to better protect this workforce. Also, this issue is being taken to the voters of Los Angeles: There is a petition drive to require that film permits be conditioned on the use of barrier protection and injury prevention plans for all adult films.

At the end of last month, this industry suffered another HIV scare. There were at least 14 primary occupational exposures and an unknown number of secondary exposures, which resulted in an industry-wide shutdown in the San Fernando Valley. This echoes the September 2010 HIV outbreak, in which there were 14 primary exposures and an unknown number of secondary exposures, which resulted in an adult performer working with two known HIV positive performers. That performer also became seroconverted with HIV. In July of this year, the Los Angeles Department of Public Health published in a peer review journal incidents of occupational exposures within this workforce. They documented 2,175 cases of Chlamydia and 1,294 cases of gonorrhea. One in four workers is likely to be reinfected with one of these pathogens within a year. This workforce is estimated at only 1,500 people.

Latex condoms and the use of barrier protection for occupational exposures have been recognized by the World Health Organization and the Centers for Disease Control and Prevention as the most effective mechanism in preventing the transmission of sexually transmitted infections, despite the fact that they suffer a potential of breaking. No other method is as effective as a latex or polyurethane condom. In addition, condoms cost pennies. The state of Nevada requires condoms in all their brothels, and as a result, the

prevalence of sexually transmitted infections is lower within that sex-worker community than they are in the general population.

In closing, Mr. McGrath added, in 1988 the California Supreme Court ruled that the production of adult content is legal. In doing so, they created a de facto workforce. In the 23 years since that ruling, Cal OSHA has become the agency of last resort in protecting this most vulnerable workforce. This is no different than paraquat exposure in agricultural communities and migrant workers. There is a transient population, a community burden, and an exposure. The difference is that there are more effective methods of protection (barrier protection), surveillance, and better treatment options. He again thanked the Board and the Division for their attention to this matter, and he stated that AHF looks forward to a favorable ruling when the proposal comes before the Board.

**Chris Anaya**, a professional firefighter, stated that he has been doing a lot of research since the last time he appeared before the Board [August 20, 2009], and since that time, a firefighter who is young enough to be his son has been diagnosed with a moderate form of Chronic Obstructive Pulmonary Disease (COPD) when he has never smoked in his life. He has only been on the job for ten years, so he is kind of stuck between a rock and a hard place because it is questionable whether he has been fighting fires long enough to develop the disease. The American Lung Association personnel that Mr. Anaya consulted indicated that they have had cases where COPD has developed within ten years. The people who responded to 9/11 should be a good reminder of how statistics do not always seem to add up.

He asked when the Board would direct staff to start doing its job. It is frustrating for him to hear or to learn that different areas of the state will enforce the law differently according to how they see fit. In Redding, they will cite somebody if they see a respirator in wild land use if there is no paperwork along with it, while in Southern California, they will cite you for some other reason. Just recently, there have been citations issued for not monitoring the air for external burning where three people were transported to the hospital because of carbon monoxide poisoning.

Carbon monoxide is one of the constituents that exceed PELs at every wild land fire. He stated that there are devices that will scrub out carbon monoxide, acetalene, and formaldehyde and prevent a lot of hospitalizations and possibly deaths. There was a death in the Cedar fire in 2003; the victim became disoriented, and the autopsy showed that he had a high level of carbon monoxide. He could not follow commands; he was going toward the fire instead of going toward an area of refuge, and he became overcome by the carbon monoxide. In the Vernal fire in Redding in 2008, according to the autopsy, a firefighter died from thermal burns and carbon monoxide poisoning. He was in a bad spot, he got caught and run over by fire. His carbon monoxide level at autopsy was 29%.

This is not uncommon; firefighters are subjected to exceedances of PELs that are not being considered when it comes to requiring or allowing firefighters to order their own respiratory protection. A couple of years ago, Assemblymember Perez introduced

AB 635 to allow firefighters to purchase their own respiratory devices. It was sponsored on behalf of the CSFA. It flew through the Assembly, but it failed in the Senate because the State lawyers said if it would cost even one dollar to the State, the Governor would veto it. They did not consider how much money it would save in reducing hospitalizations and other costs.

In the regulation, if the PELs exceed what is listed in the regulation, employers are not allowed to follow the voluntary use program; they are required to provide the equipment to their employees. When that issue was raised, the firefighters were told that it constituted an unfunded mandate. They were told that the Constitution states that the State does not reimburse local jurisdictions for something that is special for fire districts versus the public sector. He is frustrated because state workers are playing a role of influencing the government; they are in a luxury position because they are guaranteed lifetime medical benefits. Other fire fighters do not have that luxury, so it seems like a very unfair playing field, where there are people in state employment making decisions that affect the health of those that are not state employees.

After Mr. Anaya's last appearance before the Board, he met with Len Welsh, Mike Mason, who is now retired, and other Division staff, and it looked like things were going well. Mr. Anaya stated that he understands that there is a new administration now, but some of these fire fighters do not have time to wait. This is primarily a California issue, so they cannot rely on Federal OSHA for assistance with this.

C. ADJOURNMENT

Mr. MacLeod adjourned the public meeting at 10:20 a.m.

**II. PUBLIC HEARING**

A. PUBLIC HEARING ITEM

Mr. MacLeod called the Public Hearing of the Board to order at 10:20 a.m., September 15, 2011, in the Auditorium of the State Resources Building, Sacramento, California.

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

1. TITLE 8:     **SHIP BUILDING, SHIP REPAIRING, AND SHIP  
BREAKING SAFETY ORDERS**  
Division 1, Chapter 4, Subchapter 18  
Articles 1, 3, 4, 6, and 8  
**General Conditions in Shipyard Employment, Federal Final  
Rule (Horcher)**

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

Robert Massey, Safety Manager for General Dynamics NASSCO, summarized his written comments.

B.     ADJOURNMENT

Mr. MacLeod adjourned the Public Hearing at 10:41 a.m.

**III.   BUSINESS MEETING**

Mr. MacLeod called the Business Meeting of the Board to order at 10:41 a.m., September 15, 2011, in The Auditorium of the State Resources Building, Sacramento, California.

A.     PROPOSED SAFETY ORDER FOR ADOPTION

1.     TITLE 8:     **CONSTRUCTION SAFETY ORDERS**  
Division 1, Chapter 4, Subchapter 4, Article 3  
Section 1512  
**ELECTRICAL SAFETY ORDERS**  
Division 1, Chapter 4, Subchapter 5  
Group 1, Section 2320.10 (Low-Voltage Electrical Safety Orders)  
Group 2, Section 2940.10 (High-Voltage Electrical Safety Orders)  
**First Aid for Electrical Workers (Horcher)**  
(Heard at the August 18, 2011, Public Hearing)

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

MOTION

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

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

B. PROPOSED PETITION DECISION FOR ADOPTION

1. Herb Higgins  
Silverline Construction, Inc.  
Petition File No. 523

Petitioner requests that the Board amend Title 8, California Code of Regulations, Construction Safety Orders, Section 1630 to exclude parking garages from the requirements for construction personnel hoists for worker access during construction.

Ms. Hart stated that Mr. Higgins withdrew his petition from consideration, so no Board action was required.

C. PROPOSED VARIANCE DECISIONS FOR ADOPTION

1. Consent Calendar

Mr. Beales requested that the Board adopt the consent calendar as proposed.

MOTION

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

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

D. OTHER

1. Discussion of Division Form 9 Requests versus Petition Requests

Mr. MacLeod provided some brief background information, including the written information provided in the Board packet, and opened up the discussion.

Mr. Jackson stated that the Labor Code sections provided do not provide any direction to treat a request for an amended regulation from the Division any different than any other petitioner. It seems that many of the Form 9s come to the Board when the Division does not like the decision they get from the Appeals Board, and frequently the first the Board hears about it is when it comes to public hearing as a rulemaking proposal.

The proposal regarding ventilation in shafts in construction deeper than five feet and less than 20 feet was not on the 2011 Rulemaking Calendar, and the Board was little surprised to see that one. Sometime in the relatively recent past, the Division was attempting to enforce the terms and conditions of the Tunnel Safety

Orders in surface construction operations with their interpretation of the standards. Len Welsh stated that it was not necessary for the Board to take any action because the Division was not going to enforce those regulations that way. Instead, the Board received a “stealth submission” from the Tunneling advisory committee to do almost exactly what they said they were not going to do.

Ms. Hart stated that Mr. Jackson was correct that the rulemaking proposal was not on the 2011 Rulemaking Calendar. It was an old Form 9 that was submitted back in 2007, so it had been on previous rulemaking calendars. The Division amended that Form 9 in 2011.

Mr. Prescott stated that nothing in the Labor Code sections provided mandate how the Board handles Form 9s from the Division, and he does not know why preferential treatment is given to Form 9s more so than petitions and why they are not handled the same.

Ms. Hart stated that Form 9s do not get preferential treatment. Petitions move to the forefront. When Form 9s are received at the Board, they are reviewed, they are logged, they go into a queue, and if staff decides they are worthy of development of a rulemaking, they are treated the same as any rulemaking that we do. We do not simply take the Division language and put it into a rulemaking.

Mr. Prescott stated that a petition is brought to the Board for a vote before further action is taken, while that decision is made at staff level with a Form 9. It puts the Board in an awkward situation that they are handled differently. He asked whether it is possible to present the Form 9s to the Board for a vote before moving forward just as is done with a petition.

Mr. MacLeod stated that it is clear that the intent of the law is not to treat the Division like interested persons of the public; they are, in fact, staff to the Board, and the regulations specify that because they are responsible for promulgating the health regulations. Using Mr. Prescott’s logic, staff initiated proposals would have to be brought to the Board for a vote as well.

Mr. Prescott responded that that could have some merits.

Mr. MacLeod stated that it could have some downsides as well. The Board has a detailed public process that it utilizes every month for adopting regulations, but he expressed the opinion that both the Division and Board staff must be allowed some flexibility in developing regulations and moving forward with putting together a rulemaking calendar. There are always glitches from time to time, but by and large, there are a lot of points along the way where the Board and the public gets an opportunity to weigh in.

Mr. Jackson stated that he is not asking that the Board have its own staff petition

the Board for a change, but in the instant case, the Division asked for a change.

Ms. Hart stated that the Division has an established P&P for submitting Form 9s to the Board for consideration, it is a pretty involved process, going through many layers of approval.

Mr. Jackson stated that, unlike a petition, the Board was not given an opportunity to give the staff any instruction.

Mr. Beales stated that there may be a difference of outlook as to what the petition statute actually does. It seems that some of the Board members conceive that the petition statute puts members of the public at a disadvantage when compared to the Division when actually it puts members of the public at the head of line. The petition statute does not say that a suggestion by a member of the public cannot be rendered into a rulemaking proposal until the Board acts. The petition statute makes sure that suggestions from members of the public are not overlooked.

Right now, Board staff could get 1,000 Form 9s from the Division and think they are without merit and ignore them, and the Division would have no recourse to the Board to have the Board overrule the sound judgment of the Board staff. The thrust of the petition statute is to make sure that ideas from the public are not overlooked and not just swept under the rug. Also, it appears from the Labor Code that the legislature conceives that the Division is in a different position than members of the public in that the statute states that the Division is expressly required to review petitions.

Mr. Jackson thanked Mr. Beales for his explanation.

Ms. Hart stated that not all Form 9s come to the Board. We receive Form 9s that get returned to the Division or when we start doing the research, they end up being terminated. Just because a Form 9 is submitted to Board staff for regulatory action does not guarantee that it will come to the Board for regulatory action. There are those that are terminated after advisory committee, or some that the decision is made not to move forward even before that. The majority of them come to the Board in some semblance of a rulemaking, but they do not mirror what was submitted to the staff in the Form 9; it has gone through many iterations before it becomes a rulemaking.

## 2. Legislative Update

Mr. Beales stated that the Board has been provided with a written list of a large number of bills that have been tracked during this part of the legislative session, and of those bills, one passed both houses of the legislature. AB 1136, regarding patient handling in health care facilities, is pending the Governor's action. Another bill of consequence, which is not on the written list, is SB 617, which did

not involve the Administrative Procedure Act during most of its life, but in early September it was amended to modify some of the procedures that rulemaking must follow. The changes apply principally to regulations that are anticipated to have an effect in excess of \$50 million and it has to do with augmented analysis of those sorts of impacts. That bill also passed the legislature and is awaiting the Governor's action.

Mr. Jackson asked whether there is language in AB 1136 that would require some action on the part of the Board. Mr. Beales responded that the bill requires that employers must adopt something into their IIPP, but in order to make that particular IIPP requirement enforceable by the Division, it is anticipated that some sort of rulemaking might need to be undertaken.

Mr. Jackson asked whether there is a due date in the bill to force the Board to expedite a rulemaking package to that effect. Mr. Beales responded in the negative. He stated that there has been some mention of possibly doing that sort of change as a Section 100, and whether or not that is a viable way of doing it is something to which the Board staff will turn its attention if and when the bill is signed.

### 3. Executive Officer's Report

Ms. Hart stated that last month she had indicated that she was waiting for word from the Budget and from the Department on a hiring freeze exemption in order to fill the vacancy created by Tom Mitchell's retirement. She has not yet heard whether the freeze exemption process has lifted for the Department, but everything has been submitted to the Department of Finance for approval, and there are many different drills being run. Once everything has been complied with and everything has been reviewed, we are hopeful that they will allow us to start the discussions for filling vacant positions. She had heard last week that the Department of Finance was just starting to grant permission to departments to start hiring without going through the Governor's exemption process. As soon as we get the word that we can fill the Senior Safety vacancy position in our office we will move forward.

Mr. Jackson asked whether there is a candidate list. Ms. Hart responded that there is a Senior list; the thing that we will need to grapple with is that we really need the health experience in our office, so we have asked to either fill the position with a Senior Safety Engineer or a Senior Industrial Hygienist. That decision has not yet been made. She is unsure whether there is a Senior Industrial Hygienist list because the Department has been moving away from hiring IHs, but of course any lateral candidate would be considered as well.

### 4. Future Agenda Items

No future agenda items were identified.

E.     CLOSED SESSSION

Pursuant to Government Code Sections 11126(e)(1) and (e)(2)(A), the Board met in closed session to discuss the following pending litigation: *Bautista, et al. v. State of California, et al.*, Los Angeles Superior Court Case No. BC418871 and Second District Court of Appeal No. B226102.

During the Closed Session, the Board members discussed only the matter noted on the Agenda, and no action was taken.

F.     ADJOURNMENT

Mr. MacLeod adjourned the Business Meeting at 11:24 a.m.