

**Division of Occupational Safety and Health
Noise and Hearing Conservation Advisory Meeting April 22, 2005
(DRAFT MINUTES)**

Attendees:

Kevin D. Bland, CFCA/RCA
Jodi Blom, Cal Framing Contractors Association (CFCA)
Laura Boatman, State Building & Construction Trades Council
Mike Dunlap, Operating Engineers Local 9
Scotty DuPriest, Associated General Contractors (AGC)
Victor A. Esparza, Operating Engineers Local 12
Charles Fankhauser, MEDI
Richard Harris, Residential Contractors Association (RCA)
Michael Hedges, Graniterock
Michael Horowitz, Division of Occupational Safety and Health
Sam Iler, Safecon Consulting, AGC
Mary Jo Jensen, State Compensation Insurance Fund (SCIF)
Steve Johnson, Associated Roofing Contractors
Jim Kegelbein
Merlyn Lubiens, Center for Hearing Health
Peter Lupo, T. B. Renick and Sons
Marshall Massie, Operating Engineers Local 3
Barbara Materna, CA. Dept. of Health Services: HESIS
Mary McDaniel, Center for Hearing Health
Eugene McMenamin, AGC
Tracy Melrose, CEA
Tom Mitchell, OSHSB
Elisa Noble, California Farm Bureau
Fran Schreiber, WORKSAFE
Virginia Siegel, Onsite Health and Safety
David Smith, Ensign Safety
Marti Stroup-Fisher, AGC
Chris Walker, Cal SMACNA
Fred Walter, The Walter Law Firm
Bruce Wick, CALPASC
Chad Wright, Laborers
Steve Smith, Division of Occupational Safety and Health (DOSH)
Bob Barish, DOSH
Robert Nakamura DOSH

Mr. Nakamura brought the meeting to order and thanked attendees for coming. He explained that the general goal for the meeting was to determine the status of the petition to remove the exemption for agriculture, construction and oil drilling and related operations from the hearing conservation requirements in Article 105 since there had not been an advisory meeting on that particular subject for a long time.

Mr. Nakamura then asked for the attendees to make self-introductions by name and affiliation. Mr. Nakamura noted that most of the people present had been to one of the previous or other advisory meetings and asked if anyone had questions about the rulemaking process in general, no one did. He also noted that the minutes that had been emailed with the announcement and agenda were from the last meeting (September 2004) that dealt primarily with the background noise levels allowed for testing environments. However, since there were some first time attendees and many who had not been at the last meeting, he reviewed the previous general discussions.

Background: review of the process to this point.

Mr. Nakamura noted that the exempt industries are exempt from hearing conservation but not the other requirements of noise control, eg. engineering controls.

A major point raised in the early meetings is that the workforce is highly transient and this makes identifying and tracking their exposures very difficult. But there might be segments of the workforce that are less transient and more likely to be exposed to noise since they would be tend to be operators of equipment that would generate high noise levels. From this discussion, AGC suggested a worksite exposure threshold of 120 days. Employee representatives were concerned that this would exclude too many employees, if not most employees, and the operating engineers proposed that this threshold would be 30 days. In agriculture, 120 days would exclude almost all the seasonal employees. In the 2003 meetings, other concerns were identified. AGC and SMACNA were concerned about monitoring the noise in all the different operations and all the short jobs done by subcontractors. There was also concern about the specific language for some subsections that had changes proposed. The draft sent out reflects some of these concerns, but it was difficult to identify the exact draft versions and specific language that needed to be changed. He asked Steve Smith to elaborate.

Mr. Smith said that a couple of corrections were made. One was that the 30 days on the worksite threshold language was attributed to the Building Trades, and that was corrected. Also for training, based on the concept of a threshold, there would be some employees who would not qualify for a hearing test, and they would be encouraged to seek a test from their own healthcare provider. And we did not include some specific language that was suggested by J. Broyles, or J. Freyman or B. Treanor, and these are reflected in the new draft.

Mr. Nakamura continued noting that another proposal was to use a set of references for expected noise exposures for the use of specific types of equipment. Some people liked it, others did not. Another suggestion from AGC was for a consortium of employers and/or employee groups to do the testing and retain the hearing conservation records to reduce the burden on the individual employers.

Status of the proposals

Mr. Nakamura noted that since May of 2003, there have not been any meetings to discuss the hearing conservation exemption issue, but there had been a meeting to review the petitions relating to audiometric testing environment background limits in September. The Division had been expecting to hear a proposal regarding the exemption after AGC met with other parties.

Kevin Bland noted that AGC changed their position from earlier this year.

Mr. Nakamura responded that the new draft reflected the position change they had made a few weeks before this meeting, and did not have the previously suggested language.

David Smith asked about how Petition 223 brought everyone to this point.

Mr. Nakamura said the gist of it was to repeal the exemption for hearing conservation for construction, agriculture, and petroleum drilling operations.

Elisa Noble asked when the petition was made, and Mr. Nakamura told her it was April of 1986, and made by the State Buildings and Construction Trade Council.

Mr. Smith added that in 1985, when the hearing conservation section was adopted by Federal OSHA, the exemption was made to be consistent with the Federal exemption. The petition to the Board was a follow up to the exemption, and their decision at that time was that it should be further considered in California under the advisory committee process. It was our understanding three years ago when we looked at this petition, that it had never been addressed by an advisory committee. No records of such a meeting were found.

Mr. Bland asked if the scope of the petition was limited to hearing conservation.

Mr. Smith responded that it included what appropriate hearing conservation measures would be for adopting that regulation.

Mr. Bland said that if there is no adoption of the first change, there is nothing else to be done?

Mr. Smith read from the petition document.

Richard Harris said it was not very clear and asked if there was ever a meeting.

Mr. Smith said there was no record of any meeting.

David Smith, a member of the Standards Board at that time, noted that shortly after that, the Cal/OSHA program was defunded by the governor.

Bruce Wick asked if this is actually in the regulatory process? Is this meeting under their auspices?

Steve Smith replied that with any advisory committee, the purpose is to get advice from the regulated public that will be brought to the Board. Any proposal that would go to the Board would have the minutes of the meetings, and any proposed language, or recommendations. The purpose is to seek comments for all groups, employers and labor, and try to reach a consensus so that the Board knows that the public has been made aware of a proposal and has had a chance to provide input.

Mr. Harris said, so it was originally from the Trades council, is anyone here from that group? The labor groups identified themselves. Fran Schreiber noted that she was personally involved.

Mr. Harris asked why it waited twenty years.

Ms. Schreiber said that most likely it was because the Cal/OSHA program was put out of business, and no one knew the petition was still there until recently. But the real issue is that it is a valid issue and they intend to pursue it.

Mr. Smith added that the Division intends to pursue it also. That is why everyone is here today.

Mr. Nakamura noted also that there had been some consensus on the background noise levels, but most of those issues had been resolved at the last meeting.

Mr. Bland wanted to clarify that it was a separate petition was told that it was.

Mr. Smith added that the people concerned with the background noise levels had decided to have their own meeting, separate from the hearing conservation issue. Division staff took that proposal, and put it in the draft sent to the attendees.

Mr. Nakamura added that there had been another proposal made during that process to change the requirements for the individuals who perform the hearing tests, but the group did not quite reach complete consensus on that issue at the meeting. Before proceeding with hearing the current positions of the groups here today, there should be some comment from agriculture which had not been well represented at the last couple of meetings.

Mr. Smith also noted that there is a date typo error on the draft, and reiterated that the draft is a slimmed down proposal, the only thing left in is the 30 day exemption. Essentially the discussion has gone back to square one. All the language that had been previously suggested by AGC, like the 120 days, the consortium, etc. has been withdrawn from the draft.

Agricultural noise issues:

David Smith introduced himself and his background as a safety director for a large agricultural operation that included cattle and cotton gins. He has done a lot of noise monitoring for tractor operators and cotton gins. The company also did audiometric testing voluntarily. 25-30 years ago, there was a sort of macho resistance to wearing/using hearing protection by workers.

Another improvement is for environmental cabs that are very common that reduce the noise exposure for the operator. There is a wide variety of operations, some are year-round. Such as dairy operations which tend to have low noise exposures. The issue of seasonal employment is very important for agriculture. There is a segment of the workforce that returns yearly, but there are cultural and other factors for transient labor such that some groups leave the country periodically. The issue of audiometric testing would require mobile testing, and the monitoring would be problematic also. For instance, there can be intermittent noise exposures for forklift drivers depending on the type of engine and where they are working, and similar variables for tractors like the state of the mufflers, and cabs. He would look at whether there is a scientifically proven necessity. There needs to be a study that shows hearing loss of operators compared to the general public. Agriculture polices itself. If there is a hearing conservation requirement for agriculture, 120 days should be the least amount of time. During harvest, they run 24 hours, daily. Not so much with land preparation. During harvest, it would be almost impossible for a worker to have a no exposure period for 14 hours.

Mr. Nakamura asked him if for cotton ginning, there is mandatory use of hearing protection (HP)? Mr. D. Smith responded that he is familiar with most of the industry and yes, the associations promote or require the use of hearing protection while the gin is in operation. He has seen that the operators use HP.

Mr. Nakamura asked him if the employers require HP to be worn or recommend it.

Mr. Smith replied that they require it.

Victor Esparza commented that the industrial world is using 85, and NIOSH as well. Why not start using different numbers, and test people from the start?

Elisa Noble spoke for the California Farm Bureau that represents a variety of commodities. They have concerns about the proposed amendment; what needs to be addressed is 5096, which should be implemented by employers currently. They would prefer to work with Consultation on education. There is also a transient worksite issue, and most of the work is outdoors. There would be complications with monitoring consistency. Problems are already being mitigated. They have 85,000 members, most have only 2-3 employees. They are in constant contact with employees about safety and even hearing conservation.

Mr. Bland said that construction is not exempt from 5096, which requires engineering and administrative controls.

Mr. Smith noted that includes hearing protection.

Mr. Bland continued, how did this happen without showing the necessity?

Mr. Smith the necessity was discussed three years ago, and as in other industries, there is value in identifying hearing loss early on. And we can go back to the older documentation that shows the necessity and value of having prevention and education if the group wants to do that. Assuming that we can show that, there is value in audiometric testing, and training. We are at the point of finding out if there is willingness to look at including these industries for hearing conservation. If there is a willingness to look at molding some hearing conservation requirements for these industries. We understand that it is difficult for these industries and the uniqueness of the employment and whether people should be covered right away or after a number of days. But with the withdrawal of the proposals, we need to determine if there is willingness to establish a regulation.

David Smith said there are differences in the three exempted groups, couldn't there be differences in the way of dealing with the issues?

Steve Smith said there could be.

Mike Dunlap asked if the Division doesn't have an obligation to protecting employees, and could develop a regulation without the input of the group here.

Mr. Smith that is a decision that the Division can make, but we are trying to get the advice of the group about the extent of regulations, collectively or separately because our first preference is to work within the framework of an advisory meeting.

Mr. Dunlap said that the group should come up with something for the Board or the Division could do that.

Mr. Wick said his association has 470 trade contractor members and 80,000 employees, mostly artisan trades, paving, masonry, etc. They have workers' comp statistics showing that the industry has changed in the last ten years; people are much more interested in using hearing protection, and they use noise testing if there is a question about a process, but they have never found anything over 85. For them, there should be a better education, enforcement model. Their experience would be one claim for hearing loss, versus their 80,000 employees. It appears they have very little exposure.

Mr. Harris asked what the Federal level was and was told it is the same. Federal OSHA is going through a similar advisory process. Mr. Harris asked if it is 85 or 90 that they comply with. Fred Walter asked why the original exemption occurred and if something had changed so that it is being considered.

Mr. Smith said the exemption in California was based on the Federal. In the 80's the hearing conservation requirement was added. California did the same, but found out that Federal OSHA had made an exemption. The Board was asked for a similar exemption and the Board agreed but they said there would be an advisory meeting later to examine that.

Chad Wright said he would be willing to meet as much as necessary to craft a regulation. He also noted that for the one claim among 80,000 people just shows that it's hard to file a successful claim, and that really isn't a valid reason for not doing anything. We know there is a significant number of people who have hearing loss. Information can be provided, it is time to make sure that the employees who work for employers who are not trying to do something can do more to protect their hearing and enjoy a better quality of life.

Marti Stroup-Fisher said that Federal OSHA went through a much more extensive process than this and they recently terminated their advisory process. Any hearing loss may or may not be improved by a hearing conservation program but they willing to work on educational programs for prevention.

Mr. Nakamura noted that he had spoken to Federal OSHA staff who are still working on the hearing conservation in construction evaluation.

Laura Boatman wanted to note, and could supply documents that show that about 50% of construction workers have some form of hearing loss. From Washington state, 25 year old carpenters have the same hearing as 50 year olds who are not in construction. It is true there is a standard for construction but it is clearly not working, and the purpose here is to develop a workable standard. Information from British Columbia shows that hearing conservation does improve the problem

Peter Lupo said that the regulation is only as good as the enforcement. The need is to look at enforcing what is in place.

Scott DuPriest said that the 50% figure due to construction work is probably wrong, most of the loss is due to lifestyle, like rock music and dirt bike riding that employees also do. Personal responsibility for what they do outside of work is not considered and employers cannot control that. Also, for the tools that are used they go by what the manufacturer says to do for precautions, and follow those precautions, and make sure the employees do that as much as possible.

Ms. Boatman said that the studies should be provided, and people can decide if there is bias or not.

Mr. DuPriest said there just seems to be something wrong with the data.

Ms. Boatman said there is valid background research that shows that the current regulations at the Federal and state levels are not protecting worker hearing. There are certainly employers who follow the regulations.

Mr. DuPriest said that, similar to the agricultural employers, most of the contractors in California are small, but most are extremely responsible. It is important to reach the others who are not yet following the standard, and who the regulation would be aimed at. They take hearing protection very seriously just as with other safety equipment.

Mr. Smith said again that we are trying to see if there is a willingness to talk about the comprehensive hearing conservation practices or not.

Mr. DuPriest read the position paper, supported by AGC, AGC SD, California Framing Contractor's Association, Associated Roofing Contractors of the bay area, Residential Contractor's Association, California Building Industry Association, Specialty Contractors Association, bay area roofers, SMACNA and Western Steel.

This group doesn't want to go the extent of driving themselves into heavy costs.

Mr. Dunlap asked if they would be willing to increase the Compliance penalties by a factor of ten?

Mr. Dupriest said there was no logic to that.

Mr. Dunlap said hearing protection programs are not being done, but Mr. Dupriest said there is no data.

Ms. Noble said that she concurred that there may be a few employers who are the bad apples in this situation, but the best way to deal with the problem is through better outreach with consultation and increased enforcement of the existing standards rather than changing the standard.

Ms. Boatman said that during the past year and a half, she has done training under a grant for hearing loss prevention among the trades. Federal OSHA thought it was enough of an issue to have this program. This group is from larger companies, not the smaller companies. Not many got training on how to use the hearing protection or about engineering controls. These people were veteran workers, and she expected a much higher level of understanding of noise levels, and you cannot assume that they are receiving HP or training. The goal here should be to make sure that the standard actually prevents hearing loss among workers. It is misleading to say that the workers have been given hearing protection and are okay.

Eugene McMenamin asked what crafts were in the study?

Ms. Boatman said it wasn't a study, it included people from 15 crafts.

Mr. McMenamin said she just gave a synopsis of what the study was.

Ms. Boatman repeated it was not a study.

Mr. McMenamin said she is pitching it to the group like it was data. To move this ball down the field you can't just talk about comments.

Mr. Smith interjected that if scientific data was provided, could the group move along to talk about providing hearing tests and a comprehensive program?

McMenamin said he doesn't want to have the Division provide data, he wants to be involved in selecting the data, vetting it and have a control group to be sure it is legitimate.

Mr. Smith said he could do that, data was provided from three years ago and we can go back to that. But the position seems to be that you do not want to look at any hearing conservation requirements at this time beyond consultation assistance.

Ms. Noble said that is the agriculture position.

Mr. Bland said that is the construction stand.

Chris Walker said there might not be enough audiologists according to an editorial in the Sacramento Bee that describes a shortage of audiologists and speech therapists currently and the Am Speech Language and Hearing Association has now required that audiologists will need a doctorate as of 2012.

Mr. Smith said he wasn't sure that it would be the same individuals who are doing the occupational hearing tests.

Mary McDaniel said that since the standard allows a doctor to oversee the testing, the effect will not be for the technicians who conduct the testing but will be about speech therapists.

Mr. Walker said that it will be a situation that will be subject to supply and demand economics and the small businesses are likely to suffer.

Ms. Boatman asked the audiologist representatives to comment.

Ms. McDaniel confirmed that the audiologist will be a doctoral degree in 2012 and the Masters program will end in 2007 but the number of audiologists practicing in occupational testing is small, but they can use technicians so it doesn't take a long time to get staff up to speed. There would be an initial high demand but it would not be difficult to adjust to it. They are not losing enough audiologists to prevent that.

Mr. Smith asked what percentage of the total workforce, or numbers of workers there would be in California. That shortage issue has not been raised before and can be explored, but we need to establish if there is a willingness to discuss the main issue.

Ms. McDaniel added that if employers do start to get hearing loss claims, they will have no way to dispute the claim.

Ms. Stroup-Fisher said that with the transient work force, there is no way to show where the loss occurred.

Fran Schreiber concurred with Ms. McDaniel that the employer would have no defense against a claim. There might be an allocation if the employer had documents otherwise the last employer gets the claim.

Sam Eiler said that is not the way it works with an MSD claim. They are apportioned throughout the history.

Ms. Schreiber said her understanding is that hearing loss is the same as asbestos.

Mr. Eiler said it would be for the last 12 months from the date of the claim.

Mike Horowitz said that there is a problem if people think that hearing conservation means just giving someone hearing protection. A program requires ongoing interaction between the employer and employee. Also you don't notice hearing loss without some testing. For example, abrasive blasting on a bridge was over 115 dBA, what HP will protect completely against that? In that case, there was also no documentation if hearing loss was occurring.

Ms. Boatman said that it seems that if the employer groups are not satisfied that there is a basis for having hearing conservation, the available data could be gathered and reviewed for the next meeting.

Ms. Stroup-Fisher said that wasn't the issue. The issue is that whether there is a problem or not, they will do a better job of outreach about hearing loss awareness. It's not the adequacy of the data.

Mr. Dunlap asked why they can't do that now?

Ms. Stroup-Fisher said that some of their members already are.

Mr. Dunlap noted that some of their members are doing testing already because they are getting claims filed against them.

Ms. Stroup-Fisher agreed that some are testing. We do not need to mandate it across the board.

Ms. Schreiber commented that the meeting has reached an impasse. The petition stands, and there will be a proposal developed by the Trades that will be taken to the Standards Board. It's not productive to meet when the management side just wants everything to be voluntary.

Mr. Smith wanted to cover one last issue, to take care of updates of the standard to delete obsolete references. The first was to go from old ANSI documents to the more recent ones. One page 2, there is a table from 5096. The change would make clear that noise above 115 decibels would be added to the exposure total. The next was to delete the reference to a 1982 implementation date. The next change was from the most recent proposal, to establish that technicians should be able to meet a specific level of training, based on the certification requirements established by CAOHC.

Ms. McDaniel responded, noting that this was her petition, the language as shown now is more restrictive than what the group had decided on at the last meeting. Equivalent training does not exist and it would probably be beyond the scope of what was discussed at the meeting. She met with John Fritsch of PGE, they decided that they should be certified or have attended some kind of training that makes them competent to do the testing. The other thing they suggested was in item (e), they suggest that the technician who makes a comparative analysis should be CAOHC certified. She is willing to work on it again.

Mr. Nakamura asked her if there are programs for that sort of certificate?

She responded that there are some courses available and they are less intensive than the CAOHC course which requires two and a half days of classes.

Ms. Stroup-Fisher wanted to clarify that it would say a technician who is doing the test will have a certain amount of training to do the test? (yes)

Ms. McDaniel added that the technician would be able to properly operate the testing equipment, while a CAOHC certified tech would be also be able to fit hearing protectors and review the audiogram

Ms. Stroup-Fisher asked if she thought that clinics and other professionals could develop the training and make it available fairly easily?

Ms. McDaniel said yes, there are already providers for clinics who check the performance of the clinic staff.

Ms. Stroup-Fisher asked if this would make it easier and Ms. McDaniel said it would.

Ms. McDaniel said that the wording should be audiometric tester, and their language said they should have a certificate of training that demonstrates this competence. That language is there now, but there is no way to say whom the competence is for.

Mr. Smith wanted to know if he could say received training on the concepts outlined in the CAOHC certification it doesn't have to be 2 and a half days, just how to administer an exam, and the second sentence is that they have an ongoing competency on how to do the test irregardless of where they got the training.

Mr. Mitchell asked if that stated the requirement twice?

Mr. Lubiens said that the second sentence is the weak area in the regulation. It is critical to have the "certificate" because it shows that there is a documentation establishing their training and the source of that training and line of responsibility. This would be an innovation to deal with a critical shortcoming.

Ms. Stroup-Fisher asked if it means that there is a third party certification.

Ms. McDaniel said that it would be a certification of completion of training of certain items. The idea of certification is fairly relaxed.

Ms. Stroup-Fisher said that the term certificate now has a specific meaning because of the crane operator certification from a regulatory standpoint.

Mr. Smith added that was why he focused on training, not certificates. There are similar cases in other standards like MSHA. Certain training like Red Cross training, or equivalent are described without specifying equivalence. Just that they cover the specific issues.

Ms. McDaniel said that for the technician, a CAOHC certified person may be overqualified for the job.

Ms. Stroup-Fisher suggested that they have language that they successfully completed training for the duty.

Ms. McDaniel added that they have to demonstrate competence, as addressed by the last sentence referring to oversight by the specific professional.

Mr. Smith said the current language only covers the competence of the technician.

Dr. Fankhauser suggested that they shall be able to demonstrate to a professional program reveiwer competency....

Ms. McDaniel said that this is not what is happening now.

Mr. Smith suggested that she refine the language again, and send it back to the Division.

Mr. Lubiens noted that her proposal was in response to what she was asked to do.

Mr. Smith agreed but emphasized that the previous language was not enforceable by Compliance.

Training.

Mr. Smith discussed the language proposed for employees who would not have been qualified for audiometric testing.

Mr. Walther asked for a definition of standard threshold shift in the definition section. Others agreed.

Mr. Harris suggested licensing by a California agency.

Ms. McDaniel said that would be a problem for an audiologist administering a nationwide program who may not be licensed in California, so the suggestion was withdrawn.

Mary Jo Jensen asked for clarification about the people excluded from the audiometric test.

Mr. Smith said the intent was for any employee who was excluded from a hearing test as a temporary or seasonal worker, to be encouraged to get a test.

Ms. Jensen added that in her personal opinion as a CIH (Certified Industrial Hygienist) (not as the SCIF position), employee exposures should be controlled above 85 decibels because some people will suffer hearing loss at that threshold. This is demonstrated by the fact that most occupational health agencies have issued guidelines based on 85 as a limit and using the 3 decibel doubling rate (which is the real physical doubling rate as opposed to the regulatory doubling rate of 5 decibels). The current regulation, based on 90 and the 5 dB doubling is not protective enough.

Dr. Fankhauser asked her if hearing loss claims are a big ticket item at SCIF and she answered that it was about one percent of the claims. She just wanted to make the point that the current OSHA standard is outdated. She added that an article in a recent AIHA Journal indicates that just issuing hearing protection is not effective at preventing hearing loss. She has seen in the field that people often do not wear the HP that they have been given.

Mr. Harris recounted how much testing he would have to conduct if audiometric testing was a requirement, and how difficult it would be to track those records. Mr. Smith noted that there have been numerous discussions and a number of proposals to address those problems. Mr. Harris said that any change to the regulation should state exactly what an employer would have to do if they did a certain operation for compliance. Others reiterated the point that some equipment tries to provide specific protection instructions already.

Ms. McDaniel said that the group should approach the issue as how to provide hearing conservation to the industry, not make the industry comply with the current regulation.

Mr. DuPriest said that the big problem is trying to reach the thousands of small contractors and getting them to understand the problem.

Mr. Smith noted the last proposed change was to have recordkeeping agree with 3204.

Ms. Jensen noted that it should also apply to accessing of records.

Mr. Lubiens asked if there is going to be another meeting. Mr. Smith said the unresolved issues could be handled without a meeting unless a meeting is requested. For the hearing conservation part of it, there seems to not be any reason to meet, but it is possible.

Mr. Lubiens wanted to continue discussing issues since a lot of expertise has been gathered.

Ms. Stroup said that AGC would next be planning how to do their outreach.

Meeting adjourned.