

CAL-OSHA ADVISORY
COMMITTEE
MINUTES of MEETING
January 7, 2010



Department of Industrial Relations
John Duncan, *Director*

Division of Occupational Safety & Health
Len Welsh, *Chief*

Chris Lee, *Deputy Chief* of Cal/OSHA Enforcement
Edward F. Callanan, *Assistant to the Chief*
(510) 286-7000

Cal/OSHA ADVISORY COMMITTEE
MINUTES OF MEETING – JANUARY 7, 2010
ELIHU HARRIS STATE BUILDING
1515 CLAY STREET – SECOND FLOOR, ROOM 11
OAKLAND, CALIFORNIA

OPENING REMARKS

Len Welsh, Chief of Division of Occupational Safety and Health, called the meeting to order at 10:05 a.m. a copy of the attendance roster is attached to these minutes. It was announced that the next meeting of this committee will be held on March 4, 2010 at the Department of Water and Power, 111 North Hope Street, Level "A: Conference Center in Los Angeles at 10:00 a.m. (the time set by a consensus of the members at this meeting. All future meetings will commence at 10:00 a.m.).

ADMINISTRATIVE REPORT

- 1) The Division's budget for the coming fiscal year (2010-2011) so far is likely to be the same as for this year, thanks to the fact that the Division is no longer tied to the State General Fund, and instead is receiving funding from assessments on Workers Compensation premium or "premium-equivalent" for Self Insurers. There has been concern expressed by some stakeholders about the size of the assessment, which now must fund both DOSH and DLSE. However; it is anticipated that Cal/OSHA will maintain its current level of funding for next fiscal year.
- 2) The state is maintaining its mandatory furlough of employees for the first three Fridays of every month and this applies both to general fund and special funded agencies. Very few agencies are exempt from the furlough orders; some by court ordered exemptions. Cal/OSHA is not exempt at this time.
- 3) Mr. Welsh introduced Alan Traenkner, assistant Regional Manager for Federal OSHA Region 9. Mr. Traenkner has been Cal/OSHA's principal contact for Federal oversight of our State program and over the years has been a consistently helpful and knowledgeable representative for Federal OSHA.

Mr. Traenkner expressed an interest in participation in a Federal program known as the "Intergovernmental Personnel Act" which allows Federal employees of OSHA to take a leave of absence to work at another OSH agency, like Cal/OSHA. As a result, by mutual agreement, Mr. Traenkner has accepted Mr. Welsh's offer to appoint him as Special Assistant to the Chief of DOSH. The appointment, which is 50% federally funded, will last for up to two years. It is expected that he will be particularly effective in our dealing with administrative matters relating to our continuing contacts with OSHA, as well as assisting with duties similar to those of the DOSH Deputy Chief for Engineering and Technical Services, a position which DOSH has been unable to fill for many years.

- A) Mr. Traenkner expressed his appreciation for the opportunity to work with Mr. Welsh and briefly reviewed his experience with Federal OSHA, having worked in the national office, in New York after 9/11, and tours in such area offices as Boston, but noted his primary assignment has been in California for many years mainly as the Area Director in San Francisco, most notably during disengagement and most recently as Assistant Regional Manager for Region 9.
 - B) Mr. Traenkner stated that Fed OSHA continues to seek final approval of all its state programs including California, and this is one of the assignments given to him, that is, to help the state meet all the criteria necessary to achieve this goal.
 - C) Mr. Welsh noted that the journey to final approval of the state plan will be difficult in some particulars, e.g. staffing criteria, as well as the traditional issue-by-issue review process typically engaged in to determine that regulation and enforcement at the state level are at least as effective as that at the Federal level.
 - D) It was stated that high on Mr. Traenkner's priority list will be to establish robust training for Cal/OSHA staff.
- 4) Mr. Welsh noted that Federal OSHA has officially begun an audit of all state plans. One of the plans that has been audited is Nevada where there were several severe deficiencies noted (as described in previous minutes). See minutes from the meeting of November 5, 2009.
- 5) It is anticipated that some deficiencies will be found as part of the California audit but we will be working closely with OSHA to remedy such faults as soon as possible, and the State has already begun its own pre-audit . One of the anticipated areas of concern to Fed OSHA will be the manner in which citations are issued, penalties assessed, and assessed penalties adjusted throughout the course of an appeal. There has been controversy over the amount of reductions that can occur when citations are issued and adjudicated.

There are many reasons for penalty reductions. One example of a problem that may result in this is that by the time a case gets to the hearing stage, the Division with its burden of proof on any contested citation, can find itself without necessary witnesses or other evidence that may be harder to bring to bear as time goes on. All the elements in the citation must be proved, and where witnesses are not available, we cannot use hearsay alone to substantiate essential elements.

The classification of a citation has a heavy impact on the amount of the penalty, and inability to convince the Appeals Board that the classification should be "serious" as opposed to "general", for example, is one of the greatest contributors to penalty reductions.

Other concerns in anticipation of the audit will likely be related to matters concerning such issues as the quality of the work product and approaches of the Cal/OSHA Appeals Board to proof issues, which has created some controversy in adjudicating citations. An example of this was the dismissible of a serious citation involving a fatality because the name of the contractor was slightly wrong on the citation, even though the contractor on

the job showed up at the hearing and contested the citation on the basis of the slight error. The administrative law judge (ALJ) refused to allow an amendment to the citation, even though there would have been no prejudice to the employer by allowing such an amendment. As a result of this and similar cases, the Board has made some changes, and on its own motion, has designated several similar cases for reconsideration, hopefully to provide clear effective guidance to ALJ's on how to handle similar situations.

Another issue that may surface on audit relates to how California defines a serious violation. Federal OSHA has indicated this as a matter of concern and Mr. Welsh has sent a letter to the Appeals Board asking that they give thought to this issue. The Labor Code rule governing serious violations states in part, that the violation will be serious if there is "a substantial probability that death or serious physical harm could result from the violation," assuming that an accident occurs as a result of the violation. The current rule the Board follows for serious violations requires the Division to show that "it is more likely than not" that if an injury occurs as a result of a violation, that death or "serious injury," will be the outcome.

Mr. Welsh expressed the opinion that the Board's approach is too narrow in two ways. First, "serious physical harm" is not the same as "serious injury." If it was, the Labor Code would not have come up with the phrase "serious physical harm" to define a serious violation and would have used "serious injury" instead. "Serious physical harm" is a broader category of harm than "serious injury," and the Board's own case law from the 1980's bears that out.

Second, "substantial probability that serious physical harm could result" should not be interpreted as "more likely than not" (i.e., more than 50% likely) that such harm will occur. Under this approach, if it's 49% likely that someone will die or sustain a serious injury, the violation is not serious.

Moreover, such an approach virtually eliminates the possibility of applying classifying any violation of some standards as "serious," e.g. the blood borne pathogens standard, which was expressly adopted to prevent diseases which are often life threatening or fatal. No expert would consider substantial exposure of an employee to blood or potentially infectious material to be anything other than unacceptable exposure to the potential for serious physical harm, but those same experts (and DOSH) would have a very difficult time proving that should an employee have an accidental needlestick with a contaminated needle, for example, it is more likely than not that the employee will sustain a Labor Code "serious injury" or die.

Mr. Welsh noted that back in the 1980's the Board, in a Decision After Reconsideration (DAR) named "Abatti Farms/Produce", amended its approach to serious injuries and serious physical harm by adding a fourth a type of qualifying injury: a substantial loss of efficiency of a part of the body on or off the job for more than twenty four hours. The language in the current Federal Field Manual employs similar phrasing pertaining to serious physical harm, and this may become a matter of concern in the upcoming audit, thus the earlier interpretation (1980's) may be more acceptable to the auditors than the current one.

Mr. Welsh has urged the Board to adopt a codification of their Case Law through rulemaking which would result in a better understanding of Board decisions by all parties involved, employers, employees and Cal/OSHA.

Mr. Welsh finished by commending Candice Traeger, Chair of the Appeals Board, for her willingness to hold shareholders meetings and to open up dialogue with the public to explore improved methods of operation.

CAL/OSHA ENFORCEMENT REPORT

In the absence of Chris Lee, Deputy Chief for Cal/OSHA Enforcement due to a family emergency, Mr. Traenkner distributed and discussed a set of statistics previously prepared by Mr. Lee. A copy of each is enclosed with these minutes.

CONSULTATION SERVICE REPORT

Vicky Heza, Program Manager, Cal/OSHA Consultation Service, reported the following:

1. The Federal Government passed the "American Resource Recovery Act" last year which provided money to the States for infrastructure projects and as a result money was made available through Federal OSHA to State Plan States for enforcement at the sites of such projects. California accepted a substantial amount (approximately \$800,000) of money for that purpose and we have developed a Special Emphasis program to guide our enforcement staff on how to identify such sites and how to track the time and expenses involved at these particular locations. Bill Krycia, Regional Manager of Region 2 (Sacramento), is the lead person for this Special Emphasis Program, which is basically an inspection program, whether programmed, complaint driver, non-programmed or accident related inspections at an ARRA funded site. Costs must be tracked separately. Cal/OSHA will use our appropriation to inspect any construction site if that employer accepted ARRA funding. Cal/OSHA's appropriation for this project will be available only to the end of the current Federal fiscal year (September 30, 2010).

A) Although the program is primarily geared to enforcement functions, the Consultation Service has been alerted to keep track of its contacts with ARRA recipients, such contact would include on-site inspections, outreach, etc. although it did not receive special funding for this purpose.

- 2) Consultation ended the year with outstanding performances by encouraging voluntary compliance and educating both employers and their employees on safety and health, by conducting a total of 3544 employer assistance, training presentations/assistance and technical assistance, which included 2725 on-site assistance.
- 3) Considerable effort has been put into our SHARP and Golden Gate programs; the Golden Gate program is a recognition program, not an exemption program but requires an employer to have a complete and comprehensive illness and injury prevention program. SHARP is both a recognition and exemption program, and the employer must

have an effective program and meet fifty eight attributes of excellence. The number of SHARP participants is increasing even though they require considerably more consultation time, in addition the Service has achieved a greater number of employers into the Golden Gate program while the staff continues to maintain the overall number of consultations they have been conducting, much to the credit of Mike Alvarez who has been the Acting Program Manager for the past two plus years.

A) In order to promote increased participation in the SHARP program, the Consultation has hosted several SHARP Roundtable meetings that brought selective SHARP and Golden Gate employers together to share best practices and developments, and each area office seek out prospective SHARP members in many and diverse industries to attend these roundtables and encourage them to meet the rigid standards to qualify for the program. One such Roundtable meeting was scheduled for the Sacramento area on January 12, 2010.

B) An example of a successful SHARP program is the Mission Linen Supply Company, an industrial laundry in Fresno. Employees at this location are represented by the Teamsters (Service Department personnel and UNITE (Laundry Workers). The Consultation Service considers participation in the Golden Gate and SHARP programs to be a partnership with Cal/OSHA in eliminating or substantially reducing injuries and illness at their worksites. Mission Linen Supply has a long standing partnership with Cal/OSHA and applied for and earned the SHARP recognition, and it may be noted that since the inception of the SHARP application process the Plant Safety Committee has increased two-fold to include production workers, service department personnel, engineering staff and clerical office workers. The Safety Committee is comprised of representatives of all departments on the production floor, where members conduct hazard analysis of their respective areas. Spanish speakers comprise 75% of the plant team and Cal/OSHA has been diligent in providing translated material and such workers have enlisted in the process. Representatives of both Unions have contacted local management to congratulate their effort in achieving this recognition.

C) The number of Golden Gate Programs increased from 197 in 2008 to 321 in 2009. The number of SHARP partnerships has increased to 34, its highest number since the inception of the program.

2) Cal/OSHA is still working on its ATD e-tool,

A) The Division has completed an e-tool for Youth in Construction that is now available.

RESEARCH & STANDARDS SAFETY REPORT

Joel Foss, Acting Principal Safety Engineer, of the Research and Safety Unit, reported the following:

1. Joel Foss, Pat Bell, Mike Donlon and Dick Roberts (all of Research & Standards) attended a demonstration of chain & wire-rope access equipment, given by Valero Refinery at their Benicia facility on December 16. The demonstration is pursuant to their petition for a new standard for use of this equipment in the petrochemical safety

orders. The refinery made a good argument for the necessity of using the equipment to access long narrow cyclones inside of pressure vessels in the refinery. The Division has since decided to support the petition, with some additional restrictions.

2. Mike Donlon has finished working on a Form 9 regarding the safe use of 'gators' and other ATVs (all terrain vehicles) and the 'golf carts' used inside of plants and warehouses.
3. Pat Bell is working on a GISO version of the new construction standards 1598 and 1599 for the use of high-visibility safety apparel by flaggers and other exposed to vehicle traffic. Affected workers in general industry would include workers on foot in warehouses, parking lots, and agricultural fields where tractors and other equipment is in use.
4. Dick Roberts is conducting training about Construction Permits statewide. He is doing this by meeting with individual District Offices, rather than the conventional training method, where large groups were assembled from north and south. The reason: people ask more questions when they are in small groups, and in their own district offices.

RESEARCH & STANDARDS HEALTH REPORT

Steve Smith, Research & Standards Health Unit, provided the following report:

1. A new proposed revision to section 3395 heat illness prevention went to public hearing in October http://www.dir.ca.gov/oshsb/Heat_Illness.html and a follow up advisory meeting on the proposal was also held on November 16th in Oakland. Staff are currently reviewing the comments received at those two meetings and will develop a final proposal for the board to consider later this year. Steve Smith and Amalia Neidhardt are the contact persons for heat related information at 916-574-2993.
2. December 8th the section 5155 Feasibility Advisory Committee (FAC) held its 2nd meeting to discuss ethyl benzene, NMP, hydrogen chloride, and naphthalene. The next HEAC meeting will be March 24th in Oakland to discuss arsine, benzyl chloride, wood dust, trichloroethylene, and other priority 1 substances. Regarding the remaining substances that went through the PEL AC process in 2001 to 2005, a section 5155 proposal was adopted by the Standards Board on December 17, 2009 and is currently at OAL pending approval to be added to section 5155 later this year. The contact person for the PEL update process is Bob Barish at 510-286-7001.
3. The sensitizing substances advisory meeting process held its 6th meeting on October 20th to consider adding a sensitizer notation to some substances listed in section 5155 along with a new proposed section 5179 for training and medical requirements. A revised proposal and minutes of that meeting should be available later this year. Steve Smith and Bob Barish at 510-286-7001 are the contact persons.
4. On November 19th in Coast Mesa, a public hearing was held for a new Section 5197, Diacetyl. The proposal was developed with the assistance of the 2007 advisory

meetings on Diacetyl and the findings of an ongoing targeted inspection program focused on the flavorings industry. Mike Horowitz at 510-286-7009 is the contact person for this proposal and related activities the Division is conducting in the flavorings industry.

5. Two new standards for aerosol transmissible diseases sections 5199 and 5199.1 went into effect last year. The comprehensive standards were developed to protect employees who are occupationally exposed to TB and other airborne diseases including H1N1. The Division also convened several follow up advisory meetings on compliance issues for the new standards with the last meeting held yesterday in Modesto regarding section 5199.1. To address the current H1N1 flu outbreak, the Division posted a guidance document that was updated this month with a recall of one model of respirator from the state stockpile. The contact persons for these new standards and guides are Deborah Gold and Bob Nakamura at (510) 286-7006.

LEGAL UNIT REPORT

In the absence of Michael D. Mason, Chief Counsel for the Division, a copy of the updated Litigation Report was distributed to members and attendees, a copy of which is enclosed with these minutes.

STANDARDS BOARD REPORT

Marley Hart, Executive Officer of the Cal/OSHA Standards Board, reported the following:

- 1) The following petitions have been received by the Board:
 - A) From the AIDs Health Care Foundation to amend section 5193 relating to Bloodborne Pathogens and
 - B) From an engineering company seeking to amend section 1670 with regard to flexible horizontal lifelines.

Last year, the Board received a total of six petitions, down from the usual nine to twelve.

- 2) The next Standards Board meeting will be held in San Diego on January 21, 2010, at which time there will be a review of the progress on the Board's workload for 2009, including rulemaking, petitions, and variances; also the Board will put forth their plan for 2010 including the rulemaking they are proposing to deal with through advisory committees and those proposed by the Division.
- 3) In the first quarter of 2010, the Board will be piloting their new index project that will include material from their Title 8 reform project started in 2008, and which has resulted in a very comprehensive index for Title 8, which is now being tested and after proofreading the over 700 pages, will go online. The challenge, then will be to keep the index updated.

- 4) At the January Board meeting in San Diego, the Board will consider terminating further rulemaking action on a proposal to require shut-off devices for diesel equipment and vehicles at refineries.
- 5) Reference was made to the Board January monthly activity report, listing advisory committee meetings, etc. A copy of which is enclosed with these minutes.

APPEALS BOARD REPORT

No report was available at this meeting.

OPEN DISCUSSION

An inquiry was made as to whether or not Cal/OSHA would be sending a representative to a conference involving all Federal OSHA areas to be held in Houston in April, to discuss the national action summit for Latino Workers in the field of occupational safety and health.

It was stated that Cal/OSHA had received an invitation which was referred to Mike Alvarez and it is expected that a request for his attendance will be forwarded to the Governor's Office for action in light of the State's budget constraints.

ADDITIONAL HANDOUTS

1. DOSH Inspections and Violations cited by Quarter, from January 1992 through June 2009 (goldenrod sheet).
2. DOSH On-Site Inspections and Violations cited by Reason, from April through June 2009 (pink sheet).
3. DOSH On-Site Inspections and Violations cited for Major Industrial Groups, from April through June 2009 (green Sheet)
4. Revised schedule of Cal/OSHA Advisory Committee meetings for 2010.

ADJOURNMENT AND NEXT MEETING:

The meeting adjourned at 12:25pm. The next meeting of the Committee will be as follows:

DATE: March 4, 2010

TIME: 10:00 a.m.

PLACE: Department of Water and Power
111 North Hope Street, Level "A" Conference Room
Los Angeles, California

ATTENDANCE ROSTER

January 7, 2010

CAL/OSHA ADVISORY COMMITTEE MEETING

First Name	MI	Last Name	Title	Organization	Address	City	State	Zip
Jerry		Bach		Safety Center Incorporated	3909 Bradshaw Road	Sacramento	CA	95827
Gail		Bateson		Worksafe (North California)	171 Twelfth Street 3rd Floor	Oakland	CA	94607
David		Becker	District Manager	DOSH - District Office	1450 Enea Circle Suite 525	Concord	CA	94520
* Kevin		Bland		Granado Bland APC	1301 Dove Street Suite 940	Newport Beach	CA	92660
* Bo		Bradley		Associated General Contractors	3095 Beacon Boulevard	W Sacramento	CA	95691
Ed		Callanan	Assistant to the Chief	DOSH - Administration	1515 Clay Street Suite 1901	Oakland	CA	94612
Ken		Clark		ASSE Willis	1 Bush Street #900	San Francisco	CA	94102
Rick		Delao		Communications Workers of America District 9	161 Palm Avenue	Auburn	CA	95603
* Robert	E	Downey		Construction Employers Association	7311 Santa Juanita Avenue	Orangevale	CA	95662
* Malcolm	S	Driggs	Apprenticeship Cordinator	Operating Engineers Local 12, Trust Fund SC	1647 W Lagonia	Redlands	CA	92374
Joel		Foss	Acting Principal Engineer	DOSH - RSS & Crane Unit	2000 E McFadden Avenue Suite 203	Santa Ana	CA	92705
* Judith		Freyman		ORC Worlwide - Western OSH Operations	6020 West Oaks Blvd Suite 285	Rocklin	CA	95765
Pete		Greyshock	Coordinator	So Cal - COSH	1000 N Alameda Street Suite 240	Los Angeles	CA	90012
Marley		Hart		Cal/OSHA Standards Board	2520 Venture Oaks Way Suite 350	Sacramento	CA	95833
Vicky		Heza	Manager	Cal/OSHA Consultation Service	2000 E McFadden Avenue Suite 214	Santa Ana	CA	92705
* Wendy		Holt	Vice President	Motion Picture Producers (AMPTP)	15301 Ventura Blvd Bldg E	Sherman Oaks	CA	91403
Steven		Johnson	OHST	Associated Roofing Contractors of the Bay Area	1425 Treat Boulevard Suite C	Walnut Creek	CA	94597
Jim		Kent		UPS	8400 Pardee Drive	Oakland	CA	94621
Vincent		Lamaestra		Pacific Maritime Association	555 Market Street Floor 3	San Francisco	CA	94105
Kevin		Lancaster		The Veen Firm	711 Van Ness Avenue	San Francisco	CA	94102
** Danielle		Lucido		Worksafe	171 Twelfth Street 3rd Floor	Oakland	CA	94607
** Fran		Schreiberg		Kazan, McClain, Edises & Simon	171 Twelfth Street 3rd Floor	Oakland	CA	94607
Steven	C	Smith	Manager	DOSH - Research & Standards	2211 Park Towne Circle Suite 1	Sacramento	CA	95825
** Michael		Smith		Worksafe (Northern California)	171 Twelfth Street 3rd Floor	Oakland	CA	94607
Kevin		Thompson	Editor	Cal/OSHA Reporter	P O Box 911	Petaluma	CA	94953-0911
Alan		Traenkner	Special Assistant to the Chief	DOSH	1515 Clay Street Suite 1901	Oakland	CA	94612
* Elizabeth	A	Treanor		Phylmar Regulatory Roundtable	PO Box 660912	Sacramento	CA	95866
** John	C	Vocke	Attorney	P G & E Company, S H and Claims	P O Box 770000	San Francisco	CA	94177
** Vicky		Wells	Director	Department of Public Health - CIHC	101 Grove Street, Room 217	San Francisco	CA	94102
Len		Welsh	Chief	DOSH	1515 Clay Street Suite 1901	Oakland	CA	94612

* DENOTES COMMITTEE MEMBER

** DENOTES ALTERNATE MEMBER