OCCUPATIONAL SAFETY
AND HEALTH STANDARDS BOARD
2520 Venture Oaks, Suite 350
Sacramento, CA 95833
(916) 274-5721
FAX (916) 274-5743
www.dir.ca.gov/oshsb

OPTION #2

PROPOSED PETITION DECISION OF THE OCCUPATIONAL SAFETY AND HEALTH STANDARDS BOARD **(PETITION FILE NO. 448)**

INTRODUCTION

The Occupational Safety and Health Standards Board (Board) received a petition on August 15, 2002 from Tom Rankin, President of the California Labor Federation, AFL-CIO (Petitioner) requesting that the Board amend Title 8, California Code of Regulations, Section 5110 of the General Industry Safety Orders (GISO), with regard to repetitive motion injuries (RMI). On September 19, 2002 at the Public Hearing held in Oakland, California, the Petitioner presented the Board with an addendum to Petition File No. 448.

Labor Code Section 142.2 permits interested persons to propose new or revised regulations concerning occupational safety and health, and requires the Board to consider such proposals, and render a decision no later than six months following receipt. Further, as required by Labor Code Section 147, any proposed occupational safety or health standard received by the Board from a source other than the Division of Occupational Safety and Health (Division) must be referred to the Division for evaluation, and the Division has 60 days after receipt to submit a report for the proposal.

SUMMARY

The Petitioner believes that existing Section 5110, Repetitive Motion Injuries, fails to meet the requirements of Labor Code Section 6357, which requires the Board to adopt standards for ergonomics in the workplace designed to minimize the instances of injury from repetitive motion. The Petitioner contended that, according to the Division's own analysis conducted last year, there has been no sustained downward trend in the number of repeated trauma disorder cases since the standard went into effect. According to the Petitioner, as of last year, two-thirds of all Cal-OSHA complaint-triggered investigations resulted in no citations because there was no qualifying second injury as required under Section 5110(a). The Petitioner asserted that the Worker's Compensation Insurance Rating Bureau of California reported that 6,600 carpal tunnel syndrome permanent disability claims were filed in 1999 alone. The Petitioner argues that the standard, as it exists, has failed to prevent such injuries from occurring. The Petitioner initially included with his request a copy of a standard, which was proposed by the Division and rejected by the Board in November 1994, and recommends that this standard be revisited.

At the Board's September 19, 2002 Business Meeting, a representative of the California Labor Federation, AFL-CIO, addressed the Board and provided a written statement, along with a revised proposal, intended to amend the petition submitted by the Petitioner. The statement suggested the following two options for addressing the Petitioner's original request: (1) convene

an advisory committee to review the standard proposed by the Division and rejected by the Board in November 1994; or, (2) convene an advisory committee to review the revised proposal that was attached to the statement and submitted at the September 19, 2002 Board Meeting. Because the first option, as outlined in the statement, could be considered too costly and time-consuming, the Petitioner proposed the second option. The second option, addressed in the revised proposal, focuses primarily on the following perceived shortcomings of existing Section 5110: Subsection (a), which limits the scope of the regulation to only those situations where two repetitive motion injuries have been reported to the employer within 12 months of each other; subsection (b), which only addresses the control of exposures which have caused RMIs, versus those which "may" cause them; and, subsection (c), which allows employers to avoid citation by claiming that "known" prevention and control measures that they chose not to implement imposed "additional unreasonable costs" or had not been proven by the Division to be "substantially certain to cause a greater reduction in such injuries."

HISTORY

In 1993, Assembly Bill 110 added a new Section 6357 to the Labor Code, which required the Board to adopt a standard "to minimize instances of injury from repetitive motion" by January 1995. In November of 1994, after two large public hearings and the submission of over 6,500 written comments, the Board voted down a proposed ergonomics standard developed by the Division using a public advisory committee process.

Because the Board failed to adopt a RMI standard by January 1995, a suit was brought and the Superior Court in Sacramento, California ordered the Board to develop and adopt a standard that complied with Section 6357 by December 1996. In January 1996, the Board held two public hearings on a proposed repetitive motion standard. The Board adopted the standard in November 1996; and, following approval by the Office of Administrative Law, Section 5110 became legally enforceable July 3, 1997. Business and Labor interests promptly challenged the regulation on a number of grounds in court. In October 1999, following protracted litigation, the California Court of Appeal upheld the regulation with one exception. Specifically, the court struck the regulatory exemption for employers with less than ten employees.

In 1999, as part of Assembly Bill 1127, the Legislature enacted Labor Code Section 6719, which reads as follows: " The Legislature reaffirms its concern over the prevalence of repetitive motion injuries in the workplace and reaffirms the Occupational Safety and Health Standards Board's continuing duty to carry out Section 6357."

In February 2002, AB 2845 was introduced to amend Section 6357 of the Labor Code to require the Board to adopt revised standards for ergonomics in the workplace designed to minimize the instances of injury from repetitive motion by July 1, 2003. Governor Davis vetoed the Bill in September 2002 in an effort to allow the Board the opportunity to consider Petition 448 and evaluate the existing regulation as well as the merits of amending it.

DIVISION'S EVALUATION

The Division's evaluation report, dated December 2, 2002, agrees with the Petitioner that changes in the existing regulatory framework for addressing RMI and other ergonomic hazards are warranted. The Division's report provided a detailed history of Section 5110 and provided documentation that the Division complied with the Board's request to convene a working group consisting of members representing employee and employer interests to explore the issues associated with the Petitioner's request. Based on the results of this working group and further consideration, the Division suggests a different approach than that suggested by the petition.

The Division stated that there continues to be substantial confusion among the regulated public as to the interaction of Section 5110, with its two-injury trigger, and Section 3203, which requires all employers to have an Injury Illness and Prevention Program (IIPP) that addresses the hazards to which employees are exposed. The Division's report stated that at the September 19, 2002 Board Meeting, industry representatives commented that they believed that Section 3203 filled any gaps left by the jurisdictional provisions of Section 5110. The Division stated that one possible interpretation of the relationship between the two standards is that where the jurisdictional criteria of 5110 are not met, Section 3203 applies with respect to an employer's obligation to address RMI hazards. The Division's report stated that since Section 5110 took effect, the Division's policy has been to enforce the standard as the exclusive authority for addressing RMI hazards. However, the Division noted that there is ample reason to revisit this policy, in light of the provisions of 3203. The Division's report expounded on several inconsistencies between Sections 5110 and 3203, along with various Labor Code references that emphasize the employer's obligation to provide a safe and healthy work environment.

The Division's report concluded by stating that the Division believes that the most effective way to control ergonomic hazards is to do so through procedures that either parallel or are integrated into Injury and Illness Prevention Programs. The Division noted that it is likely that employers who have an effective IIPP are already addressing ergonomic hazards, to the extent that they exist, irrespective of the requirements contained in 5110. The Division emphasized that the most effective and sensible way to approach a standard addressing ergonomic hazards is to structure it so that it builds on IIPP procedures already required to be in place, thus allowing employers to address these hazards just as they would any other hazard to the extent that they exist and are correctable. The Division recommended that the Board consider initiating the rulemaking process to replace Section 5110 without consideration by an advisory committee in accordance with a regulatory proposal developed by the Division and submitted along with their evaluation.

STAFF'S EVALUATION

Board staff prepared an evaluation report also dated December 2, 2002, which concluded that the Petitioner's request to modify GISO Section 5110, in accordance with the Petitioner's second option[1] as outlined in the statement submitted at the September 19, 2002 Board Meeting, merits further consideration by an advisory committee to determine whether or not Section 5110 can be improved.

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[1] Board staff notes that since the existing standard has been approved by the Office of Administrative Law with respect to compliance with the Administrative Procedure Act and has been tested in the courts and found to meet the statutory requirements of Labor Code Section 6357, the Petitioner's second option was preferable for consideration by Board staff.

Board staff's evaluation included an analysis of several statistics referenced by both the Petitioner and the Division and emphasized that there are many factors that can potentially influence RMI incident rates, such as: an increased awareness of repetitive motion injuries and activities, an over or under reporting of RMI incidents, voluntary ergonomic programs, OSHA enforcement and consultation activities, changes in workers' compensation laws, changes in workforce demographics, economic factors, the number of workers performing repetitive activities, and changes in the kind of repetitive activities workers perform. Board staff stated that change in RMI rates cannot be attributed - with certainty – to any one factor alone, including the adoption of Section 5110.

Board staff noted that since 1992, the United States RMI rates have declined every year except 1993 and 1999, demonstrating a sustained downtrend in RMI rates. In contrast, in California, the only state with a RMI standard that is being enforced, the RMI rates over the same time period do not demonstrate a similar sustained downtrend. The California RMI rates have tended to vary up and down every year or two, demonstrating the uncertainty involved with identifying injury trends from a few years' data. The absence of a downtrend in RMIs in California could be read to support the Petitioner's argument that Section 5110 needs to be strengthened; however, the sustained decline of RMIs in other states that do not have a RMI regulation suggests that a strong RMI regulation may not be the determining factor in reducing RMI rates.

Board staff analyzed the Petitioner's proposed amendments to Section 5110, which included eliminating the two-injury trigger in subsection (a); requiring all employers to implement the provisions of existing subsection (b) when exposures "may" cause RMIs, rather than when exposures "have" caused RMIs, as the current standard reads; and, making specific in subsection (c) that the employer is required to address RMI risk through the Injury and Illness Prevention Program mandated by Section 3203. Board staff also reviewed information provided during the public meetings and work group meeting which addressed the petitioner's proposed amendments. Board staff concluded that available data confirms the problematic nature of identifying RMIs as being "work related", and that labor and management representatives do not agree as to whether there is a measurable cause and effect relationship between work tasks and RMIs. There is general agreement, however, that RMIs can be caused by many factors, including those that are not work-related. By controlling employer costs for non-work related injuries and focusing mandatory preventive measures where they are most likely to be effective, the two-injury trigger strives to provide a balance between the potential economic burden on the employer and the gray area often surrounding causation of RMIs. Board staff concluded that eliminating the two-injury trigger entirely, as the Petitioner proposes, without some control mechanism in place, could increase employer costs without substantially reducing RMIs.

Board staff's evaluation report outlined the challenges faced by the Division when enforcing Section 5110. The most problematic issues appear to be related to the requirement that a RMI be reported to the employer, be predominantly caused (i.e., > 50%) by a work-related repetitive operation, and be a musculoskeletal injury diagnosed by a licensed physician. According to the Division, injured employees often do not go to a licensed medical doctor. They may seek treatment from a chiropractor or physical therapist. When employees do go to a MD, the MDs do not describe the injury as a "repetitive motion injury predominantly caused by work"; or, the injured employees do not report the injury to their employer or initiate a worker's compensation claim, which in turn would notify the employer of the injury. Determining whether or not an RMI is predominantly work-related also remains a problem. Additional challenges exist

regarding the two-injury trigger requirement and the confidentiality of medical information. For example, recent legislation, which will be effective next year, prohibits physicians from providing employers with an employee's medical diagnosis without the employee's consent.

With regard to the Petitioner's proposed amendments to subsection (b), Board staff notes that the proposal lacks clarity as to the employer's obligation to correct exposures that "may" cause RMIs. Existing subsection (c) states that the measures implemented by an employer under subsections (b)(1), (b)(2) or (b)(3), shall satisfy the employer's obligation under subsection (b), unless it is shown that a measure known to but not taken by the employer is substantially certain to cause a greater reduction in such injuries and that this alternative measure would not impose additional unreasonable costs. The provisions of subsection (c) are sometimes referred to as the "safe harbor". Labor interests contend that subsection (c) provides a disincentive for employers to evaluate potential engineering and administrative controls because the employer is only obligated to implement the controls that are known to the employer. They also assert that many engineering controls are proven to be cost effective. Business interests assert, however, that eliminating subsection (c) could expose employers to the burden of implementing costly, unproven, and ineffective control measures. It is the opinion of Board staff that these issues merit further investigation.

Board staff concluded that, given the Board staff's findings and the complexity and highly controversial nature surrounding the Petitioner's request, the Petitioner's second proposed option submitted at the September 19, 2002 Board Meeting merits further consideration by a representative advisory committee.

CONCLUSION AND ORDER

The Occupational Safety and Health Standards Board has considered the petition of Tom Rankin, President of the California Labor Federation, AFL-CIO (Petitioner) to make recommended revisions to Title 8, California Code of Regulations, Section 5110 of the General Industry Safety Orders (GISO), regarding repetitive motion injuries (RMI). The Board hereby recommends that the petition be **DENIED** for the following reasons: that the available data confirms that there are multiple factors that cause RMIs, that some of these risk factors are non-work related; that the quantitative relationship between these factors and the development of RMIs remains unclear; that the two-injury trigger and safe harbor provisions, which the Petitioner proposes to eliminate from the existing standard, help to focus interventions where they will be effective; and that injury statistics and enforcement data are insufficient to demonstrate that the existing standard is unenforceable or does not reduce RMIs.