

**OCCUPATIONAL SAFETY
AND HEALTH STANDARDS BOARD**

2520 Venture Oaks Way, Suite 350
Sacramento, CA 95833
(916) 274-5721
FAX (916) 274-5743
www.dir.ca.gov/oshsb



OPTION # 1

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

At its August 15, 2002 Public Meeting in Sacramento, the Occupational Safety and Health Standards Board (Board) received a petition dated August 7, 2002 from Mr. Tom Rankin, President of the California Labor Federation, AFL-CIO and over 100 individual co-signers (Petitioner). The Petitioner requested that the Board adopt a revised ergonomics standard that amends Title 8, California Code of Regulation, Article 105 Ergonomics, Section 5110 of the General Industry Safety Orders regarding Repetitive Motion Injuries. On September 19, 2002, at the Public Meeting in Oakland, CA, the Petitioner presented the Board with a second option on how the Board could address its petition and this written statement was added as an addendum to Petition 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 to render its decision no later than six months following their receipt. Labor Code Section 147 further requires the Division of Occupational Safety and Health (Division) to evaluate the petition no later than 60 days after receiving it from the Board.

SUMMARY

The Petitioner has requested that Section 5110 be revised and has suggested two options. The first option would be for the Board to adopt the ergonomic proposal that was developed by the Division, modified during a year-long public hearing process and ultimately voted down by the Board at its November 1994 meeting. The Petitioner further suggests that, before noticing this proposal for adoption, an advisory committee could be used to review it. However, the Petitioner has expressed concern that an advisory committee convened for this purpose could result in a lengthy process involving a great deal of staff time before a recommendation could be put before the Board and the public for hearing.

The second option suggested by the Petitioner involves the convening of an advisory committee to examine specific aspects of the existing standard and to consider the proposed revised Section 5110 submitted by the Petitioner. The Petitioner asserts that this can be accomplished with one, or at most two, advisory committee meetings with the committee reporting back to the Board before the end of the year. The Petitioner

proposes that the committee review the provisions of section 5110 they contend contradict the statutory requirement for a standard “designed to minimize the instances of injury from repetitive motion” and make enforcement of the standard problematic. These provisions include:

- the requirement in section 5110(a) that, before an employer has any obligation to comply with the hazard-reduction measures in section 5110, at least two employees report to the employer repetitive motion injuries which must be predominantly caused by identical work activity and which must meet other specified criteria within the past twelve months; and
- the requirement of section 5110(c) that any action taken by the employer under the hazard-reduction provisions of section 5110 be considered acceptable unless the Division can show that the employer knew of some other measure which is substantially certain to cause a greater reduction in injuries than the measures taken by the employer and which would not impose additional unreasonable costs. The Petitioners contend this provision makes it difficult for the Division to enforce any part of the standard.

The Petitioner also alleges, in defense of these arguments, that the provisions of section 5110(a) and 5110(c) are unprecedented and have no similar counterpart in any other occupational safety and health standard found in Title 8.

At its meetings held in September, October, November, and December, 2002, the Board invited public comment on the Petition and discussed what further information it needed from staff before acting on the Petition. During the September and October Board meetings, the Division was requested to convene a "working group" meeting to obtain input from industry, labor, and the public on whether there is a necessity to amend section 5110 in light of the issues raised by the petitioners. On November 15, 2002 in Oakland, California, the Division convened a working group meeting. Members of the working group consisted of representatives of labor and industry, as well as experts in the field of ergonomics.

At the working group meeting, presentations were given by Division staff on data relating to the incidence of RMIs and on the Division's enforcement and consultative experience in interacting with employers potentially subject to section 5110. Each member of the working group was invited to make a presentation on issues they deemed relevant to the working group, and discussions were held among the working group members, Division staff, and members of the public.

DIVISION STAFF EVALUATION

Division staff prepared an evaluation memorandum dated December 2, 2002. The Division evaluation provided background information on section 5110 and recent litigation, legislation and petitions that unsuccessfully attempted to compel the Board to make further revisions to the standard. At the working group meeting of November 15, 2002, Division staff presented the following summary information:

- Data from the U.S. Bureau of Labor Statistics' Annual Survey of Occupational Injuries and Illnesses shows that while the overall incidence rate for injuries and illnesses with days away from work due to repetitive motion in California has remained relatively stable since 1997 (in the range of 9.6 cases per 10,000 full-time employees) in the United States nationwide since 1997 this rate has declined from 8.7 to 7.4. Moreover, while the overall rate for all California employers has been largely unchanged since 1997, the incidence rates for RMIs with days away from work in the manufacturing and service sectors in California have increased substantially since 1997.
- The average median days away from work for injuries in California classified in the BLS Annual Survey as being due to repetitive motion is four to five times higher than the average median days away for injuries and illnesses due to all causes, and increased from 25 to 30 between 1996 and 2000.
- Since 1997, approximately 16% of the Division's inspections involving evaluation of an employer's compliance with Section 5110 have resulted in issuance of citations for failure to comply with Section 5110.
- There is no requirement for physicians to report RMI diagnoses in terms that can be translated into the diagnostic and causation criteria used by section 5110(a) to define its two-injury trigger. The requirements for physician reporting are tailored to the workers' compensation system, which utilizes different criteria relating to diagnosis and causation. The lack of congruity between existing reporting requirements and the diagnostic criteria used by section 5110(a) has the potential to undermine the effectiveness of section 5110(a) as a trigger for the hazard-control measures contained in section 5110.
- Workplace activities are usually so varied among employees that even when they are substantially similar it is difficult for the Division to conclude with certainty that two employees can be said to be conducting "identical" work activities. This creates an additional impediment to reasonable reliance on the triggering criteria of section 5110(a) as an effective means of identifying those places of employment that should be utilizing the hazard-control measures contained in section 5110.

- Subsection (c) places a potentially unworkable burden of proof on Division inspectors when determining an employer's compliance with section 5110. The Division described examples of past inspections where citations were not issued to an employer who claimed that minimal actions, e.g., providing "training" by distributing an informational pamphlet, were sufficient to constitute compliance with the standard.

The Division has stated its agreement with the Petitioner that changes in the existing regulatory framework for addressing RMI and other ergonomic hazards are warranted. However, the Division has suggested and provided proposed language for a different approach than those suggested by the Petitioner. The reasons given for the Division's proposal are as follows:

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 and Illness Prevention Program (IIPP). At the Standards Board meeting of September 19, 2002, two representatives from industry commented that they believed section 3203 filled any gaps left by the jurisdictional provisions of section 5110. 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. Another interpretation, which has been followed by the Division since section 5110 took effect, is that section 5110 is the exclusive authority for addressing RMI hazards, and where its jurisdictional criteria are not met, there is no employer obligation to address RMI hazards at all. Still another question regarding the applicability of 3203 arises where an ergonomic hazard exists but involves a risk of injury other than an RMI.

The wording of section 3203 closely parallels that of Labor Code section 6401.7, which is the statutory provision requiring employers to establish and implement injury prevention programs. Both the statute and the standard require employers to have an effective program that identifies, evaluates, and controls the specific hazards employees encounter in their work. There is no provision excluding any particular type of occupational hazard and there is no requirement for the reporting of two injuries to an employer before the requirement to address hazards takes effect. If section 5110 is to be viewed as the exclusive source of requirements applicable to controlling RMI hazards then there is an irreconcilable inconsistency between its injury-triggered provisions and the hazard-triggered provisions of the Injury and Illness Prevention Program requirement.

Substantial inconsistency appears to exist between 5110 on the one hand and Labor Code sections 6400, 6402, 6403, and 6404 on the other. These are all employer-duty statutes that articulate different approaches to describing the employer's obligation to provide a safe and healthy work environment, but the consistent theme throughout all can be summed up as a mandate to do what is reasonably necessary to protect employees. Most if not all safety experts will agree that protection means prevention, and awaiting injury before engaging in prevention is not likely to be seen as reasonable in most situations.

Based on the above, the Division has recommended that the most effective way to control ergonomic hazards is to do so through procedures that either parallel or are integrated into the Injury and Illness Prevention Program required by section 3203. It is likely that employers who have effective Injury and Illness Prevention Programs are already addressing ergonomic hazards, to the extent they exist, whether they perceive this as a legal requirement or not. Therefore, the Division believes, the most effective and sensible way to approach a standard addressing RMI hazards is to structure it so that it validates and builds on IIPP procedures already required to be in place. This will allow employers to address RMI hazards if they are present and to focus on other hazards if they are not present.

The Division has not recommended resort to an advisory committee, but instead has suggested that the Board initiate rulemaking with language proposed as part of the Division's petition evaluation, which was provided to the Board for its December meeting. At the Board meeting of December, 2002, the Division agreed to draft a supporting Initial Statement of Reasons, which has been presented for consideration at the Board meeting of January, 2003.

In light of the public input and discussion that have taken place to date, including the discussions that have taken place at recent Standards Board meetings as well as the working group meeting of November 15, the Division believes that the rulemaking process, which allows ample comment from the public, will be the most effective means of evaluating its proposed revisions to section 5110. The Division further believes that the proposal will provide a means of (1) settling the confusion regarding the relationship between sections 5110 and 3203; (2) implementing a hazard-based approach to the prevention of RMI's consistent with Labor Code sections 6400, 6401, 6401.7, 6402, 6403, and 6404; and (3) taking reasonable action to respond to the Legislature's expression of concern, as expressed in Labor Code section 6719, over the prevalence of repetitive motion injuries in the workplace and the Standards Board's continuing duty to carry out Labor Code section 6357.

BOARD STAFF EVALUATION

Board staff prepared an evaluation report that was provided to the Board for its December 12, 2002 meeting in Sacramento, California. The Board staff provided a chronological overview of the history of section 5110, legislation and litigation relating to that standard, federal attempts at developing ergonomics regulations, occupational injury data for repetitive motion injuries, enforcement statistics, and an evaluation of the existing language of section 5110 as it compares to the requested changes in the petitioner's second option.

Board staff concluded that the Petitioner's first option was not viable but the second option had merit and recommended that the petition be granted to the extent that the

Division convene a representative advisory committee for the purpose of addressing the issues presented in Petition 448. The staff recommendation stated that the advisory committee should not attempt a “quick fix” but should gather statistical, scientific, and medical information to support the necessity for any proposed changes to Section 5110 and to assess their costs and benefits. Board staff further recommended that amendments to Section 5110 have a sound basis for change. Based on the recommendations of the November working group meeting, Board staff further recommended that the advisory committee consider administrative alternatives to improve enforcement of existing Section 5110, and explore the employer’s obligation to address ergonomics and repetitive motion injuries under Section 3203.

CONCLUSION AND ORDER

The Occupational Safety and Health Standards Board has considered the petition filed on behalf of the California Labor Federation, AFL-CIO and over 100 individual co-signers recommending revisions to Title 8, California Code of Regulations Section 5110 of the General Industry Safety Orders regarding ergonomics and preventing repetitive motion injuries. The Board has also considered the recommendations of the Division and Board staff along with the public comments provided during the Board meetings of September, October, November, and December 2002. The Board agrees with Board staff that the Division should continue to explore options for improving enforcement of section 5110, as it does with other occupational safety and health standards. However, the fact that the Division has a duty to engage in an ongoing process of reviewing and attempting to improve enforcement does not negate the Board’s duty to engage in its own process of reviewing and attempting to improve occupational safety and health standards. For the reasons stated in the preceding discussion, the Petition is hereby **GRANTED** to the extent that the proposed amendments to section 5110 and supporting Initial Statement of Reasons provided by the Division be finalized and noticed for public hearing on or before February 28, 2003.