

**OCCUPATIONAL SAFETY
AND HEALTH STANDARDS BOARD**

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**MINUTES OF THE ADVISORY COMMITTEE MEETING****Certification, Recertification of Construction Personnel Hoists (CPH) Safety Brakes and
Governors, Preventive Maintenance and Servicing**

September 23, 2014
Sacramento, California

The meeting was called to order by the Chairman, Marty Tamayo, Associate Engineer, Occupational Safety and Health Standards Board (Board) at 9:00 a.m. on Tuesday, September 23, 2014. The Chair was assisted by Ms. Leslie Matsuoka, Associate Government Program Analyst, Board. Board staff present at the meeting was Marley Hart, Board Executive Officer, and Senior Engineers George Hauptman and David Kernazitskas. Larry McCune, Research and Standards, and Dan Barker of the Elevator Unit, represented the Division of Occupational Safety and Health (Division). The Chairman welcomed the committee members and asked for self-introductions. Attendees were encouraged to sign-in so they would be placed on the mailing list to be informed of developments on this proposal.

The Chairman reviewed the Board's policy regarding the use of advisory committees as an effective method to reach consensus or determine if further discussions were necessary. The Chair explained that the advisory committee was convened to address the items from a petition that was submitted by Joel A. Goldman, Clark Trevithick Law Corporation, representing Alimak Hek, Inc. (Petitioner), petition file number 534. The petition proposes to revise Section 1604.1(c)(1), and add new subsections 1604.20(i) and 1604.27(c) of the Construction Safety Orders applicable to Construction Personnel Hoists (CPH). The Petitioner is requesting that the standards for servicing and maintaining sealed safety brakes and speed governors used on rack and pinion driven CPHs be performed only by the manufacturer.

The Petitioner, Dale Stoddard, President of Alimak Hek Inc., was given the opportunity to briefly explain the rationale for submitting the petition. Mr. Stoddard stated that Alimak Hek proposes to clarify the regulations requiring sealed safety brakes be returned to the manufacturer for replacement at regular intervals. According to Mr. Stoddard, third party non-manufacturers are not following that requirement and this goes against the goal of consistent safety standards. The purpose of Alimak's petition is to clarify the language of the exception to the replacement requirement to make it more in line with the manufacturer's specifications and to provide for more consistency in the standard for elevator safety.

Mr. Stoddard reminded the committee regarding the history of the petition and that many of the issues for the committee are set forth in the Division Memorandum dated September 20, 2013. The Division's study in the memorandum recognized that the manufacturer may have more

consistent quality control for the replacement of overspeed brakes. Mr. Stoddard emphasized that Alimak has more consistency in quality control as their brakes are returned to the factory for replacement. Further, the original brake is removed from the market and a completely new replacement brake, applying the original tolerances, stresses and other standards that went into the manufacture of the brake, is provided. Alimak contends that third party processes do not measure up to the manufacturer's standards and they do not replace parts that should automatically be replaced. Mr. Stoddard expressed concern that third parties are applying unknown standards, tolerances and stresses and not routinely replacing the safety brakes. According to Alimak, returning the safety brake to the manufacturer is the default regulatory requirement and is the best way to achieve consistency.

After Mr. Stoddard's opening remarks, the Chairman provided committee members the opportunity to respond to the Petitioner's comments or to make a general statement. Hearing none, the Chairman proceeded to introduce the elements of the Petition. The first issue introduced referred to the revisions of Section 1604.1(c), which added language to expound the non-availability of the manufacturer's specifications. The new language also qualified the meaning of a professional engineer as one who is licensed in California. Finally, the proposed amendment prohibits modifying, changing or circumventing the manufacturer's product or design modifications.

Mr. Kevin Bland, Esq., Ogletree, Deakins, Nash, Smoak & Stewart, P.C., representing the Construction Elevator Contractor's Association and Western Steel Council (CECA/WSC), expressed concerns regarding the necessity of the rulemaking. He opined that under the Administrative Procedure Act (APA), in order to have a change in the regulation there has to be a necessity for that change. Secondly, we currently have a performance oriented standard and to go to a prescriptive regulation under APA that excludes a segment of the market requires many steps before reaching that level. According to Mr. Bland, he does not believe there is necessity that would bring rise to the manufacturer's position that they have the specifications and therefore the device should be returned to them. Mr. Bland cited the example that Chevrolet is the only brand that can service brake pads and therefore one cannot go to Goodyear or any other qualified entity to change brake pads.

The Chairman asked if there was necessity based on data or injuries associated with the failure of these brakes. Dan Barker, DOSH Elevator Unit, stated the necessity arises out of years that the Division inspected the lifts and the codes intended that the brakes be returned to the manufacturer for recertification. The code allows the determinations of a professional engineer to set the limitations of the equipment if the manufacturer is no longer in business. The need arises out of the need to clarify the standard. Dan Barker asked the committee if the manufacturer's specifications are being made available.

Al Marchant, Alimak Hek, responded that Alimak has made the specifications available for many years and the marketplace has been aware of the specifications. Mr. Marchant stated that the first sentence of the cited subsection governs the actions of the marketplace and the manufacturer's specifications takes precedence. Jim Meyer, James Meyer Consulting

(represents the Petitioner), interjected that this particular section of the code was always interpreted that we follow the manufacturer's specification and return the brake to the manufacturer. According to Mr. Meyer, there was no need to change this particular regulation and now there is a new interpretation that says we can take this to a third party using a professional engineer. Therefore, Mr. Meyer stated, it is quite clear that there is a necessity to clarify the old language that in the new markets sometimes old language is no longer clear. He opined that there is a need for new language to make sure that we have a regulation that is doing what it is supposed to do.

The Chairman asked the committee whether the proposed language that states, "... because the manufacturer is no longer in business or operating ..." can adequately explain why the manufacturer's specifications would not be available in the case where a manufacturer does not want to share proprietary information. Dale Stoddard, Alimak Hek, responded that manufacturers do supply specifications and Alimak's specification states that you bring my brake back to me and I will deal with the brake. He continued by saying that there would not be proprietary information if everybody had to reveal the specificity of their creations. Mr. Stoddard further stated that manufacturers have devices that have proprietary information but it does not insinuate that an engineer can tear it apart and do whatever he wants to it. If the engineer wants to build a brake, he can do that but the specification for Alimak brakes is that the brake goes back to the manufacturer. Joe Gallatos, McDonough Elevators, sought clarification from Mr. Stoddard's statement, but interpreted it to mean that if a manufacturer is no longer in business and it is okay for third parties to rebuild the safeties, third parties have no more information at that time than when the manufacturer was in business. Mr. Gallatos then asked the question, "Does this mean that when a manufacturer goes out of business a third party brake cannot be used and the hoist has to be discarded?" Jim Meyer, Jim Meyer Consulting, (representing the Petitioner), responded by stating that the regulation has to provide a means to deal with the fact the manufacturer is no longer in business. As long as the manufacturer is available, the only thing anybody can do is to send it back to the manufacturer. The professional engineer is the last resort if the manufacturer is no longer in business, according to Mr. Meyer.

The discussion moved to the reliability of the brakes manufactured by Alimak as opposed to third party certified brakes. In a comparison of safety, Alimak contended that their devices are removed from service after four years from the first drop test and a new device is manufactured. According to Alimak, the inconsistency amongst third party devices creates an unreasonable risk to the user and compromises safety. Kevin Bland, Esq., representing CECA/WSC, interjected that third parties provide a check valve on manufacturers as does the requirement for a registered engineer and DOSH review. He commented that if safety is a concern, look into the crane certification regulation that requires a third party to certify the crane. Geoff Nelson, Access Equipment, asked the question as to how Alimak would know if brake parts were not replaced by third party manufacturers. Mr. Nelson stated that when brake pads, pinion bearings or thrust washers are replaced in third party brakes they are the same pads and bearings also used in Alimak brakes as these components are not exclusively Alimak components. Dale Stoddard,

Alimak Hek, responded that Alimak has documented proof of brake drop test failures with their identifying marks on the brake pads that indicated they were not replaced by third party recertifiers.

Al Marchant, Alimak Hek, directed the committee to the original intent of the first sentence to Section 1604.1(c)(1) which requires employers to comply with the manufacturer's specifications and limitations regarding the operation of hoists and elevators. The issue, according to Mr. Marchant, is the interpretation of the second sentence which states, "Where manufacturer's specifications are not available..."; but the specifications are available. Mr. Marchant further commented that if third party recertifiers have a problem with the intent of the proposed language in the second sentence specifying the manufacturer no longer being in business, then this language needs to be clarified so that the current practice is no longer going against the market specifications and limitations of the manufacturer's product.

There was general discussion related to manufacturer brakes versus third party brakes as to whose product was more reliable and several anecdotal examples supporting each side's argument was exchanged. The issue of liability arose from this discussion and the Chairman asked the question as to why the third party manufacturer who certified the brake would not be ultimately liable if the brake fails rather than the original manufacturer? Mr. Penn Spell, Esq., (representing the Petitioner), stated that Alimak's name is embossed on the brake and they would be involved in any litigation. Mr. Spell added that there is an associated risk to Alimak by third parties doing what they do to Alimak brakes.

The committee then turned its attention to certification of the brakes. Kevin Bland, Esq., representing CECA/WSC, asked how the Division knows if Alimak meets the standard for certification in comparison to third party certifiers? Dan Barker, DOSH Elevator Unit, responded that the manufacturer has to be the one to certify the brake because DOSH cannot do it any other way. DOSH does not have the staff to certify brake certifiers. Dale Stoddard, Alimak Hek, interjected that Alimak has European certifications, meets ASME/ANSI requirements and is ISO compliant for design whereby there are no US standards that oversee these recertification issues.

Kevin Bland, Esq., representing CECA/WSC, noted that this proposal changes the standard from a performance standard to a prescriptive rule that excludes third party participation in the marketplace. For the record, he read the definition of prescriptive versus performance standards as defined in the APA. Mr. Bland quoted the APA which states that prescriptive standards place an unnecessary burden on California citizens and discourages innovation, research and development of achieving desirable social goals. According to Mr. Bland, going from a performance standard to a prescriptive standard limits and stifles the ability of third parties to contribute toward improvements.

In order to move the discussion forward, the Chairman proposed to discuss the remainder of the proposed language in the amended subsection. Kevin Bland, Esq., representing

CECA/WSC, immediately challenged further discussion on the proposed language since necessity had not yet been determined and substantial evidence to move forward had not been established. Mr. Meyer, representing the Petitioner, responded that necessity is there to do something with this regulation, but what it is and how to proceed is not clear. He mentioned that the APA requires necessity and clarity and the need to clarify the regulation is apparent. Mr. Bland, Esq., responded by asking if anyone can cite a Decision after Reconsideration (DAR) or other Appeals Board action where clarity was an issue with the language in the current regulation? There was no comment to this question. Dale Lindemer, Safway Group Holdings, interjected that necessity has not been established. The option to go to a third party or professional engineer protects the public and existing language already covers this.

Several committee members shared concerns regarding mandating end users to send their safety brakes to substandard manufacturers. Alimak countered by presenting examples in the marketplace of third party recertified brakes which did not meet the manufacturer's specifications which could pose a safety concern. Alimak noted that the risk of failures of these brakes by third party manufacturers supports the necessity finding and a prescriptive standard is needed. When the issue arose of the lack of data regarding any known failures of safety brakes in California, no evidence was produced to dispute this contention. However, Alimak provided anecdotal incidences where a number of safety brakes that were recertified by third party manufacturers showed replacement component parts that were not replaced. Geoff Nelson, Access Equipment, agreed that there are bad third party manufacturers and inspectors.

The discussion reverted back to accusations from both sides supporting the reliability of their remanufactured brakes and the basic question whether necessity had been established to amend this regulation. Peter Juhren, Morrow Equipment Company, commented that the discussion was going around in circles. He commented that data shows there have been no injuries caused by failures of the brakes in California, no hoists have failed nor have any drop tests or safety devices. He further stated that the Feds allow engineers to be used if the manufacturer does not or will not provide the specifications. Therefore, the precedence has been set. Dan Leacox, Esq., Greenberg Traurig, LLP, agreed that we were going around in circles but empathized with Alimak's contention that necessity is there because of the need to clarify the standard. Al Marchant, Alimak Hek, restated their belief that the manufacturer is the best entity to understand the quality and safety of the product and components of the marketplace. Jeremy Smith, State Bldg. & Construction Trades Council of CA, reminded the committee what Kevin Bland, Esq. representing CECA/WSC, had stated earlier regarding the crane industry sharing its specifications with the outside world, but we were not doing it in this case. Mr. Smith, State Bldg. & Construction Trades Council of CA, then asked the question, "What would happen if we didn't move forward with this proposal?"

George Hauptman, Standards Board Senior Engineer, stated that we haven't heard anything to move forward with the regulation because necessity has not been established. Jeremy

Smith, Construction Trades Council, suggested that the Division and the Standards Board should get together and come up with more distilled language and later reconvene. Dale Stoddard, Alimak Hek, summarized by saying that the concerns of manufacturers and the role of professional engineers establish a necessity to do something to provide clarity in the regulation. He agreed with others that we were beating this issue to death and the powers that be need to review the record, make a determination and move forward.

The Chairman declared that based on the day's discussion and exchange, a consensus was not achieved. He reminded committee members of the Board's rulemaking process and stated that minutes of the meeting would be prepared and sent to the committee members. The Chair thanked the committee members for their attendance, participation and comments. With that stated, the Chairman adjourned the meeting.