DEPARTMENT OF INDUSTRIAL RELATIONS
OCCUPATIONAL SAFETY AND HEALTH STANDARDS BOARD
2520 Venture Oaks Way, Suite 350
Sacramento, California 95833
(916) 274-5721

In the Matter of a Petition by:	)	
	)	PETITION FILE NO. 557 & 560
Michael Weinstein, President	)	DECISION
AHF Aids Healthcare Foundation	)	
6255 W. Sunset Blvd, 21st Floor	)	
Los Angeles, CA 90028	)	
	)	
Eric Paul Leue, Executive Director	)	
Fee Speech Coalition	)	
PO Box 10480	)	
Canoga Park, CA 91309	)	
Applicant.	)	

The Occupational Safety and Health Standards Board hereby adopts the attached PROPOSED DECISION.

OCCUPATIONAL SAFETY AND HEALTH STANDARDS BOARD

DAVID THOMAS, Chairman

ROBERT BLINK, M.D, Member

DAVE HARRISON, Member

PATTY QUINLAN, Member

BARBARA SMISKO, Member

LAURA STOCK, Member

By: Marley Hart
Marley Hart, Executive Officer

DATE: 8/18/2016
Attachments

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PROPOSED DECISION OF THE OCCUPATIONAL SAFETY AND HEALTH STANDARDS BOARD REGARDING PETITION FILE NOS. 557 & 560

INTRODUCTION

On March 2, 2016, the Occupational Safety and Health Standards Board (Board or OSHSB) received a submission on behalf of AIDS Healthcare Foundation (AHF), from Michael Weinstein, the Foundation's President. The AHF submission was received by the Board pursuant to Labor Code Section 142.2 and designated OSHSB Petition 557.

On May 9, 2016, the Board received a submission on behalf of Free Speech Coalition (FSC), from Eric Paul Leue, the Coalition's Executive Director. The FSC submission also was received by the Board pursuant to Labor Code Section 142.2 and designated OSHSB Petition 560.

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.

SUMMARY

Petition 557, and Petition 560, each request distinctly different changes to California Code of Regulations, Title 8, occupational health standards potentially impacting the adult filmmaking industry— most particularly existing Section 5193, prescribing extensive protections against exposure to blood or other potentially infectious material found in the workplace.

Previously, in December 2009, Michael Weinstein of the AHF submitted a petition (No. 513) to the Board substantially identical to Petition 557. In March 2010, the Board granted Petition 513, to the extent that the Division of Occupational Safety and Health (Division) was requested to convene advisory committee meetings to further investigate the issue. Subsequently, from March, 2010, through June, 2011, six advisory committee meetings were convened by the Division to develop a proposal supplementing Section 5193 with a new Section 5193.1. In May, 2015, the Board heard public comments on the proposed language and on February 18, 2016, the modified proposed regulation reached the Board and was considered, however, it was not adopted.

On February 18, 2016, immediately following the Board considering, but not adopting a proposed new Section 5193.1, the Board unanimously adopted a motion requesting that the Division reinitiate the rulemaking process with a renewed emphasis on stakeholder involvement.

DIVISION'S EVALUATION OF PETITION 557

In its evaluation dated May 3, 2016, the Division addresses concerns brought up by members of the Board during the February 2016 business meeting. The Division cites an Appeals Board Decision After Reconsideration (DAR) from August 2015, which ruled that the Bloodborne Pathogen (BBP) standard applies to the adult film industry, and states that "The Board…lacks the authority to exempt the adult film industry from requirements in the Bloodborne Pathogens standard."

Nonetheless, the Division recommends granting the petition to the extent that the Division is requested by the Board to convene an advisory committee meeting to discuss the following:

1. Confirm the applicability of existing standards to adult film as determined in the August 2015 DAR.

2. Specify additional requirements not found in existing standards (e.g. vaccines for hepatitis A and human papilloma virus, confidential medical exams for sexually transmitted diseases (STDs) not included in the BBP standard, pre-exposure prophylaxis for HIV, and additional employee training).

Stakeholders would then review the standard and advise the Division on whether it should propose the new standard to the Board. The Division would also report advisory committee findings to the Board and make recommendations for further actions if necessary.

BOARD STAFF'S EVALUATION OF PETITION 557

In its evaluation dated June 9, 2016, Board staff emphasizes that California's BBP standard applies to all occupations where employees have reasonably anticipated exposure to blood or other potentially infectious materials (OPIM) in the course of their work duties.

Board staff concurred with Petitioner that adult film is an industry with occupational exposure to BBP and that the employer / employee relationship has been established by the Occupational Safety and Health Appeals Board.

Board staff recommends that Petition 557 be granted to the extent that an advisory committee be convened to discuss additional protections for workers in adult film.

DIVISION'S EVALUATION OF PETITION 560

The Division evaluation of July 8, 2016, recommends that the Board grant the petition to the limited extent that Cal/OSHA convene advisory committee meetings on the substance of the present petition and Petition 557 (Weinstein). The Division recommends that the Petitioner provide quantitative data on the effectiveness of its testing protocol as compared to proper condom use. The Division also highlights an OSHA Appeals Board decision after reconsideration in which the Appeals Board held that Section 5193 applies to the adult film industry.

BOARD STAFF'S EVALUATION OF PETITION 560

Board Staff's July 14, 2016 evaluation of Petition 560 makes clear that California's BBP standard, Section 5193, applies to all employees having reasonably anticipated exposure to blood or OPIM.

Board Staff concludes that because the industry exposes employees to illnesses which are not always spread through contact with blood or OPIM, the Board should address such STDs with the necessary rulemaking. A new section should be added to Title 8, which addresses the specific hazards associated with work in the adult film and similar industries.

Board staff recommends that Petition 560 be granted to the extent that an advisory committee discussion take place concerning protection of workers in the adult film and similar industries from hazards associated with their working environment.

DECISION AND ORDER

The Board does not have the option of adopting a standard less effective in protecting employees in the adult film industry, than does the existing federal standard broadly applicable to occupational exposure to blood or other potentially infectious materials (29 CFR 190.1030). Both the supremacy of federal law, and California Labor Code Section 142.3, limit the Board's discretion in this area of regulation. Nonetheless, the Board remains committed to giving the same careful consideration to concerns about regulatory impact raised by the adult film industry, that it would provide any other industry subject to California's occupational safety and health standards. Having afforded the concerns of stakeholders in the adult film industry that careful consideration, the Board's options will be no less limited, but any resulting standards can only benefit from the effort.

Having carefully read and considered Petition 557, and Petition 560, as well as the above cited evaluations of each by the Division, and Board staff, Petition 557, and Petition 560, are GRANTED to the limited extent that the Division is requested to proceed in convening an advisory committee, with stakeholder involvement inclusive of AHF, FSC, and a diverse cross section of the adult film industry, to consider amending or expanding upon Title 8, Section 5193, to specifically address risks of employee exposure to bloodborne pathogens and STDs in the adult film industry. The Board also requests that the Division provide periodic updates at monthly board meetings on the advisory committee process.