

**OCCUPATIONAL SAFETY
AND HEALTH STANDARDS BOARD**

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

**SUMMARY**
PUBLIC MEETING/PUBLIC HEARING/BUSINESS MEETING

April 17, 2008
Sacramento, California

I. PUBLIC MEETING**A. CALL TO ORDER AND INTRODUCTIONS**

Chair MacLeod called the Public Meeting of the Occupational Safety and Health Standards Board (Board) to order at 10:01 a.m., April 17, 2008, in the Auditorium of the State Resources Building in Sacramento, California.

ATTENDANCE**Board Members Present**

Chairman John MacLeod
Jonathan Frisch, Ph.D.
Bill Jackson
Jack Kastorff
Steve Rank
Willie Washington (Public Hearing and Business Meeting)

Board Members Absent

José Moreno

Board Staff

Marley Hart, Executive Officer
David Beales, Legal Counsel
Michael Manieri, Principal Safety Engineer
Tom Mitchell, Senior Engineer
Bernie Osburn, Staff Services Analyst
Chris Witte, Executive Secretary

Division of Occupational Safety and Health

Len Welsh, Chief

Others present

Tina Kulinovich, Federal OSHA	Marcia Dunham, PG&E
Greg McClelland, Ironworkers Workers' Compensation	Judi Freyman, ORC Worldwide
Patrick Bell, DOSH	Kevin Thompson, Cal-OSHA Reporter
Larry McCune, DOSH	Elizabeth Treanor, Phylmar Regulatory Roundtable
Dan Leacox, Greenberg Traurig	Steve Johnson, ARC of the BAC
Shauna Boehm, Center for Public Interest Law	William Van Cleve
Wendy Holt, AMPTP	

B. OPENING COMMENTS

Chair MacLeod indicated that this portion of the Board's meeting is open to any person who is interested in addressing the Board on any matter concerning occupational safety and health or to propose new or revised standards or the repeal of standards as permitted by Labor Code Section 142.2.

Chair MacLeod then opened the floor for public comment.

There were no public comments.

C. ADJOURNMENT

With no further comments, Chair MacLeod adjourned the Public Meeting at 10:04 a.m.

II. **PUBLIC HEARING**

A. PUBLIC HEARING ITEM

Chair MacLeod called the Public Hearing of the Board to order at 10:04 a.m., April 17, 2008, in the Auditorium of the State Resources Building in Sacramento, California.

Chair MacLeod opened the Public Hearing and introduced the item noticed for public hearing.

1. TITLE 8: **CONSTRUCTION SAFETY ORDERS**
Chapter 4, Subchapter 4, Article 29
Section 1710(k)(2)
Permanent Flooring—Skeleton Steel Construction in Tiered Buildings

Mr. Manieri summarized the history and purpose of the proposal and indicated that the package is now ready for public comment and the Board's consideration.

Greg McClelland, Safety Director of the Ironworkers Workers' Compensation Program, spoke in support of the proposal, stating that the lack of such language had caused confusion and costly delays for employers.

2. TITLE 8: **GENERAL INDUSTRY SAFETY ORDERS**
Chapter 4, Subchapter 7, Article 109
Section 5168
PETROLEUM SAFETY ORDERS—REFINING
TRANSPORTATION AND HANDLING
Chapter 4, Subchapter 15, Article 5
Section 6775
Static Electricity

Mr. Manieri summarized the history and purpose of the proposal and indicated that it is now ready for Board consideration and public comment.

Elizabeth Treanor, Director of the Phylmar Regulatory Roundtable, spoke on behalf of her clients in support of the proposal, asking for modifications to the Initial Statement of Reasons and the regulatory language, and she asked that all of the requirements for static electricity be in one place. She submitted written comments to the same effect.

B. ADJOURNMENT

Chair MacLeod adjourned the Public Hearing at 10:20 a.m.

III. BUSINESS MEETING

Chair MacLeod called the Business Meeting of the Board to order at 10:20 a.m., April 17, 2008, in the Auditorium of the State Resources Building in Sacramento, California.

A. PROPOSED PETITION DECISION FOR ADOPTION

1. Petition File No. 500
Henry Morgan

Petitioner requests the Board to amend Title 8, General Industry Safety Orders, Sections 1592, 3706, 3801, 7016, 7024, 8483, etc., regarding the 200 feet requirement for warning devices.

Ms. Hart summarized the history and purpose of the petition and indicated that the proposed decision to grant the petition to the extent that a representative advisory committee be convened is now ready for adoption.

MOTION

A motion was made by Mr. Jackson and seconded by Mr. Kastorff that the Board adopt the proposed petition decision.

Mr. Jackson asked that the staff explore how the potential change would affect the several

existing variances for back-up alarm technology.

Mr. Washington asked whether the 200 foot requirement would be eliminated as a result of the proposed change. Ms. Hart responded that that would be a matter for discussion by the advisory committee.

A roll call was taken, and all members present voted "aye." The motion passed.

B. PROPOSED VARIANCE DECISIONS FOR ADOPTION

Mr. Beales summarized the 41 proposed variance decisions for adoption and asked that the Board approve the consent calendar and thereby adopt the proposed decisions as written.

MOTION

A motion was made by Dr. Frisch and seconded by Mr. Washington to adopt the consent calendar as proposed.

Mr. Rank asked to remove Variance File No. 02-V-025M from the Consent Calendar for separate discussion.

Dr. Frisch amended his motion to adopt the Consent Calendar with the exception of 02-V-025M.

A roll call was taken, and all members present voted "aye." The motion passed.

A motion was then made by Dr. Frisch and seconded by Mr. Jackson to adopt 02-V-025M as proposed.

Mr. Rank noted that the Division's evaluation of this variance application indicated that the applicant had violated the terms of a previously granted variance, and he expressed concern about granting another variance to the same applicant under those circumstances. He asked for an explanation of the reasoning for granting an additional variance to this applicant, and he indicated that further input from the Division and from Board staff would be useful.

Mr. Beales responded that the Board has the option to adopt the decision now if it so chooses. Mr. Rank's request for further input may or may not result in further input depending on the pleasure of the other Board members. He indicated that if the other Board members agreed with Mr. Rank that further input would be of value to the Board, then in accordance with Title 8, Section 426, the matter would be continued to another meeting so that all the parties could have an opportunity to be present and to present further comments to the Board. He further stated that these matters are governed by considerations of due process, and it would be a violation of due process to provide only one of the parties an opportunity to argue its case one more time in front of the Board. If the Board wished to pursue that course, the matter should be continued to another meeting and notice given to the applicant and Board staff so that all those who had participated in the hearing would have the opportunity to speak before the Board.

Chair MacLeod stated that, given adoption of the proposed decision, the parties to the variance have rights that they can exercise. Mr. Beales responded that if a party were dissatisfied with the decision adopted by the Board, depending on whatever defects may exist in the record, there may be an opportunity to appeal, there may be an opportunity to seek a writ, and even if the record were absolutely correct, the parties have the opportunity to seek to modify or rescind a variance, and there is also a reconsideration procedure provided in the rules regarding variances.

Mr. Rank stated that he was not opposed to the use of alternative systems; however, he is concerned with maintaining the integrity of the variance process, and if any applicant receives a variance and subsequently fails to meet the conditions of the variance, the worthiness of that applicant to receive an additional variance needs to be examined.

Chair MacLeod stated that he was one of the panel members for the variance and had had an opportunity to read both the Division's evaluation and the Board staff evaluation. It was clear in those evaluations that the applicant was forthright in admitting failure to comply. He stated that the Board was breaking new ground with this, because he could not recall a variance ever having been rescinded by the Board. He indicated that if the Board decides to rescind the variance, he wants the record to be crystal clear that it is what the Board intends to do.

Dr. Frisch stated that Teichert's application is to modify an existing variance that has already been approved by the Board to add two locations to that variance. At the hearing, at which Chair MacLeod and Dr. Frisch were the panel members, the issues of compliance with the existing variance were discussed at length. The motion before the Board at the moment is to modify the existing variance to add two addresses, with all the other conditions being present in the same form. He stated that the current discussion, as well as the discussion at the hearing itself, had more to do with complying with the existing variance and not with adding the two additional locations. He stated that if the Division had asked to rescind the variance due to noncompliance, it would have been a very different discussion, but no such application was filed with the Board.

Mr. Beales responded that no such application had been filed. The Division did state in its evaluation that, based on Teichert's past performance, consideration should be given to rescinding the existing variance, and the notice of hearing indicated that because that issue was raised in the evaluation, rescission might be one of the issues considered at the variance hearing. However, once the hearing convened, it did not seem that the issue of rescission of the existing variance was adequately noticed to the parties, particularly the applicant. For that reason, Mr. Beales clarified that the hearing did not consider rescission as an option but whether or not to add two addresses. In addition, as it turned out, there was discussion as to whether additional conditions should be added.

Dr. Frisch stated that there was a discussion during the hearing about compliance issues, in which the applicant made it very clear that they were aware that they had failed to comply and that they had taken steps to address that compliance issue. Therefore, Dr. Frisch separated the issue of compliance from the issue of modifying the existing variance. He stated that the question of compliance with the variance and the use of rescission as a tool to assure

compliance is something for the Board to consider, but the issue during the hearing was adding two addresses to an existing variance, not failure to comply, which only came to light as a result of the application to add two addresses. He expressed concern that the discussion of rescinding the variance could create a situation in which an applicant is going to fear applying for what amounts to an administrative change to an existing variance because it opens up investigations as to its business activities.

Dr. Frisch further stated that the applicant's attitude during the hearing, the posture that they took, and the statements that they made, made it clear that this was a mistake they would not make a second time, which is why he considered the administrative matter of adding two addresses separately from the compliance issue. He indicated that there are administrative methods available to the Division and to staff to further pursue the issue of Teichert's compliance. He expressed the opinion that this particular modification application was the way to do it.

Mr. Rank stated that he was uncomfortable that the Board has no evidence, other than statements made at the hearing, that the applicant will comply with any future variances as well as the existing variance. He stated that if there is a history of noncompliance, then that history needs to be examined before granting further variances or modifications to existing variances.

Dr. Frisch stated that photographs were presented during the hearing that indicated that Teichert took the issue of noncompliance seriously and was taking steps to ensure that it did not happen again.

Chair MacLeod expressed his agreement with Dr. Frisch, and stated that the additional conditions in Variance File No. 02-V-025M provide that the applicant has an affirmative duty to notify the Division of their compliance with the variance for training and other matters in advance. Those were conditions volunteered by the variance applicant itself, and they were not suggested by either Board or Division staff.

A roll call was taken, in which Mr. Rank voted no and Mr. Kastorff abstained. However, the majority of the Board members present voted aye, and the motion passed.

Chair MacLeod stated that it had been a very unique experience in variance applications.

Mr. Washington stated that he was influenced by the fact that the issue of compliance was a citable item and the rules of the citation would apply, so that if the applicant had not complied once and was cited another time, the mechanism would work to enforce that portion of the law, which was the only reason that he was comfortable voting for the proposed decision.

C. OTHER

1. Legislative Update

Mr. Beales stated that several of the bills described on the Legislative Update provided in the Board packets had been moving through the committee process, and he provided updates on them:

- SB 1473, the green building bill, was approved by the Senate Transportation and Housing Committee on April 8, 2008, and the Senate Environmental Quality Committee on April 14, 2008. The bill was also amended on April 10, 2008, to remove the deadlines for the adoption of green building standards that were in the previous version of the bill.
- AB 1988 is set to be heard by the Assembly Labor and Employment Committee on April 17, 2008. It was amended on April 3, 2008, to impose certain fees under certain circumstances for employers who appeal citations. It would also have procedural modifications in the way abatements are handled.
- AB 2031 was passed by the Assembly Natural Resources Committee on April 7, 2008.
- AB 2184, regarding personal protective equipment for firefighters; AB 2629, regarding man-lifts; AB 2689, regarding Vietnamese nail worker information and training; and AB 3059, were all passed by the Assembly Labor and Employment Committee on April 9, 2008.
- The California Labor Federation is having an event in the Bay Area on April 26, 2008, to promote AB 515 by Assembly member Lieber regarding the control of hazardous substances in the workplace, which was tracked last year. That is an indication that there might be movement regarding this bill in the legislature sometime soon.

2. Title 8 Reform Project Workplan

Ms. Hart summarized the Title 8 Reform Project Workplan in the Board packets. She stated that the Workplan shows the objective, methodology, status, constraints, and time frame for each element of the project. Ms. Hart has committed two staff members to work on the project, and work has begun on those elements in accordance with the workplan. Hans Boersma continues to work on the project and has started the first draft of the index. Mr. Boersma, with the assistance of Bernie Osburn, will soon have the first group of redrawn graphics ready for submission to the Office of Administrative Law as a Section 100 document.

She stated that the index will be an online index placed on the DIR website. The Office of Administrative Law met with Board staff and expressed concern that the California Code of Regulations does not include other indexes of this sort prepared by rulemaking agencies. OAL determined, therefore, that the Board's index should not be included in Title 8.

Dr. Frisch asked whether the online version of the index would be printable, and Ms. Hart responded affirmatively.

Mr. Rank asked whether the Division was working with Board staff on the project. Ms. Hart responded that the Division offered assistance, and Board staff have included them in the process. They are not taking a role in development, but they are assisting with the review of the index.

Chair MacLeod asked whether reference to the online index could be included in Title 8. Ms. Hart responded that that is a possibility and Board staff would explore it. She stated further that the Board is not precluded from publishing the index, but from publishing it in Title 8. The Board could self-publish or make arrangements to have it published. She stated that a reference in Title 8 to the online index would be a good idea.

Chair MacLeod asked whether the index and the redrawn graphics could be submitted to the Division and the regulated public for comment simultaneously. Ms. Hart responded that Board staff is agreeable to that if that is the Board's wish.

Chair MacLeod commented that that would help to speed up the process considerably, and Ms. Hart agreed. She stated that it is a very lengthy document, and staff has provided 45 days for review of it. She further stated that it is comprehensive, and it is going to take a lot of time and input from stakeholders and the Division to create a user-friendly document.

Ms. Hart stated that the graphics were different than the index, in that they simply were being redrawn and not changed. The existing graphics and labels are blurred and faded to the point where they are illegible. She stated that any graphic that has a change to it will be noticed via the regular rulemaking process, so the public would have an opportunity to comment on it. Those that are simply redrawn for clarity are being submitted to the Division to ensure that Board staff have read them correctly and that they have been redrawn correctly, but they have not been provided to the public at this point.

Chair MacLeod asked whether the redrawn graphics would be incorporated into Title 8 all at once or a few at a time. Ms. Hart responded that they are being broken down into manageable portions to submit to OAL section by section. Board staff expects to be able to give OAL "a good chunk" soon, but the submissions to OAL will be staggered.

3. Executive Officer's Report

Ms. Hart summarized the April Calendar of Activities. She stated that Al Tafazoli of the Division was providing notice to those parties interested in the Elevator Safety Orders that that proposal had been approved by OAL, filed with the Secretary of State, and will become effective on May 1, 2008. She commended him for the work he has done on getting the word out.

Mr. Jackson asked about the status of the amendments to the Low Voltage Electrical Safety Orders that the Board had adopted in March. Ms. Hart responded that that package is currently at OAL for review, and OAL has until May 2 to address it.

4. Future Agenda Items

Just prior to adjournment, Chair MacLeod asked staff whether the Board had directed staff to convene an advisory committee with regard to the rolling scaffold petition, and Mr. Manieri responded positively.

F. ADJOURNMENT

Chair MacLeod adjourned the Business Meeting at 10:57 a.m.