

**OCCUPATIONAL SAFETY
AND HEALTH STANDARDS BOARD**

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

July 16, 2009

Los Angeles, California

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

Chairman MacLeod called the Public Meeting of the Occupational Safety and Health Standards Board (Board) to order at 10:00 a.m., July 16, 2009, in the Carmel Room of the Junipero Serra State Building, 320 W. 4th Street, Los Angeles, California.

ATTENDANCE**Board Members Present**

Chairman John MacLeod
Jonathan Frisch, Ph.D.
Bill Jackson
Jack Kastorff
Guy Prescott
Willie Washington

Board Members Absent

José Moreno

Board Staff

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

Division of Occupational Safety and Health

Len Welsh, Chief
Steve Smith, Principal Safety Engineer

Others present

Jay Weir, AT&T
Emanuel Benitas, CRLA
Terry Thedell, Sempra Energy
Larry Pena, SoCal Edison
Bruce Wick, CalPASC
Bryan Little, California Farm Bureau
Manuel Cunha, Nisei Farmers League
Carlos Cordon, ILWU
William Krycia, DOSH
Marti Fisher, California Chamber of Commerce

Rick Ragsdale, State Fund
Roberto Maciel, CRLA
Kevin Bland, Granado Bland
Bill Taylor, PASMA
Elizabeth Treanor, PRR
Bo Bradley, AGC of California
Hassan Adan, DOSH
Mike Shanteler, CTA
Hank Rivera, Pouk Steinle
Margaret Wan, Kaiser Permanente

Jesse Ruiz, McCarthy Building Co.
Steve Johnson, ARC-BAC
Dan Shipley, DOSH
Mariano Kramer, DOSH
Jason Resnick, Western Growers
Elizelda Morales
Alberto Ledeslu
John McCoy, Lakeview Professional Service
Michael Smith, WorkSafe

Rob Roy, VCAA
Dan Leacox, Greenberg Traurig
Mark Pisuni, DOSH
Dan Schuetz, Independent Construction
Jennifer Hernandez
Silas Shawver, CRLAF
Michael Lovell, Weather Advisory Service
Dan Leiner, DOSH

B. OPENING COMMENTS

Chair MacLeod introduced Mr. Ken Nishiyama-Atha, Regional Administrator for Federal OSHA's Region IX, and invited him to address the Board.

Mr. Atha stated that federal OSHA has had several discussions regarding its regulatory agenda, which has been significantly reduced from years past. OSHA will be adding approximately 20 new positions as well as receiving additional funding just for standards.

Jordan Barab is very committed to moving the regulatory agenda forward on some fairly significant issues, such as crystalline silica, exposure to beryllium, methylene chloride, diacetyl, combustible dust, and hexavalent chromium. Also on the agenda are proposed standards regarding confined spaces in construction, walking on working surfaces, fall protection, general working conditions for shipyard employment, cranes and derricks, national consensus standards, and hazard communication. In addition, federal OSHA will be working on an entirely new ergonomic standard and will be actively seeking public input on an ergonomic standard.

There will also be an increased emphasis on enforcement. The 10% increase in federal OSHA's budget will be applied to enforcement, including the hiring of 130 new compliance officers and a new enforcement agenda.

Chair MacLeod thanked Mr. Atha for his comments, and he stated that the sequence of the meeting today would differ from previous meetings, in that he asked people who wished to comment on the proposed emergency revisions to the heat illness prevention standard to hold their comments until the Business Meeting portion of the meeting. During the Business Meeting, Chair MacLeod would ask Mr. Welsh to brief the Board on the two heat illness proposals, then the Board members would present their preliminary comments, and then the public would be given an opportunity to comment. Once all public comments had been received, the Board would deliberate and vote on one or both of the proposed standards. Then the Business Meeting would continue as usual.

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.

C. ADJOURNMENT

Chair MacLeod adjourned the public meeting at 10:09 a.m.

II. PUBLIC HEARING

A. PUBLIC HEARING ITEM

Chair MacLeod called the Public Hearing of the Board to order at 10:09 a.m., July 16, 2009, in the Carmel Room of the Junipero Serra State Building, 320 W. 4th Street, Los Angeles, California.

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

1. TITLE 8: **LOW-VOLTAGE ELECTRICAL SAFETY ORDERS**
Division 1, Chapter 4, Subchapter 5, Article 11
Section 2395.6
Portable and Vehicle-Mounted Generators

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.

There was no public comment or Board discussion on this item.

2. TITLE 8: **GENERAL INDUSTRY SAFETY ORDERS**
Division 1, Chapter 4, Subchapter 7, Article 154
Sections 6070, 6074, 6075, 6080, 6085, 6087, 6089, 6090, 6100,
6115, and 6120, and Appendices A and B
Pressurized Worksite Operations

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

There was no public comment on this proposal; however Mr. Jackson asked how the Division would determine whether an employer was providing equivalent safety. He expressed concern that the advisory committee recognized that there are times when variations from the standard are necessary, and instead of using the statutory system, the proposal is asking the Board to vest its authority to grant variances with the Division in some instances without any specific criteria for the ultimate objective of the regulation. Mr. Mitchell responded that that issue would be addressed in the 15-day notice.

Dr. Frisch also expressed concern about vesting variance authority on the Division. He also expressed concern about basing the regulation on the current Naval diving tables. In addition, he asked whether a physician has to be available on site or simply retained. He stated that the proposal seems to suggest that a physician has to be on site and prepared to enter the decompression facility. Mr. Mitchell responded that the physician must be available at all times

but not necessarily on site. Dr. Frisch asked Mr. Mitchell to address that issue in the 15-day notice as well.

Mr. Prescott stated that this was one proposal in which the advisory committee procedure worked very well in crafting an effective proposal.

B. ADJOURNMENT

Chair MacLeod adjourned the Public Hearing at 10:23 a.m.

III. **BUSINESS MEETING**

Chair MacLeod called the Business Meeting of the Board to order at 10:23 a.m., July 16, 2009, in the Carmel Room of the Junipero Serra State Building, 320 W. 4th Street, Los Angeles, California.

A. PROPOSED SAFETY ORDERS FOR ADOPTION

1. TITLE 8: **GENERAL INDUSTRY SAFETY ORDERS**
Division 1, Chapter 4, Subchapter 7, Article 10
Section 3385(c)(2)
Foot Protection
(Heard at the May 21, 2009, Public Hearing)

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

MOTION

A motion was made by Dr. Frisch and seconded by Mr. Jackson that the Board adopt the proposal.

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

2. TITLE 8: **GENERAL INDUSTRY SAFETY ORDERS**
Division 1, Chapter 4, Subchapter 7, Article 10
Section 3400
Medical Services and First Aid
(Heard at the March 19, 2009, Public Hearing)

Mr. Smith summarized the history and purpose of the proposal and indicated that the package is now ready for the Board's adoption.

MOTION

A motion was made by Dr. Frisch and seconded by Mr. Kastorff that the Board adopt the

proposal.

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

B. PROPOSED EMERGENCY SAFETY ORDERS FOR ADOPTION

1. TITLE 8: **GENERAL INDUSTRY SAFETY ORDERS**
Division 1, Chapter 4, Subchapter 7, Article 10
Section 3395
Heat Illness Prevention
Alternatives 1 and 2

Mr. Welsh stated that Section 3395 was first adopted in 2005 as an emergency standard. It became permanent in 2006. It was the first regulation in the nation to be adopted to address heat illness prevention for outdoor workers. He went on to say that he came before the Board four weeks ago to brief a proposal for emergency amendments to the standard. After discussion, the Board did not vote to adopt that proposal, and Mr. Welsh was invited to return to the July meeting to present another proposal crafted with the Board's comments at the June meeting in mind. The Division has submitted a proposal responsive to Dr. Frisch's concerns regarding shade as well as a proposal very similar to the one submitted in June with some changes.

Alternative 1 proposes changes in the existing definition of shade, and the deletion of the phrase "preventive recovery period," due to changes in subsection (d), which clarify that subsection and make the phrase unnecessary. In addition, the definition of "temperature" has been amended.

Subsection (d), Access to shade, includes several changes. First, subsection (d)(1) provides for a temperature trigger of 85°. At or above that temperature the employer shall have and maintain one or more areas of shade at all times while employees are present that are either open to the air or provided with ventilation or cooling. The amount of shade present shall be at least enough to accommodate 25% of the employees on the shift at any time. Thus, it is a requirement that the shade be actually present, up, and available to 25% of the employees on the shift at one time when the temperature exceeds a dry-bulb reading of 85°. There is also an added provision that employees have to be able to sit in a normal posture fully in the shade without having to be in physical contact with each other and that the shaded area shall be located as close as practicable to the areas where employees are working. The provision that in no case could the shade be further than five minutes away from employees is not present in this proposal.

Subsection (d)(2) addresses situations in which the temperature does not exceed 85°. That provision states that employers may either elect to have shade actually present or provide timely access to shade upon employee request. Subsection (d)(3) states that employees shall be allowed and encouraged to take a cool-down rest in the shade for a period of no less than five minutes at a time when they feel the need to do so to protect themselves from overheating. Such access to shade shall be permitted at all times. This language motivated the Division to delete the preventive recovery period language.

In the existing standard, the formula is that employees may seek a preventive recovery period when they feel the need to do so, or they can seek shade when they are feeling the symptoms of

heat illness. The phrase “feeling the symptoms of heat illness” has caused a number of problems in the field due to misinterpretation. A common reaction to that phrase among many employees is that the shaded area is only for employees that get sick. Thus, in crafting the proposal, the Division took a different approach to convey the requirement that the shade must be available and actually up so employees can take advantage of it.

Both proposals delete a provision of the previous proposal that provided an “infeasibility” exception to the requirement that shade actually be up. Mr. Welsh expressed his belief that the deletion of that exception would create some controversy at this meeting. It was controversial at the last meeting; many of the labor advocates, in particular, did not like that provision because they felt it invited employers not to have shade up. That interpretation is incorrect, but since this is an emergency standard, it is not necessary to have that provision in this particular version because it is not a matter of emergency to include that provision.

In addition, it is the Division’s legal requirement, whether such a provision is included in the standard or not, to not cite an employer for violating any requirement of the regulation if it is not reasonably feasible for the employer to do so. That applies to all the regulations in Title 8. That issue was explored with the Occupational Safety and Health Appeals Board in the early 1990s with cases involving Adia Temporary Services in which the issue was how to deal with dual employer situations where the primary employer refers an employee to a secondary employer’s worksite. The issue was whether the primary employer could be held liable for any kind of violation that occurred at the secondary worksite.

The decision was that Labor Code Sections 6401 and 6403, among others, impose limits on the Division’s authority to require a primary employer to do things at the secondary worksite that are not reasonable. That language of those Labor Code sections says that employers must do what is reasonably necessary or reasonably adequate to provide a safe and healthy workplace for employees, and they define the legal limits of the Division’s authority to enforce an employer to do something that is not reasonable.

The Division has done this already with the existing heat standard without a stated exclusion for infeasibility. As part of the final regulation, the issue will have to be resolved in the advisory committee process so the Division and stakeholders can come to an understanding about the exact language of the exception. Mr. Welsh expressed his opinion that such an exception would be a good idea, as it gives employers notice of what their rights are, but it is not really necessary. For that reason, the exception was deleted from both the current proposals; the Division will not require an employer to do something that is not reasonable.

In Alternative 2, subsection (c), regarding the employers’ responsibility to provide water to employees, the Division proposes to add language regarding continuous, ready access to fresh, pure, suitably cool potable drinking water. That is a clarifying amendment; in fact, agricultural workplaces already are under that requirement, as the language comes from Section 3457, the field sanitation regulation. Therefore, the clarifying language in the proposed emergency heat illness standard is not adding any new requirements, but it does clarify the requirement.

In addition, the Division has proposed a new subsection (e) entitled “High Heat Procedures,” which is exactly the same as the proposal submitted four weeks ago. It requires employers to

implement high heat procedures when the temperature equals or exceeds 95° Fahrenheit. The requirements are to ensure that effective communication is present, that the use of a buddy system is implemented, that employers observe employees for alertness and signs or symptoms of heat illness, reminding employees throughout the work shift to drink plenty of water, and close supervision of new employees by a supervisor or designee for the first 14 days of employee's employment, unless the employee indicates that he or she has been doing similar outdoor work for at least ten of the past 30 days for four or more hours per day.

There are a few changes to the training requirements provision in subsection (f)(1) that employees or supervisors shall not begin outdoor work unless the required training is given. There is an additional subject-matter requirement for the training regarding the added burden of heat load on the body caused by exertion, clothing, and personal protective equipment. There are further training provisions requiring that the employer designate a person to be sure that emergency procedures are invoked when appropriate and requiring that supervisors are trained to monitor weather reports and to respond to hot weather advisories. Finally, subsection (f)(3) requires that the employers' procedures for complying with each requirement of the standard be in writing and be made available upon request.

Mr. Welsh then addressed the issue of whether the proposal is an emergency, as it was a cause for concern at the previous meeting. He stated that the proposal meets the definition of an emergency, that OAL would approve it if it were to be adopted by the Board, and that the decision should be left to OAL. He stated that one of the comments from the previous meeting was that this proposal should have been considered last year; however, when the Division was in a position to consider revising the regulation last year, the economy was in very bad shape—the markets were in free-fall, and there was a lot of panic. Mr. Welsh further stated that at that time, the Division did what the Board would have wanted, which was to increase its education and outreach efforts to the public to inform them what they needed to do to comply with the standard. The Division did not want to wield a heavier hammer than necessary, and the industries affected would have been very upset by a proposal to revise the standard, as it might be costly for them to meet the new requirements.

Therefore, the Division did the prudent thing by focusing on developing a massive training program for early this year and how to meet or exceed the ramp-up in enforcement from the summer of 2008. The Division conducted over 2,000 inspections last summer, which was more than 1/5 of all the inspections performed anywhere during the entire year, and it drew heavily from other parts of the Cal-OSHA program in order to devote resources to heat illness inspections. Thus, the Division had to do some long-range planning to determine how to maintain or exceed the same kind of field work and still meet the other needs of the Division for other planned inspections.

The Division embarked on that program by planning for training in the latter months of 2008, working very closely with the agricultural industry to provide training for farm labor contractors, which had been the weakest link in the chain of employers who have heat illness prevention responsibilities. The Division generated a special certificate program for farm labor contractors, similar to trainings it had conducted previously, but the amount of training was quadrupled this year.

In addition, the Division was ready to at the first time hot weather struck this year, which happened in May. Division personnel were shocked to find that in a two-week period, eight Orders Prohibiting Use (OPUs) were issued, compared to three in 2008. Every time an OPU is issued, the Division has to be prepared to have a hearing within 24 hours (the employer's operation is shut down, so the Division has to deliver a hearing to that employer right away). This includes marshalling lawyers, managers, and the inspectors who issued the citations.

Since that time, two more OPUs have been issued, the most recent being on the previous Tuesday (July 14, 2009) to a farm owner in Dixon with no shade on site. There is still a compliance problem. In an examination of the citations issued in other years, shade has not been among the prevalent violations. This year, however, the Division's sweeps are demonstrating that there is rampant noncompliance with the shade requirement, which does not mean that every employer is noncompliant. In fact, more employers than ever are complying with the standard. It is one thing to adopt a standard and assume that employers will comply with it, but is it another to conduct inspections and actually catch employers that operate at the edge of the underground economy who are not easily found. In addition, performing inspections when the temperature reaches 105° or 110° can put the inspectors themselves at risk. The significant noncompliance could contribute to the kind of fatalities that occur from exposure to heat. There have already been more cases this year than there were last year.

Mr. Welsh expressed his opinion that there is a need for an emergency standard. The Division did the best it reasonably could last year to work with the situation at hand. He stated that former Deputy Chief Vicky Heza testified to the Board in March that she did not think changes to the regulation were necessary, and he felt that it seemed that way at the time. The Division felt that the situation was under control, but now it does not. It is clear from the noncompliance the Division is encountering in the field that the crux of the problem is the definition of the requirement to provide access to shade. Some employers feel that it means that the shade mechanism must be handy and ready to put up, while others understand that the shade actually must be up.

Mr. Welsh then addressed arguments from the June meeting that changing the regulation would not increase compliance, stating that adoption of the emergency regulation would make it more difficult for employers to appeal when they try to make the argument that they had the shade handy. He stated that there will be a lot of appeals of heat illness citations. Some people may think that employers should not have to actually have shade up when it is over 85°, and there is nothing that can be done to change that thinking except to ask them to consider how likely it is for an employee to take advantage of the shade if it is not actually up. Employees are much less likely to ask employers to put up shade if it is not available. If the shade is actually up, the employer is demonstrating that the shade is available for the employees' use.

Mr. Welsh stated that the Division will continue conducting training and penetrating the agriculture, construction, and other industries that are affected by the standard, but it would be doing it with much clearer language—language that is actually in the regulation instead of a Q&A document that most people feel is an underground regulation. The revised standard would make enforcement easier because employers will be able to see that there are clear requirements with which they must comply. That, in turn, will affect the number of employees that get sick and die this summer. If the Board adopts the emergency standard, it will be in

place and effective within two to three weeks. Some of the heat season has passed, but most of it is still ahead. If the emergency standard is not adopted, then the normal rulemaking process would begin, and the new standard would not be in place until the heat season is over. Thus, there is a necessity to act now, and there is a benefit to be derived in terms of public health and protection.

Mr. Welsh expressed the opinion that OAL would agree with him that there is an emergency situation that warrants immediate action. He noted that the Governor issued a press release the previous day urging the Board to adopt the standard.

Chair MacLeod thanked Mr. Welsh for his remarks and asked the Board members to make any initial comments they had before accepting public testimony.

Mr. Jackson stated that he continues to be less than impressed by the Finding of Emergency. From the testimony received at the meeting last month, it seemed as though, if there were a problem with compliance, it resided almost solely in the agricultural industry. He stated that it is inappropriate for the Board to impugn all employers' ability to protect their workforce with the behavior of a very small minority of a very small industry in California. He expressed his opinion that it is not an emergency, and it appears to be a way to change the regulation without soliciting input from the stakeholders and the regulated community. The proper way to develop a rulemaking package is to convene an advisory committee, take input from the regulated community and other stakeholders, and present a package where there already is a consensus. To write the regulation in private, force it on all employers with outside places of employment in California and then sort out who is really right sometime in the future is not the way this Board should do business in spite of the idea that OAL might say it is okay. Mr. Jackson stated that he cannot support an emergency adoption of either of the alternatives presented.

Mr. Prescott expressed concern, particularly after the Board's comments at the previous meeting concerning the need for emergency action, that the language remained basically unchanged. He had been hoping to see more language demonstrating the need for emergency action. He also expressed concern that, although the Board was told that there would be stakeholder input on a new regulation, that input was limited to the agricultural industry. The infeasibility exception that he had stated was necessary for the construction industry had been omitted, and there are no fewer than 21 letters that had been sent from the construction industry during the five-day notice period expressing concern over the lack of such an exception. He stated that although the Division feels that the exception is in other parts of the Labor Code, Mr. Prescott's concern is that most employers do not read the other parts of the Labor Code in trying to comply with the heat illness regulation, and they will be setting up shade that will create a greater hazard in construction, particularly in the road construction industry. Mr. Prescott further stated that Alternative 2 was out of proportion with what would be needed in an emergency standard. He cannot support Alternative 1 as it is written, either. However, if his fellow Board members were willing to consider Alternative 1 as an agriculture-only standard, eliminating subsection (d)(4), he would be willing to consider that; he could not support a standard without an exception for the construction industry.

Mr. Kastorff stated that he has lived in California since 1974, and it has gotten warm in the

summer every year. He has difficulty accepting that this is an emergency. Further, he does not think the solution is more regulation, but rather enforcing the existing regulation. The guidelines issued earlier this year defining the existing heat standard went a long way toward making the existing regulation better. He further stated that Alternative 1 is far more acceptable than Alternative 2.

Mr. Washington stated that after hearing the other Board members' concerns, and considering that the proposed regulation had be revised to address only the provision for access to shade, he understands the concern about adopting the proposal as an emergency standard. He stated that he could support Alternative 1 but not Alternative 2.

Dr. Frisch stated that when he started thinking about heat illness again, his first consideration was the issue of emergency, about which his fellow Board members have made very articulate arguments, and he decided to set it aside because he knows that everyone else on the Board has an opinion about it. He was going to focus more on the content of the proposed alternatives, and he does not believe he can support Alternative 2 as a viable emergency regulation.

Regarding Alternative 1, Dr. Frisch shares Mr. Washington's ambivalence about it. Beyond that, he has grave concern over the trigger temperature as proposed; he believes it is too high. He expressed grave concern over the reference to timely access to shade, particularly in light of changes that have been made. He stated that the term needs to be further defined. He expressed more general concern that if the Board is going to adopt an emergency regulation, it needs to not weaken the existing standard. He did not want to create a situation in which the adoption of an emergency standard weakens the existing regulation. Therefore, he is particularly interested in public comment regarding the specific provisions in Alternative 1, whether it clarifies or weakens the existing regulation, and arguments about whether or not there really is an emergency.

Chair MacLeod stated that he shares the Board members' concerns regarding Alternative 2. He stated that it was very similar to the proposal presented at the previous meeting, on which the Board took no action. He stated that his inclination is to consider Alternative 1 after hearing public testimony, because the Board had asked Mr. Welsh to draft a regulation that dealt solely with the provision of shade.

Chair MacLeod then asked commenters to keep in mind that the Board had heard comments last month on a very similar proposal. He also asked that commenters be specific in comments regarding the regulation with respect to page number and section number.

Chair MacLeod adjourned for a ten-minute recess at 11:09 a.m., and he reconvened the meeting at 11:20 a.m.

Rob Roy, President and General Counsel of the Ventura County Agricultural Association, stated that there are wide temperature variations in the agricultural industry in California. In the desert areas where temperatures routinely reach 100° and more, there are rare incidences of heat illness, perhaps due to the acclimatization of the employees. The trigger temperature of 85° is a fair trigger point and would clarify the regulation for employers. He stated that there are regions along the coast, from San Diego to Monterey, that rarely reach 85°; thus, a lower

trigger temperature would be unfair to those employers. There have been no fatalities this year, which is due to the adoption of the provisions in the Division's Q&A document. The existing standard, which was first adopted as an emergency regulation in 2005, set regulatory goals and left the method for achieving those goals largely to the employers themselves. That created a host of problems. From the language in the existing regulation, employers know that shade is only triggered when an employee is suffering from heat illness or believes a preventive recovery period is necessary. The current proposal (Alternative 1) goes well beyond that by stating that shade goes up automatically at 85°. It has provisions for encouraging employers to put up shade when the temperature is lower than 85°.

Dr. Frisch asked why Mr. Roy feels that 85° is a fair trigger point. Mr. Roy responded that, based on research of federal OSHA standards, information on heat illness, and relative temperatures throughout the state, symptoms of heat illness are rarely present below 85°. He stated that there are areas in the state such as the desert areas of Yuma and the El Centro area with no significant incidents of heat illness. In addition, there was concern that a trigger temperature set too low would put too much of a burden on farmers living along the coast. In many instances, their temperatures rarely reach 85° throughout the year because of prevailing westerly winds.

Dr. Frisch asked whether there had been incidents of heat illness on the coast. Mr. Roy responded that they were not related to violation of the standard. Last year, there was one man in the Santa Maria area that suffered a heart attack a few days after reporting to work.

Mr. Prescott asked whether Mr. Roy would still support the proposal if it were placed in the Agricultural Safety Orders rather than in the General Industry Safety Orders. Mr. Roy responded affirmatively.

Marti Fisher, representing the California Chamber of Commerce, stated that she was addressing her comments only to Alternative 1, as she did not wish to repeat her comments from last month, which were applicable to Alternative 2. She stated that the Chamber agrees with the Division that it is necessary to reduce the frequency of outdoor occupational heat illness, and they appreciate the attempt to provide clarification and guidance to employers. However, the Chamber is concerned about the removal of the infeasibility provision, as there are incidences particularly in construction where shade cannot be up and available at all times. There has to be an allowance for such an exception. The Chamber is also concerned that changing the rules in the middle of the summer might cause some confusion and put employers in the position of having liability. In the end, however, the Chamber is not opposed to the proposal.

Terry Thedell, Safety & Health Advisor for SDGE, stated that SDGE supports continued enforcement of the existing heat illness standard for all applicable California employers and recognizes the special safety and health concerns of agricultural workers. Agricultural operations are only a subset of all outdoor places of employment, yet both proposals treat heat illness requirements as if all outdoor employment is agricultural with a minor exception where alternative cooling methods are available to non-agricultural employers. SDGE seeks more clarification between non-agricultural and agricultural applications, particularly if shade is an emergency. If it is an agricultural emergency, it should be stated and not lump all of the rest of

the non-agricultural outdoor employees the same. Furthermore, the Division is implying that all outdoor employers are experiencing an emergency increase in heat-related illness and noncompliance. SDGE challenges this implication as a California employer with hundreds of employees working outdoors in coastal, inland, and desert conditions in Southern California year after year with very few cases of heat-related illness and no upward trends. SDGE has never had a heat-related fatality in the millions of man-hours spent outdoors over the years. SDGE supports enforcement of the existing heat illness prevention standard but struggles to understand how these emergency revisions will improve compliance with the existing standard. Furthermore, SDGE understands and applies the provisions of the existing heat illness standard. By adding more provisions to the standard, they become academic to the work culture and increase regulatory compliance burdens without improving the safety of employees. SDGE asks the Board not to confuse agricultural and non-agricultural outdoor work and imagine an appropriate regulatory response to heat illness for the overall California worker experience and not assumptions of the emergency for all non-agricultural outdoor employers. SDGE believes that what is needed is more enforcement directed at recalcitrant employers with what is already on the books.

Dr. Frisch asked Mr. Thedell whether he sees a basis for the 85° trigger temperature to be accepted. Mr. Thedell responded in the negative, stating that there are other factors to be considered.

Bruce Wick, risk manager for the California Professional Association of Specialty Contractors, stated that while CalPASC believes Mr. Welsh's reasons for presenting an emergency rulemaking proposal may be legitimate, construction does not constitute anything that would constitute the need for an emergency regulation. If there is a need for an emergency regulation in any industry, Alternative 2 goes well beyond that. Alternative 1, however, does clarify and strengthen the shade requirement, and as such has triggered the issue, in construction, where certain jobsites or operations make it not possible to comply; there must be some alternative, and there is no alternative to the shade provision in the proposal.

Larry Pena with Southern California Edison stated that there is still much to be discussed regarding whether or not the need for a revised standard is actually an emergency requirement. Southern California Edison would support Alternative 1 with a modification to subsection (d)(1) where it states that employees must be able to "sit in a normal posture." It is the opinion of Southern California Edison that the language can be interpreted to mean that an individual can only be rested in a sitting position, and that language is not consistent with subsection (d)(3), which stipulates that employees shall be encouraged and allowed to take a cool-down rest. Mr. Pena suggested substituting the word "rest" for the word "sit." He expressed concern that the use of the word "sit" could be interpreted to mean that an employee must carry a portable chair. He stated that he was speaking specifically of Southern California Edison service reps in remote areas that already carry a significant weight burden in the course of their jobs. Southern California stands opposed to Alternative 2, which would be infeasible and impracticable.

Dr. Frisch stated that he did not share Southern California Edison's interpretation of subsection (d)(1); he interpreted it as a description of the size of the available shade, not the nature of how recovery should occur. "The amount of shade shall be enough to accommodate

25% of the employees on the shift at any time, so that they can sit in a normal posture...” Mr. Pena responded that Southern California Edison’s concern was that the provision would be interpreted to mean that the employee must only be able to sit in the shade.

Elizabeth Treanor, Director of the Phylmar Regulatory Roundtable, stated that the Roundtable fully supports the stated objective of the emergency standard, which is to significantly reduce the frequency and severity of occupational heat-related illness, although it questions whether there is an emergency. Although there may be an emergency in the agricultural industry, Ms. Treanor does not believe that a finding of emergency has been made for applying either of the alternatives to general industry. In addition, typically when employer noncompliance is a problem, the solution is not additional regulation. In this particular case, the Roundtable was not aware that there was such widespread misunderstanding of the shade requirement. However, that there is such widespread misunderstanding demonstrates a need for clarification of the existing standard. To that end, the Roundtable would not object to the adoption of Alternative 1.

Kevin Bland, representing the Residential Contractors Association and the California Framing Contractors Association, expressed adamant opposition to Alternative 2. However, he stated that he would support Alternative 1 in light of Mr. Welsh’s briefing which addressed his main concern in construction with the feasibility of putting shade up in all instances where there are situations that may create an unsafe situation or where it may not be feasible to have it up at all times.

Mr. Bland then addressed Dr. Frisch’s stated concern about strengthening the standard as opposed to weakening it. Mr. Bland stated that the proposal strengthens the standard by clarifying the shade requirement, and he stated that such widespread confusion regarding the shade requirement does indicate an emergency.

Mr. Bland went on state that although he does not have a scientific basis for a trigger temperature, practical experience in the field indicates that a trigger temperature of 85° is appropriate.

Mr. Kastorff stated that a young man suffered heat exhaustion before noon in temperatures well below 80° at the Dixon May Fair. This young man was a resident of Truckee, which does not get very warm in April and May, so he had no acclimatization at all.

Mr. Bland asked whether Mr. Kastorff would agree that that was an exception and not an everyday occurrence. Mr. Kastorff responded that it was an exception, but it was also an apt anecdote.

Dr. Frisch asked whether a lower trigger temperature would present a practical problem for the construction industry. Mr. Bland responded that it would make a material difference in his support for the proposal. He stated that he could support a trigger temperature of 85°, but he could not support a lower trigger temperature.

Bo Bradley, representing the Associated General Contractors of California (AGC), stated that the AGC is adamantly opposed to Alternative 2, and she expressed concern that there really is

not an emergency in the construction industry, as they have made a concerted effort to train and educate employers and employees on the heat illness standard and are continuing to do so. Alternative 1 does provide some clarity to the shade requirement, but AGC cannot fully support it because there are concerns about the infeasibility exception not being included. She stated that although the exception is included in the Labor Code, as Mr. Welsh indicated, she expressed concern for the layperson who would look only at the heat illness regulation and not necessarily understand that the infeasibility exception is part of the Labor Code.

Dr. Frisch asked Ms. Bradley if the AGC would object to a lower trigger temperature. Ms. Bradley responded that the AGC had advocated from the beginning for no trigger temperature because the majority of the AGC employers would put the shade up no matter what and not wait for the temperature to reach 85°. However, she expressed concern for the road workers who are in constant transit or employees working on a runway, where the FAA does not allow any shade structures to be erected.

Bryan Little, representing the California Farm Bureau Federation (the Farm Bureau), stated that to the extent that the proposals under consideration today codify the Division's guidance document, agricultural employers will be able to comply with the revised emergency standard, especially given the efforts to train and educate employers, supervisors, and farm labor contractors. Division personnel must also be trained to enforce the emergency standard reasonably and consistently throughout the state.

The Farm Bureau is pleased to see clarification describing the adequacy of shade, in which shade provided by natural or artificial means is acceptable if, and only if, it meets the Division's other requirements for the quality of shade and does not expose employees to unsafe or unhealthful conditions. The Farm Bureau believes that the proposal is a clear and unambiguous response to concerns raised at the Oakland meeting that this type of shade is not acceptable. The Farm Bureau preferred language in the June 18 proposal making reasonable allowance for situations where provision of shade is not reasonable, and it is concerned that such allowance has been deleted from both proposals presented today. The Farm Bureau hopes that the Division still recognizes that the provision of shade by artificial means can be impractical in certain situations and impossible in others.

Of the two alternatives presented, the Farm Bureau would prefer to see Alternative 1 adopted on an emergency basis should the Board find the Division's Finding of Emergency to be persuasive. Alternative 1 has the considerable value of simplicity compared to Alternative 2, and as such informing the Farm Bureau's members about the revisions to the heat illness prevention standard envisioned in Alternative 1 will be less difficult and create fewer opportunities for misunderstanding and for noncompliance. Alternative 2 also raises additional issues of greater complexity which would be more suitable for consideration in a regular rulemaking process should the Board choose to pursue it in the future.

The Farm Bureau would caution the Board and the public not to assume that the emergency standard would eliminate all heat illnesses in the state's outdoor workplaces. It ultimately rests with each employee to be aware of his or her physical condition and to take advantage of provided drinking water, shade, and rest breaks. In this regard, the Farm Bureau appreciates the Finding of Emergency, which recognizes that it may never be possible to eliminate all

deaths and serious injuries due to heat exposure.

Mr. Little addressed Dr. Frisch's concerns regarding an appropriate trigger temperature. He stated that he has always viewed the trigger temperature of 85° as an administrative convenience both for the regulated community and for the Division as a practical target to indicate what measures must be taken at which level. He expressed uncertainty whether there is any scientific basis for any trigger temperature. The problem is that if the trigger temperature is too low, there may as well not be a trigger. It is not practical or reasonable to expect that _____ producers and dairymen in Humboldt County and Del Norte County should have to have shade up on a day when it is 70° outside, and it is not unusual for it never to reach 70° in summertime in those places. This is an inherent problem in trying to regulate to suit a variety of conditions such as those encountered in California.

As to Mr. Prescott's question as to whether the proposal should be applicable only to agriculture, Mr. Little supported that as a general proposition, and the Farm Bureau would as well, but he cautioned the Board to understand that, at least in the Farm Bureau's view, outdoor work is outdoor work, regardless of the industry. The reason that noncompliance is being found more in agriculture than in other industries is that that is where the Division has concentrated its enforcement efforts. He does not question the Division's enforcement priorities in doing that, but given that the unemployment rate is almost 11% in California, there are probably a lot of outdoor industries that normally would have work occurring. During a recession, even if the economy is falling, people still eat, and the farmers still grow food, and so agricultural employers are still working outdoors even though a lot of industries may not be. Thus, he cautioned the Board against making assumptions based on what they may have heard in recent months.

Mr. Prescott expressed the opinion that the agricultural industry is very different from the construction industry or other outdoor workplaces. Although there is some work done on a piecework basis in construction, and particularly in landscaping, the overwhelming majority of agricultural work is primarily piecework. Mr. Little expressed uncertainty that the majority of agricultural work is done on a piecework basis, stating that there is a lot of work that is done on a straight hourly basis. He stated that a lot depends on local market conditions, and very often workers prefer to be compensated on a piecework basis because they are able to earn more.

Mr. Prescott stated that workers paid on a piecework basis are unwilling to take a break because of the potential earnings lost. He stated that it creates a problem for the employer because the employees are driven to make higher income, and thus the break issue becomes a problem. He stated that a separate regulation for agriculture would better address those problems and be more appropriate than a general industry regulation. Mr. Little responded that inducing employees to take breaks has always been a difficult issue in the agricultural industry, and the Farm Bureau encourages agricultural employers to exercise the supervisory discretion to ensure that their employees take all required breaks, that they take breaks for the required periods, and that the employers exercise reasonable supervisory discretion, including discipline if necessary, to ensure that employees drink water as needed and that they are mindful of their health and safety issues in the workplace. Mr. Little acknowledged that it is the employer's responsibility to do those things and to use appropriate supervisory discretion and discipline, if

necessary, in order to get workers to do that. He stated that employers must strike a balance between the workers' preference for working hard and using piece rates while at the same time making sure that those workers are working in a safe and healthful environment.

Mr. Prescott stated that it has been his experience that it is/ much more difficult to strike that balance in a piecework environment, regardless of whether it is agriculture or general industry.

Dr. Frisch asked whether Mr. Little would consider a trigger temperature 5° or 10° below the stated 85° in the proposal, and he asked how much of an impact a lower trigger temperature would have on the agricultural industry, indicating that he was emphasizing temperatures of 75° or above. Mr. Little responded that it would have a pretty significant practical impact because the 85° trigger temperature allows the employer to have some certainty as to when the shade must be physically present at all times.

Dr. Frisch stated that a trigger temperature of 75° would provide the same guidance. Mr. Little responded that it would significantly expand the times when the employer would have to have the shade physically present at all times when, arguably, it would be unnecessary to do so. He compared it to the Proposition 65 warnings (regarding cancer-causing substances in use) that are posted in public places, and he asked, rhetorically, whether anyone pays attention to those warnings now. He further stated that the use of shade as an extraordinary measure that an employer takes in certain conditions, and people have a greater appreciation for the fact that there is an actual hazard because the temperature exceeds 85°, and employees will be more conscious of making sure they drink sufficient water and they go get in the shade if they start to not feel well.

Dr. Frisch asked whether the agriculture industry is representing that providing shade is an extraordinary measure. Mr. Little responded that he had intended to convey that to the degree that shade is present, it sends a message to everyone present in the field that the situation is such that at 85°, it is a sufficiently potentially dangerous situation that everyone should be paying very close attention to whether the workers are drinking water, whether they are seeking shade if they need to, and whether all appropriate precautions are being taken, and the nature of the hazard might not be as serious at 75°. He stated that to the extent that encouragement is provided to employers and employees to take those extra special precautions at higher temperatures, the value and effectiveness of those precautions at higher temperatures is improved.

Chair MacLeod asked Mr. Little whether the Farm Bureau provides training for employers, supervisors, and others who are responsible for carrying out the regulations. Mr. Little responded affirmatively, stating that the industry, collectively, trained over 4,000 supervisors and farm labor contractors last winter and spring, and the previous spring, the Farm Bureau trained 700 or 800 farm labor contractors. He stated that these employers represented 209,000 farm workers. The industry has been very proactive in trying to reach the supervisors and employers whose responsibility it is to provide a safe and healthful workplace for employees, and the Farm Bureau will continue those training sessions. The Farm Bureau is currently working with the Division to provide refresher training for farm labor contractors and employers in the Coachella Valley in September in preparation for the winter vegetable season because those farm labor contractors and employers have expressed a desire for such refresher

training.

Chair MacLeod stated that over the course of the last month, the Board has heard many stories where people are not being provided shade, or in some cases water, and he asked Mr. Little how those issues should be approached, whether those deprivations are blatant or inadvertent. Mr. Little responded that an employer that either blatantly or inadvertently does not comply with the law should be subject to the appropriate sanctions. The Farm Bureau would not advocate giving an employer a pass for failing to comply with the law. He stated that the existing heat illness standard has been in place for three years, and the Farm Bureau has something in their weekly publication almost every week reminding readers that they need to provide shade and water to their employees. In addition, the Nissei Farmers League worked with Igloo to create heat illness coolers, and those coolers are being marketed through websites, publications, and agriculture-related organizations. He expressed uncertainty that any employer really has an excuse for not knowing that the heat illness standard is in effect and what the requirements are. He stated, however, that the nature of training is that it must be done more than once because people forget, and the Farm Bureau will continue to provide that training.

Mr. Washington asked whether the Farm Bureau was providing training to farm labor contractors. Mr. Little responded affirmatively.

Mr. Washington asked whether all farm labor contractors in California are licensed. Mr. Little responded affirmatively.

Mr. Washington asked whether farm labor contractors must have training regarding current regulations as part of the licensing process. Mr. Little responded affirmatively, and he stated that heat illness is included as part of the training for them to receive their farm labor contractor license. The training provided by the Farm Bureau has been supplemental training; they have been working with the Division to provide English and Spanish language training supplemental to what they receive in the farm labor contractor licensing procedure.

Mr. Washington asked whether the Farm Bureau imposes any sanctions on employers cited by the Division for violation of the existing standards or whether the Farm Bureau checks to ensure that employers are compliant with existing regulations prior to any Division inspection. Mr. Little responded that employers receive certificates when farm labor contractors complete training that contain the employers' name, farm labor contractor license number, the date, and the location of the training, and the Farm Bureau encourages farm employers to ask farm labor contractors to provide that certificate as verification of the training before they are hired.

Mr. Washington stated that he is dismayed that the Division continues to find employers noncompliant with the existing standard even after all of the training that has been provided by both the Division and agricultural organizations such as the Farm Bureau. He asked whether there is anything else that can be done to ensure compliance. Mr. Little responded that the staff leadership and the volunteer leadership of the Farm Bureau have been asking the same question for the last six months because those incidences tarnish the reputation of the entire industry. He stated that there are 80,000 farms in California, 1,200 registered farm labor contractors, and about 500,000 people that work on farms every day (over 1 million people

during peak seasons), and he can recall only eight or ten incidents in the past few months. With that many people working outdoors, there are plenty of opportunities for somebody, somewhere to make a mistake, and he is unsure whether it is possible to completely eliminate noncompliance, but the Farm Bureau will continue trying because their goal is to send each employee home each day safe and healthy.

Silas Shawver, an attorney with the California Rural Legal Assistance Foundation (CRLA), stated that he works with agricultural workers throughout the Central Valley, and based on his experience, there is a health crisis and there are a lot of people whose life are at risk because of the lack of shade and a lack of proper procedures due to the extreme temperatures. He stated that having a strong regulation that provides clear protections to employees and guidance to employers is going to save lives. CRLA has seen, with the development of the emergency standard and the Division's increased, specific guidance about the shade requirements, more employers are putting up shade where previously the only shade available was sitting in the truck or a small umbrella covering boxes of grapes. A clear regulation that provides specific shade requirements is going to make a big difference in improving compliance.

Mr. Shawver stated that the existing standard requires that shade is always available, and the proposal provides a guideline for when shade must be up. He stated that employers have an obligation to provide shade when an employee requests it; there is no trigger temperature for an employee to request shade. Thus, the issue under discussion is not whether the employer must have the shade present in the field or not, it is the burden of whether or not the employer puts the shade up on a particular day. CRLA feels that a better trigger temperature for having the shade up would be 75° rather than 85°. He stated that there have been incidents of heat illness at 75°, because although the temperature may be only 75°, other conditions including humidity and the work being performed affect how the body reacts to the temperature. The National Weather Service would issue a caution under circumstances where the temperature is 75° and there is high humidity. In addition, if the shade is up, it lessens the burden on the employees because they do not have to ask for it to be put up and risk being penalized for asking for special treatment. He also stated that workers should be able to take their lunch breaks and regular rest periods in the shade. Workers should be able to take breaks in the shade without having to argue that they feel the need for it or having to claim that they feel sick.

Mr. Prescott asked whether Mr. Shawver feels there is enough difference between the agriculture industry and other outdoor work that a separate agricultural standard would be a better way to proceed. Mr. Shawver responded that it is difficult for him to answer that question because he works exclusively with agricultural workers; however, he thinks that workers outdoors need protection, and available data indicates that there are other industries that have traditionally done a better job of protecting workers.

Chair MacLeod asked whether CRLA provides any heat illness training for the people it represents. Mr. Shawver responded that CRLA has provided significant training in the form of workshops, working with the Division to provide training to agricultural workers, and training trainers to help other workers learn how to train their coworkers. A regulation, such as the proposal, with clarification regarding the shade requirement would make it easier to present that training and help workers understand their rights. The provision for access to shade

should be clear so workers understand that they have a right to take meal and rest periods in the shade.

Chair MacLeod asked whether the training has been formal or informal. Mr. Shawver responded that CRLA has had some programs where it issued certificates of completion, and it has had others where certificates are not issued.

Chair MacLeod asked whether Mr. Shawver would support Alternative 1 as it is currently written. Mr. Shawver responded that although there are small changes that could be made, he would support it as written because it is an improvement over the existing standard.

Alberto Ledesme stated that he has worked in the fields for 15 years. Before the current regulation, there was no shade and a lot of people would prefer to cover the grapes than to provide shade for the workers. Workers would take their lunch breaks wherever they could, sometimes under the vines, sometimes outside, where the temperature could be 95°, and it would be 102° inside the vines. That is why, as a farmworker, Mr. Ledesme feels that it is very important to have shade available during lunch, during breaks, and for extra breaks if it is hot.

Last year, Mr. Ledesme went to work with a crew, and he asked the crew boss where he would take someone who was suffering from heat illness. The crew boss responded that he would lay the person on a piece of cardboard under the vines. He did not have a shady place, but there was a little bit of shade by the water jug, just enough to cover it. When Mr. Ledesme asked the crew boss what he would do to provide shade for the employees, the crew boss stated that he had an umbrella in his truck.

Ramón Rodriguez of CRLA stated that this was the first year that he has seen a lot of shade structures provided for the workers in the Coachella Valley. The new regulation will clarify requirements for employers will make compliance easier. He stated that the 25% access to shade requirement is inadequate because all of the employees need to be able to take their lunch break in the shade.

Steve Johnson of the Associated Roofing Contractors of the Bay Area Counties (ARC-BAC) stated that feasibility is a concern. He stated that roofing has unique challenges with access to shade. In some circumstances, there is no safe place to set up shade, and in other cases, there might be situations where a shade structure set up on a roof might blow off and create a hazard for people below. Having alternatives to provide equal protection is important. ARC-BAC is in favor of the regulation and will provide clarification for employers. If the Board votes to adopt one of the proposals presented today, ARC-BAC opposes Alternative 2 but would support Alternative 1.

Michael Smith of WorkSafe stated that the Finding of Emergency sets out that there has been increased noncompliance with Section 3395 this year, and it is likely that more workers will become ill or die if the standard is not passed; that meets the definition of an emergency. One could always say that the Division should have acted last year or the year before, but it would needlessly harm workers not to enact the emergency standard now. The Finding of Emergency meets the standard of emergency defined in Government Code Section 11346.1. WorkSafe

supports both alternatives because they are an improvement over the existing standard. The proposal provides clearer guidance, which is good for both employers and employees and employee representatives. Mr. Smith shares some of the misgivings with the Board members about the trigger temperature, but a specific trigger temperature provides a clear and objective guide for when shade should be erected. Mr. Smith agrees with Mr. Shawver of CRLA that the trigger should be lower than 85°. Studies based on the heat illness incidents reported in 2005 and 2006 indicated that there were instances of heat illness in temperatures as low as 75° or 80°. WorkSafe would support a trigger temperature of 80°, and 75° would be even better. In answer to Mr. Washington's concern regarding what else could be done to prevent noncompliance with the standard, Mr. Smith suggested increased training, particularly for workers who are new on the job.

Mr. Washington asked whether WorkSafe has any connection to the agricultural industry. Mr. Smith responded that WorkSafe tries to advocate on behalf of workers in all industries. He stated that there could be cases of heat illness in other industries as well. In the last year or two, there has been an indoor heat illness death. Workers in all industries can be equally affected by heat illness, and Mr. Smith believes that the standard should apply to all industries.

Jason Resnick with the Western Growers Association (WGA) stated that WGA would support Alternative 1 in that it strengthens and clarifies the existing standard. He stated that the Division did a good job in preparing a Q&A guidance document that tends to give the affected community the opportunity to understand how the Division enforces the standard. He stated that there was also a great disparity in the way different inspectors would interpret and enforce the law, and the Q&A document provided guidance for the inspectors as well. Given the concerns over the Q&A document being an underground regulation, the emergency regulation goes a long way to codify the Division's enforcement strategy and gives employers sufficient certainty and clarity on how to comply. Thus, Mr. Resnick believes that the emergency conditions are satisfied, and the Finding of Emergency is appropriate. Mr. Resnick expressed the opinion that the 85° trigger temperature is scientifically based, but he would not support a lower trigger temperature. Clarification of the standard is in the best interests of everyone involved, employers, employees, and the Division. Alternative 1 clarifies the existing standard and strengthens it by creating new conditions upon which an employer must put up shade. Under the current standard, shade only needs to be put up when an employee requests it when he or she needs a preventive recovery period. That condition still applies under Alternative 1; however, an employer would also be required to put up shade when the temperature trigger is reached, which strengthens the existing standard and creates a bright line with which employers can comply.

Dr. Frisch asked why the WGA would not support a lower trigger temperature. Mr. Resnick responded that as the number gets lower, the burden on employers increases and the proportional increase in safety and health of the workers does not proportionately increase.

Dr. Frisch stated that the burden is one of putting up a shade structure that should already be present at the worksite, and he asked Mr. Resnick to further explain the burden to employers. Mr. Resnick responded that it takes effort, time, and energy to erect the artificial shade structures, which are heavy. If the temperature is not such that the employees truly need the shade, it sends the wrong signal to employees. When the shade goes up, it sends a signal to

employees that there is a heat illness hazard and they should take advantage of the shade. If the shade were up all the time, the efficacy of having the shade is diluted, and the opposite message is sent to employees. If the shade is up all the time, the employees need not avail themselves of it.

Chair MacLeod asked whether the WGA provides any training for employers or employees. Mr. Resnick responded that WGA has worked with other employer organizations to provide formal and informal training on a regular and ongoing basis to members. WGA was involved in training thousands of workers during the months following the release of the Q&A guidance document, and that training is ongoing. WGA has a loss control staff that provided training to members on a regular and ongoing basis, and WGA has an electronic newsletter in which there are regular articles about the need to train and to comply with the heat illness regulation and emphasizes the necessity for shade and water training for employees, as well. Mr. Resnick stated that WGA believes that their member employers are receiving the message loudly and clearly. It is the outliers, the individual contractors that are not members of any association, which are called rogue employers. They are the ones that will not comply with the regulation. A temperature trigger as low as 50° will not protect the worker who is never given shade or water or who is working for a rogue employer. That is where the problems exist; there are rogue employers who are not complying. It is not that they comply with the existing standard or put up shade at 85° and somebody felt ill at 75°, it is that there they do not have shade at all or, in some cases, do not have water at all. That is where the Division's enforcement efforts should be asserted, not the employers that are covered by associations who are trying their very best to comply and asking what they need to do to comply. Those employers are going to comply and the employees of those employers are going to be safe. There will never be 100% nonfatalities from heat illness in outdoor industries. Individual circumstances must be taken into account. Employees who drink alcohol or energy drinks are going to have an increased risk of heat illness regardless of the temperature or the presence of shade and water.

Chair MacLeod commented that there are industries that get pretty close to complying at a high level, but agriculture does not appear to be one of them. Mr. Resnick respectfully disagreed with that statement, stating that the agricultural industry, by and large, does comply. He expressed the opinion that Mr. Welsh would agree with the statement that, by and large, agriculture does comply with the heat illness prevention standard and that the focus of the Division's enforcement efforts have been mostly on agriculture. He clarified that that enforcement activity is appropriate, but if the majority of the enforcement attention is focused on one industry, it should not be surprising that any rogue employers that are not complying would be found to be members of that industry. There are no doubt other industries that are not complying with the existing heat illness standard that applies to all outdoor industries. He stated that he went to a sporting event on an afternoon when the temperature was over 100°, and the parking attendants that were directing traffic had no ready access to shade. That is just one of what Mr. Resnick believes are many examples. He expressed the belief that agriculture sometimes gets unfairly targeted as an industry that does not comply with the standard, but that is a function of the size of the industry and the attention of enforcement.

Chair MacLeod stated that Mr. Welsh predicated his Finding of Emergency largely on noncompliance, and Mr. Resnick agreed that the emergency conditions are satisfied. He asked Mr. Resnick whether he agreed or disagreed that there is a large amount of noncompliance in

agriculture. Mr. Resnick agreed that there were a number of instances of noncompliance, and every one of those instances are inappropriate and are too many. There should not be any noncompliance in agriculture at this point because of the great outreach and training performed by the Division and employer organizations. However, Mr. Resnick believes that in all the cases of which he is aware, the employers were not members of WGA, and he was unsure if they were members of any other association. He believes that the employers that cut corners are the ones that are probably not paying dues to an association that is trying to help them comply with the law, and he agrees that there were too many instances of noncompliance, and that is where the enforcement efforts should be concentrated. The emergency nature of the regulation goes to the issue of clarity and uniformity, and the standard is stronger when it is clearer and when there is a temperature trigger that creates a bright line for employers to comply.

Mr. Washington commented that it has become clear from Mr. Welsh's presentation and the comments of others that there is a group of rogue contractors who are not complying with the existing standard. He expressed concern, however, that there may be employers who are trying to comply with the standard but are unaware of the training sessions available through the Division or through the various employer organizations or do not understand the requirements. He stated that he is more concerned about that type of employer receiving a citation for noncompliance than the occasional rogue employer that will not comply with a heat illness regulation, no matter how clear it is.

Mr. Prescott asked whether the WGA would support a separate regulation for agriculture that would address agricultural conditions. Mr. Resnick stated that he is not pleased when agriculture is singled out, and there are aspects of health and safety that are applicable to all industries. However, there may be differences between agriculture and other industries, so he is not categorically opposed to the prospect of having a separate standard for agriculture if that is appropriate.

Margaret Wan with the Environmental Health and Safety Office of Kaiser Permanente stated that there is really no basis for the 85° temperature from a scientific point of view because there are other factors that affect how a person would respond physiologically to heat stress. However, it is important for employers and employees in the field to have some kind of basis to determine when shade is necessary, and it is not reasonable to expect people to measure everything that would be affecting the conditions. Therefore, it is practical to have a trigger temperature, but she asked that the Board consider a temperature of 80° because 85° is too high.

Hank Rivera, Safety Specialist for Pouk Steinle, stated that a heat illness standard is necessary in all aspects of all outdoor work. There must be some compromise between the need for shade and the difficulty or impossibility of erecting a shade structure in some workplaces. He suggested that the section on training be amended to specify the measurement of four cups of water to mean one quart.

Bill Taylor of the Public Agency Safety Management Association (PASMA) stated that the proposal does not meet the requirements for an emergency regulation. The heat illness standard has been in effect for four years. He stated that, based on what he has heard from the commenters, an agriculture-only regulation may be appropriate. He stated that the shade provisions in both proposals were unacceptable. There is a shade requirement in the existing standard, and employers can meet that requirement, and neither of the alternatives will improve that requirement.

Manuel Cunha, President of the Nisei Farmers League (NFL), stated that he supports Alternative 1, which codifies the Q&A document. In 2008, NFL worked very hard with the Division to get information and training regarding the heat illness standard to its members. There are many farm workers in the Imperial Valley, Salinas Valley, and Central Valley areas, and that is where many of the questions regarding the heat standard are asked. Employers want to know at what temperature they need to erect shade structures and what is needed at the worksite so that if an employee does become ill, it can be dealt with right away.

This year training began very early in the year, and the Division issued its Q&A document, which was very helpful. The training focused on farm labor contractors, of which there are approximately 1,500 in the state of California, and about 73% of the entire workforce in agriculture is from farm labor contractors. The rest are hired directly by farmers, the processors, and the packers. Farm labor contractors play such an integral role in agriculture because of the seasonality of the work. They know where the jobs are going to be and how long they are going to last; farm workers themselves rarely have access to that information directly. The piece rate total of all agricultural work in the state of California is approximately 2.9% of the total payroll. Very little agricultural work is on a piece rate basis.

Mr. Cunha went on to state that it is not appropriate to separate agriculture from all other industries. The existing standard is an outdoor regulation for all industries with outdoor workplaces, and they all need to be addressed.

Igloo Corporation now manufactures coolers with safety information regarding heat illness printed in both English and Spanish on the coolers. Agricultural employees see the safety information every day when they get their water from the coolers. They know to seek shade and to wear proper clothing, and they know when there is an emergency plan. Training and education are the most important factors in ensuring compliance with the standard. Alternative 1 provides clarity for the standard.

Lowering the trigger temperature to 80° now, after employers, supervisors, and farm labor contractors have been trained to the 85° standard, would be inadvisable. Mr. Cunha stated that it would be infeasible for the agricultural industry to change all of the requirements for shade to be up from 85° to 80°. Agriculture in the San Joaquin Valley is facing major issues, including the loss of 500,000 acres land due to water tabling, 80,000 unemployed workers in small towns, and up to 41% unemployment in larger towns. In addition, U.S. Immigration and Customs Enforcement, under the Department of Homeland Security, is performing enforcement actions in California, which affects all businesses, but it affects agriculture in particular. He recommended that the Board adopt the emergency proposal with the 85° trigger temperature and the Division monitor the situation over the rest of the season to see if it is

effective. In addition, more training sessions could be offered. The NFL, in conjunction with the Department of Industrial Relations, offers an eight-hour training class for farm labor contractors that they must take in order to obtain their license. Currently, only one-half hour of that training is focused on heat illness, but that time could be expanded.

Chair MacLeod called a 20-minute recess at 1:22 p.m. and reconvened the meeting at 1:42 p.m.

Dr. Frisch asked Mr. Welsh to provide more information about how the 85° trigger temperature was determined and whether there was a scientific basis for it. Mr. Welsh responded that the National Weather Service issues a Heat Index on which they list the ambient temperature with relative humidity and determine the hazard level based on those two factors combined. If one is in a 75° environment working in direct sunlight, the direct sunlight can add as much as 15° to the effective temperature. If one wanted to be absolutely protected, which is desirable in public health but in almost all cases cannot be achieved, the temperature would be set at 75° or lower.

Dr. Frisch asked whether 90° is the trigger for extreme caution according to the NWS, and Mr. Welsh responded affirmatively. He stated that there are many physiological characteristics, such as heavy clothing, the amount of energy being exerted, diabetes, being overweight, and alcohol use, that may contribute to heat illness at very low temperatures. Mr. Welsh went on to state that when the temperature rises above 85°, that is when the phones at the Division start to ring. The Division knows that when the temperature gets to 85° or above, they are going to be busy with complaints and reports of illnesses; they see almost nothing below 85°. The Division's own statistics show that although there are a few cases that occur below 85°, most of those cases involved working with very heavy clothing, an additional diagnosis such as heart disease, or working at the end of a heat spell where there had been several preceding days of significantly higher temperatures.

Mr. Welsh stated that he has spent a lot of time negotiating with the agricultural industry over the last several years in an attempt to reach a consensus about a legislative approach to addressing heat illness. The agricultural industry has become increasingly pragmatic about how to realistically reach an effective heat illness standard. He chose a trigger temperature of 85° because he felt that that is an appropriate starting point. In proposing an emergency regulation, he wanted to be as surgical as possible in terms of proposing just what was needed.

Dr. Frisch asked whether, if an emergency is being declared, the temperature should be set at the lower end. Mr. Welsh responded that the overwhelming majority of the cases have been above 85°. In a perfect world, Mr. Welsh would like to set it at 70°, but that has to be balanced with what the industry is willing to do in terms of complying with the standard. He emphasized that he was not referring to the representatives at the meeting today; they want to do the right thing to protect their workers. However, they have to deal with their clients and be able to sell the regulation to them. Therefore, there has to be a certain amount of compromise. He stated that there would be advisory committees in preparation of a regular rulemaking package, and he predicted that those advisory committees would probably be arriving at a lower temperature, and employers would have time to figure out how to comply with the lower temperature. He stated that we cannot snap our fingers and say, "Put up shade," and expect instant compliance. It is not always easy to determine the best approach for a particular area, and employers need to have time to figure it out and still make a profit and stay in business.

Dr. Frisch commented that the implication of that statement is that nobody has been doing anything about the shade problems since the current standard was adopted. He stated that employers already should have determined how to provide shade for their employees. Mr. Welsh disagreed, stating that the employers are doing their best. He stated that, at first, employers did not even agree that the way the regulation is written requires that the shade has to actually be up. Those conversations started taking place last summer when the Division was training employers. The idea that they had to have the shade up was new to employers.

Dr. Frisch then addressed the idea presented by several commenters that setting up shade sends a signal. He stated that he has become sensitive over the past couple of years, since the existing standard was adopted, that many employees are uncomfortable or would be uncomfortable asking for special treatment. The signal should be that the shade is available for the employees to use without having to ask for special treatment. He asked Mr. Welsh his opinion—whether he viewed the shade going up as a signal of something special or as a signal that this is something that employees are entitled to take advantage of if they are not feeling well or feel the need for a break. Mr. Welsh responded that he is not convinced by the signal argument. The shade provision is a requirement that an employer must provide. Fewer people will need the shade in lower temperatures. Requiring the shade to be up at all temperatures and in all situations raises questions of what to do at night or in the case of dust. If there is an ironclad requirement that the shade must always be up, people start to look at it as a silly requirement. There is a danger, whether realistic or not, that if the shade is always up people will take it less seriously. If an employer actually has it up or has it available even if it is not up, and they train employees that if the shade is up, there is a greater risk, the employees will be more likely to use the shade whether or not they have to ask for it. If it is always a matter of having to ask for shade, that is a problem as well.

Mr. Prescott asked whether the OPU's issued this year were all for agricultural businesses. Mr. Welsh responded that one or two were landscaping situations. He stated that the Division had engaged in a sweep approach this year. Enforcement personnel used a roving approach, trying to see when the shade was up. In the past, the Division had performed a lot of agricultural inspections, but they had not used the sweep approach. He expressed the opinion that if the Division were to use the same approach with construction as it did with agriculture, which it intends to do, it would find similar noncompliance. He stated that he was not talking about union jobs or other labor organization jobs; the feasibility issue in those can be addressed. Big construction jobs can work with AGC or other organizations and the Division to develop an agreement on which situations that it makes sense not to have the shade up because it presents another hazard or is otherwise infeasible. That is why the exception was included in the first place.

He asked Mr. Prescott to consider that it is not the union operations that are not in compliance but rather the shoestring operations of very unsophisticated employers operating on the edge that are not necessarily criminals. They are definitely in the lower ranks, just as in agriculture.

Mr. Welsh stated that there is no doubt that the same kind of issues encountered in agriculture are being encountered in roofing operations, other construction, landscaping, and even oil field services. He stated that construction has the second highest incidence of fatalities from heat

illness. In 2005, 50% of the heat-related fatalities were in agriculture, 25% were construction, and 25% were other. In 2006 37% were in agriculture, construction had a zero that year, and 38% were other. In 2007, agriculture had zero and construction had 100% because there was only one death that year. In 2008, 50% of heat-related fatalities were in agriculture and 17% were in construction. As indicated by these statistics, there are fatalities in construction, and there are similar statistics for non-fatal heat illness as well.

Mr. Welsh stated that if employees feel uncomfortable asking for shade in an agricultural environment, they will feel uncomfortable asking for shade in construction environments or in any other work environment. There are all kinds of businesses, the vast majority of which are in compliance, but that is not the whole story. There are bad businesses and they make all businesses look bad.

Mr. Kastorff asked Mr. Welsh to explain the phrase “as close as practicable” and the phrase “timely access to shade.” Mr. Welsh responded that those phrases, while not crafted with precision, represent an improvement on the existing language, which does not indicate distance or timing. The concepts are that the shade has to be as close as it can practically be to the worksite and that if an employee requests the shade, it must be provided as soon as practical.

Chair MacLeod asked why there were two emergency proposals. Mr. Welsh responded that, as a public health professional, he feels obligated to make his best effort to develop a rule that can protect people as effectively as possible. He stated that he fully understands the concern about it being an emergency regulation, which was made very clear at the last meeting. Therefore, he brought back a proposal that seemed to fit within the concerns expressed by Dr. Frisch and others as something that they might consider. By the same token, he heard a number of criticisms at the last meeting that reflected misinterpretations of what was intended by the language; he saw an opportunity to clarify some of those provisions that were prohibitive, and he felt that the Board might at least want to have the opportunity to consider a proposal that reflected their input from the last meeting.

Mr. Prescott stated that it seems, even from Mr. Welsh’s comments, that a tremendous amount of time was spent getting a consensus about the agricultural industry; agricultural employers have been highly involved in the Q&A document and other aspects. He expressed the opinion that it had reached a point that agriculture should be looked at separate from other industries rather than a one-size-fits-all approach. He stated that perhaps it is time to look at the specific needs of each industry. He also stated that the emergency has not been clarified to his satisfaction; however, if it were an agriculture-only standard he could support it. He feels that there has been a tremendous amount of input from agriculture but nobody else has had the opportunity to participate.

Chair MacLeod stated that OAL had put in place relatively new procedures for adopting emergency regulations largely because there were numerous agencies that, almost as routine, utilized an emergency process to adopt regulations, which is not the intent. Many of those agencies were agencies that required regulations; however, they did not have trained staff, in many cases, or they needed the regulations right away. That is why OAL changed the regulations to make it more difficult to adopt emergency regulations. He stated that when he became Executive Officer, he met with OAL and discovered that Board staff has a lot of

credibility based on the fact that the Board adopted a lot of regulations, they did so in a professional manner, and they rarely utilized the emergency process. That continues today. The Board does not take its responsibility for worker safety lightly; it does not submit a lot of emergency regulations, and OAL will take seriously any package the Board sends over.

A motion was made by Mr. Kastorff and seconded by Mr. Washington that the Board adopt Alternative 1.

Dr. Frisch stated that he accepts the premise of the emergency. He stated that the argument to split between agriculture and construction, while valid, is something that would best be taken up in an advisory committee. He further stated that he has severe reservations about the trigger temperature. He does not accept 85° as acceptable, and he would be much more comfortable voting for the proposal with the modification that the trigger temperature be reduced to either 80° or 75°. He apologized for the inconvenience presented to employers in terms of modifying the message, but the Board's goal is to prevent heat illness: it is not to catch heat illness on the cusp; it is to keep it from happening.

He used the analogy of fall protection, stating that regulators would not establish fall protection at 18 feet and think about reducing it to 12 feet later. It makes more sense to start lower and then raise it later. He stated that there is an opportunity, through an advisory committee, to perhaps provide justification for a higher number, but it would be in the best interests of the Board to establish a baseline at a lower temperature and allow a proper advisory committee to discuss the science, the anecdotal evidence, etc., and attempt to rationalize a higher number or determine that they cannot rationalize a higher number.

He expressed appreciation for Mr. Welsh's use of the NWS Heat Index, but the important item in his mind is the footnote, which states that exposure to full sunshine can increase heat index values by up to 15 degrees. To start at 85° and add 15 degrees gets to 100°, which is well into the area that the Department of Commerce and the National Oceanic and Atmospheric Administration say that sunstroke, muscle cramps, and heat exhaustion are likely. He stated that he would rather have shade up at a point when it is possible but not likely that heat illness could occur, which argues for a slightly lower trigger temperature.

He proposed an amendment to Mr. Kastorff's motion to adopt to lower the trigger temperature to 80°.

Mr. Beales stated that he did not think the Board could adopt a standard with that change at this meeting because of the Bagley-Keene requirement of noticing the public as to actions that the Board is going to take.

Dr. Frisch asked whether that meant that the Board could either adopt the proposal exactly as it is or reject it. Mr. Beales responded that the Board could adopt the proposal exactly as it is or, if it wishes to make that modification, it could re-notice it for another meeting, which does not necessarily have to be at the next regular meeting of the Board. It could be another meeting called for the express purpose of adopting the modified proposal. He went on to state that lowering the trigger temperature is a substantial change, and several people who spoke today indicated that if the trigger temperature were lower than 85° there would be a lot of opposition that does not exist with the trigger of 85°. People who had not had an opportunity to participate in today's meeting or who were not present at today's meeting may want to have some input.

Dr. Frisch stated that while he fully endorses having an emergency standard, he cannot support the proposal with 85° at the trigger.

Chair MacLeod stated that it is clear to him, as the public member of the Board, that we do not know what the appropriate temperature is. A lot of different temperatures have been suggested. The regulation as it currently exists is unclear with respect to shade, and whether or not 85° is right, wrong, or indifferent, there really is no guide in the existing regulation for when the shade has to be up.

Mr. Welsh stated that he appreciates Dr. Frisch's stance. He struggled with the same conflict, but to throw the whole proposal out just because of a five degree difference does not make sense. What is really going to matter is the permanent regulation.

Dr. Frisch responded that Mr. Welsh presented two alternatives. He stated that he had expressed his desire for a lower trigger temperature at the last meeting, and Mr. Welsh could have presented one proposal with a lower temperature, but he did not.

Mr. Prescott stated that during the five-day notice period, 21 letters had been received from the construction industry, both labor and management, not supporting either alternative because of the lack of an exemption for when the shade creates a greater hazard or is infeasible. It is a major concern of the construction industry that that wording has been removed. He stated that he could only support a proposal with that exemption added.

Mr. Beales stated that the Board can add language, modify the proposal, and craft an alternative that it believes should be enacted if it is different from either alternative. However, in addition to that, the Board must set a further Board meeting where members of the public can comment on it after it has been properly noticed.

Mr. Prescott stated that if that is an option, then he would further modify the proposal by removing it from the General Industry Safety Orders and place it in the Agricultural Safety Orders.

Chair MacLeod stated he is reluctant to engage in drafting regulations at the Board meeting. He does not think it is a good idea; the proposal needs to be vetted and researched appropriately by the staff before moving forward. He stated that a lot of people today representing the construction industry had supported the proposal, or at least did not oppose it. Not all of the comments from the construction industry had been negative, and most of the letters the Board received in opposition were form letters.

Mr. Washington stated that staff could craft a permanent regulation, keeping in mind the comments from both the Board members and the public and acting accordingly. He also stated that the issue of whether or not there is an emergency should be left to the Office of Administrative Law.

Mr. Beales asked for a brief recess, and Chair MacLeod granted the request, calling for a five-minute recess. The meeting resumed at the conclusion of the recess.

Mr. Jackson echoed Mr. Prescott's concern about the exemption for infeasibility. He stated that, as written, Alternative 1 mandates that at 85° the shade goes up without regard for whether or not it is more dangerous or difficult or feasible. There is a little bit of an exemption for industries other than

agriculture to misting or another method when they cannot put up shade. Most people have not been on the receiving end of a Division enforcement action, and he did not know of a regulation that gives a compliance officer permission to exempt an employer from the regulation because it is difficult to comply. Without the language for an exception to give an employer the option to try to explain it and to give the compliance officer a defense when he chooses not to cite the employer, the standard is unclear. He stated that if the Board adopts the proposal, the only thing that some employers can possibly do is apply for a variance. He stated that if the Board adopts the regulation today, some employers are going to have to ask for a variance tomorrow to make sure that there is an option other than shade or misting devices, because it looks like that is the only available choice. Therefore, Mr. Jackson stated that he could not support the proposal without an exception.

A roll call was taken, and Chair MacLeod, Mr. Kastorff, and Mr. Washington voted "aye." Dr. Frisch, Mr. Jackson, and Mr. Prescott voted "no." The motion failed.

C. PROPOSED VARIANCE DECISIONS FOR ADOPTION

Mr. Beales requested that one change be made to one of the proposed variance decisions. One plural reference in the conditions should be changed to a singular reference in Variance File No. 09-V-036. With that change, he requested that the Board approve the items on the consent calendar.

MOTION

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

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

C. OTHER

1. Legislative Update

Mr. Beales stated that some of the matters that the Board has been tracking have passed various committees and moved on in the legislative process. He stated that he would provide a full update in next month's written report. One bill amending the serial meeting provision of the Bagley-Keene Open Meeting Act has made it through both houses of the legislature. Also, SB 478, regarding man-lifts in agricultural related settings, has been amended so that the in-house person doing the job of a CCCC no longer may do inspections, and an additional statute was amended by the Act having to do with a CCCC disclosing its CCCC status.

2. Executive Officer's Report

Ms. Hart stated that in response to the Board's decision on Petition 507, Board staff met with the Air Resources Board and South Coast Air Quality Management District in June, and progress is being made. By the end of July, Tom Mitchell of the Board staff will be

working with AGC and Operating Engineers with the intent of having a proposal out to stakeholders sometime in August.

Additionally, the Office of Administrative Law approved the Aerosol Transmissible Disease and Zoonotics packages on July 6, and they would become effective on August 5, 2009.

Ms. Hart then summarized the Calendar of Activities. She reminded the Board that in accordance with the Governor's Executive Order, Board staff is now furloughed three days a month, which is really beginning to affect the staff's work. That furlough order is in effect until June 2010.

3. Future Agenda Items

Ms. Hart stated that the Board needs an update on the Performance Based Code for Elevators, and indicated that it would be provided at the next meeting.

D. ADJOURNMENT

Chair MacLeod adjourned the Business Meeting at 2:35 p.m.