

**OCCUPATIONAL SAFETY  
AND HEALTH STANDARDS BOARD**

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**SUMMARY  
PUBLIC MEETING/PUBLIC HEARING/BUSINESS MEETING  
July 15, 2010  
Burbank, 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 15, 2010, in The City Council Chambers of the Burbank City Hall, Burbank, California.

**ATTENDANCE**

Board Members Present  
Chairman John MacLeod  
Bill Jackson  
Jack Kastorff  
Hank McDermott  
Guy Prescott  
Dave Thomas  
Willie Washington

Board Members Absent

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

Division of Occupational Safety and Health  
Steve Smith, Principal Safety Engineer

Others present  
Wendy Holt, CSATF/AMPTP  
Judi Freyman, ORC  
Steve Johnson, ARC-BAC  
Dan Leacox, Greenberg Traurig  
Terry Thedell, Sempra Energy

Marti Fisher, CalChamber  
Russ McCrary ILU Trust ADR  
Joan Gaut, CTA  
Bruce Wick, CalPASC  
Elizabeth Treanor, PRR

**B. OPENING COMMENTS**

Chair MacLeod introduced the two new Board members, Hank McDermott and Dave Thomas, and administered the Oath of Office.

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

Elizabeth Treanor, Director of the Phylmar Regulatory Roundtable, expressed concerns about the practice of incorporating national consensus standards by reference into Title 8. Her comments included:

- Tracking the standards development process of the myriad technical committees involved in standard-setting takes time and requires a high level of sophistication.
- Since most of the technical committees meet on the East coast, it is difficult for California employers to participate in the process of developing consensus standards.
- The standards are developed by technical organizations operating for profit, and the standards are often expensive and unavailable in the public domain.
- The standards frequently reference other consensus standards that reference other standards into a virtually endless loop, requiring employers to find all the referenced standards to find out what the requirements are for their workplaces.
- Many of the standards have been updated and may be difficult to obtain or are no longer available.

Ms. Treanor expressed appreciation for the background document prepared by Ms. Hart that was included in the Board packet. She stated that she has been working in the occupational safety and health regulatory arena for 30 years, and it was a pleasure to learn more about incorporation by reference (IBR).

Ms. Treanor further stated that she was not asking the Board to abandon the IBR practice but to request that the Board take certain actions, such as:

- Developing criteria as to why certain provisions are chosen for IBR and when an advisory committee is established to address an issue raised by IBR so that the regulated community understands when IBR is used.
- Specifying more clearly in the Initial Statement of Reasons what has been incorporated by reference and why.
- Developing a "Technical Resources" webpage on the Board's website that would include hyperlinks to technical societies and various ways to find current and

outdated consensus standards. Adding a hyperlink to each IBR standard would be helpful to the regulated community.

Terry Thedell, Health and Safety Advisor for Sempra Energy Utilities, expressed support for Ms. Treanor's comments. He further stated that he was not asking the Board to abandon IBR, but he shares the interest of the Board staff to make IBR as minimal and as user-friendly as possible. In addition to the suggestions made by Ms. Treanor, Mr. Thedell asked that Board staff keep a running tally of how often the IBR process is used, which would be in keeping with the desire to keep this practice to a minimum.

Judith Freyman of ORC Worldwide spoke in support of Ms. Treanor's and Mr. Thedell's comments regarding IBR, and she asked that the Board provide stakeholders an opportunity to discuss IBR further. In addition, Ms. Freyman thanked the Board for the changes made to the Portable Ladder proposal, particularly the favorable treatment of step-stools and the change in the frequency of inspections.

C. ADJOURNMENT

Chair MacLeod adjourned the public meeting at 10:13 a.m.

II. PUBLIC HEARING

A. PUBLIC HEARING ITEM

Chair MacLeod called the Public hearing of the Board to order at 10:13 a.m., July 15, 2010, in The City Council Chambers of the Burbank City Hall, Burbank, California.

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

1. TITLE 8:
  - CONSTRUCTION SAFETY ORDERS**  
Division 1, Chapter 4, Subchapter 4, Article 4  
Section 1532.2
  - GENERAL INDUSTRY SAFETY ORDERS**  
Division 1, Chapter 4, Subchapter 7, Article 110  
Section 5206
  - SHIP BUILDING, SHIP REPAIR, AND SHIP BREAKING SAFETY ORDERS**  
Division 1, Chapter 4, Subchapter 18, Article 4  
Section 8359
  - Employee Notification Regarding Chromium (VI) Exposure Determinations (Horcher)**

Mr. Manieri summarized the history and purpose of the proposal, and he indicated that it was ready for the Board's consideration and the public's comment.

Ms. Treanor expressed support for the proposal.

There was no Board discussion of this item.

B. ADJOURNMENT

Chair MacLeod adjourned the Public Hearing at 10:19 a.m.

III. **BUSINESS MEETING**

Chair MacLeod called the Business Meeting of the Board to order at 10:19 a.m., July 15, 2010, in The City Council Chambers of the Burbank City Hall, Burbank, California.

A. PROPOSED SAFETY ORDER FOR ADOPTION

1. TITLE 8:      **GENERAL INDUSTRY SAFETY ORDERS**  
Division 1, Chapter 4, Subchapter 7, Article 88  
Section 4848  
**Update of Welding Fire Prevention and Suppression  
Procedures**  
(Heard at the April 15, 2010, 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 Mr. Jackson and seconded by Mr. Thomas 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 108  
Section 5158  
**Other Confined Space Operations**  
(Heard at the June 17, 2010, 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 Mr. Kastorff and seconded by Mr. Prescott that the Board adopt the proposal.

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

B. PROPOSED VARIANCE DECISIONS FOR ADOPTION

Mr. Beales stated that six of the seven matters on the consent calendar were heard at a variance hearing held just prior to today’s Board meeting, and the proposed decision of the hearing panel on each of those matters is that the modification or variance in question be granted. The proposed decisions are contained in the Board materials. One of the matters heard today was in reference to an Otis Gen 2 modification involving a non-controversial change. All of the elevator matters were heard under the expedited variance procedure because the Board is being asked to adopt variance conditions and to grant variances that have been granted in numerous other, virtually identical, cases. Mr. Beales asked that the Board adopt all of the proposed decisions on the consent calendar.

MOTION

A motion was made by Mr. Thomas and seconded by Mr. Washington to adopt the consent calendar as modified.

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

C. OTHER

1. Termination of Rulemaking—Broadband Technology for Back-up Alarms (Petition 500)

Ms. Hart stated that Board staff recommends termination of further rulemaking action related to Petition 500. An advisory committee was held on April 21, 2010, to consider amendments to various Title 8 standards to permit the use of broadband sound technology for automatic back-up alarms that must be audible from a distance of 200 feet. The memorandum to the Board members as well as the advisory committee minutes outline the various issues that led to the recommendation to terminate further work on this project, such as concern that broadband alarm was not readily discernible as a warning alarm and that the alarm could be mistaken for the sounds of other types of machinery and equipment. Also, if the 200-foot rule were to be eliminated, it was problematic to identify and define a specific hazardous or alerting area applicable to a wide variety of vehicles and equipment. The committee was not able to agree on a range that would be as effective as the existing standard.

Therefore, in the absence of Board objection, this rulemaking will be terminated.

2. Information regarding incorporation by reference process.

Ms. Hart stated that the memorandum contained in the Board packet explains staff's rationale for incorporating by reference various consensus standards into Title 8. There are many reasons for doing so, most notably the legal issues associated with copyright infringement. Even if staff sought and obtained permission to publish copyrighted documents, attached to that permission are other requirements and limitations that make it impractical to consider that option.

Staff has found that many national consensus standards provide well thought out approaches to dealing with workplace hazards. Although the Board is not staffed to research and develop similar standards, they carefully evaluate the consensus standards to determine their applicability for inclusion in Title 8. Staff will continue to do so and only recommend incorporating by reference those standards or parts of standards that are essential for workplace health and safety in future rulemaking proposals.

Staff recognizes the concerns of the Board and stakeholders surrounding incorporation by reference, and staff will continue to look for ways to minimize the impact on employers and to rely on incorporating by reference only when necessary.

Ms. Hart further stated that some of the suggestions made during the Public Meeting this morning by Ms. Treanor and Mr. Thedell for steps the Board staff can take internally to make this process easier for the regulated public, and a "technical resources" page on the website is a great idea and something that would be fairly easy for staff to create.

Mr. Prescott stated that it is important to note that the majority of national consensus standards incorporated by reference in Title 8 have already been incorporated by reference by federal OSHA, and in order to maintain equivalence, the Board has no choice but to incorporate those standards.

Mr. Prescott has worked with a number of the organizations that promulgate these consensus standards, and many of them are focused primarily on one industry or area. His concern in using the process is that, when the Board incorporates a national consensus standard by reference, it is absolutely necessary that a particular edition be incorporated and does not leave it open to "the newest edition."

Mr. Beales stated that staff believes that the Administrative Procedure Act requires the specification of an edition. Thus, if there is something in Title 8 that refers to

the newest edition, that is something that Board staff should look at because the standards should not be written that way.

Chair MacLeod stated that some of the ideas presented this morning were very good ideas. The suggestion to hold discussions or an advisory committee meeting may be implemented if the Board decides to develop some written materials as to how to proceed.

### 3. Information regarding petition decision process.

Ms. Hart stated that the memorandum in the Board packet provides information on how and why petition decisions are crafted in the manner they are. The three petition decision options, for the most part, are: (1) denial of the petition; (2) granting the petition; or (3) directing the Board staff or Division staff to develop a rulemaking proposal, or granting the petition to the extent that an advisory committee be convened to determine necessity and then develop a rulemaking proposal if appropriate.

Obviously, in the case of a denial, the petition file is closed. For all others, whether or not the Board directs the convening of a formal advisory committee, staff needs the flexibility to discuss regulatory language with stakeholders, to make modifications if appropriate, evaluate proposed language for equivalency with federal standards and ensure compliance with Administrative Procedure Act requirements.

Because it could be very limiting and problematic if the Board gave staff specific instructions for the development of rulemaking proposals, the standard practice has been to allow staff to use all available resources to develop a sound rulemaking proposal. This is a tried and true process that has served the Board well for many years.

Mr. Prescott stated that it may be helpful to staff and provide a clearer path if the Board were to provide more direct instructions regarding petition decisions, particularly if the politics of working with another agency are involved. If the staff had the ability to inform stakeholders that the Board had directed that they only examine certain aspects rather than a broader spectrum, it would limit staff's ability, but it would also save staff hundreds of hours of manpower in some cases.

Mr. Prescott recognizes the problem that most often it is in retrospect that we find that politics is going to enter into something, and we wish in hindsight that we had done something different. He wondered whether the Board perhaps should re-examine petition decisions and maybe provide further direction to keep them on track, not to limit the process but to prevent staff from spending hundreds of hours going off on things that are not related to the original petition.

His second concern is in connection with the occasions where Board staff and Division staff evaluations do not agree, and he has heard on occasion that the Division has requested that Board staff change a proposed decision from approved to denied or vice versa so there will be consistency Board. He does not feel that procedure is proper.

Chair MacLeod stated that the current process has been in place for quite some time, and it has served the Board well. The Board has ample opportunity to review the petition requests and the proposed decisions. With regard to Mr. Prescott's observation regarding differences of opinion between the Board staff and Division staff or the lack thereof, when Chair MacLeod was the Executive Officer, there were differences of opinion that came to the Board, and the Board had to sort it out. He agreed with Mr. Prescott that if there are differences of opinion as to how to proceed, the Board needs to take a look at that. Generally, however, resolution can be achieved beforehand. The key point is that although the topic of a petition is contained in Title 8, the petitioner is only concerned about one aspect of that particular topic, but staff is obligated to look at the entire impact of that regulation on the regulated public. He does not agree that the Board should rein in staff's ability to go to all resources and come up with what staff believes to be the most appropriate direction.

The petition process is very unique in the occupational safety and health realm. Anybody can petition the Board, and that petition does not even have to be in writing; they can come up to the microphone during a public meeting and present an oral petition.

#### 4. Legislative Update

Mr. Beales stated that there are three bills that have had subsequent developments as of July 13. One is AB 846, regarding civil and administrative penalties, which was amended on June 30 but not in a way that had any impact on the Division. In addition, AB 2738, regarding rulemaking, was amended on June 29 in a manner that requires additional justification if a rulemaking entity that is subject to the bill wants to use a prescriptive standard rather than a performance standard. The bill is, in essence, a way for the legislature to tell rulemaking bodies that performance standards are preferred. The two previously mentioned bills and AB 1652, involving ski resorts, have all made progress through Senate committees.

#### 5. Executive Officer's Report

Ms. Hart stated that in response to comments received from a 15-day Notice regarding the Heat Illness standard, a second 15-day Notice of Modification was issued on July 14 and mailed out to all of the commenters from the first 15-day Notice as well as being posted on the Board's website and available to the public. The comment period for this 15-day Notice ends July 29 at 5:00 p.m. The final

proposal for Section 3395, Heat Illness Prevention, will be considered for adoption at the August Board meeting in Sacramento.

There currently is no budget in place for the current fiscal year, and it appears that there is no budget on the horizon, which means that the office is not allowed to incur any debt, pay any bills, or spend any money. However, in anticipation of the budget delay, staff made all necessary purchases in June in order to remain operational for several months until a budget might be in place. Overtime usage has been prohibited by the Department, which is really not an issue for Board staff, as we do not use too much overtime.

In addition, travel expenses will not be reimbursed until a budget is signed, nor will travel advances be issued, and employees are asked to cover their own expenses with the understanding that if it creates a hardship they can decline travel. It has never become an issue in the past, but it helps to be mindful of it, because this process may be a long delay this year. Once a budget is signed, all expenses will be reimbursed.

All out of state travel has been denied by the Governor's office, and even after registration was completed and money had been submitted, a Board staff trip to the ASSE conference in Maryland had to be cancelled when the Department rescinded travel approvals. Staff has been informed that it will not be able to attend the ASSE conference in Chicago next year either.

It is unknown whether staff will be paid. Governor Schwarzenegger issued a minimum wage order on July 1, but Controller Chiang has stated that it is impossible for him to comply with that order. Payroll will be submitted to the Controller's office about the 21<sup>st</sup> of the month.

#### 6. Future Agenda Items

Chair MacLeod reiterated his suggestion to revisit the incorporation by reference if staff develops a written policy or procedure on that.

#### D. ADJOURNMENT

Chair MacLeod adjourned the Business Meeting at 10:46 a.m.