

**OCCUPATIONAL SAFETY
AND HEALTH STANDARDS BOARD**

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SUMMARY
PUBLIC MEETING/PUBLIC HEARING/BUSINESS MEETING

June 18, 2009
Oakland, 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 10:04 a.m., June 18, 2009, in the Auditorium of the Harris State Building, 1515 Clay Street, Oakland, California.

ATTENDANCE

Board Members Present

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

Board Members Absent

Jack Kastorff
Jose 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

Michael Smith, WorkSafe
Wes Sander, Capital Press
Jay Weir, AT&T
Anne Katten, CRLA
Randy Weissman, CalTrans
J.M. Nave, AT&T
Dave Harrison, Operating Engineers Local 3
Ralph Armstrong, IBEW 1245
Jim Hay, State Fund
John Vocke, PG&E
Kimlee Lindgren, Hensel Phelps Construction Co.
Kirk Emgee, SHSCO Electric
John McCoy, Lakeview Professional Services

Terry Thedell, Semper Energy
Tim Brown, Sempra Energy
Suzanne Murphy, WorkSafe
Mary Lynn Rogers, FedEx Express
Linda Loza, Kaiser Permanente
Kevin Thompson, Cal-OSHA Reporter
Greg Rainey, OC Jones & Sons
Rachel Gioseffi, Korbel
Kevin Bland, Granado Bland
Nancy Moorhouse, A. Teichert & Son, Inc.
Dana Lahargoue, Koebbler/CEA
Jere Ingram
Silas Shawver, CRLA

Adelfo Leiva
Josefina Morales
Elizelda Morales
Terry Snow, Weather Advisory Service
Ed Ostrowski, East Bay Municipal Utility District
Ephraim Camacho, CRLA
Carmen Hernandez, CRLA Advisory Board
James Tait, Berg Electric
Peter Robertson, CalTrans
Marcia Dunham, PG&E
Greg Avalos, Pioneer Hibred International, Inc.
Bill Taylor, PASMA
Steve Johnson, ARC-BAC
Larry Pena, Southern California Edison
Don Bradway, AGC of California
Cindy Sato, CEA
Eric Bach, T.B. Penick & Sons
Marti Fisher, California Chamber of Commerce
Mike Herron, EUCA
Ken Clark, Willis
Art DeLeon, Underground Construction Co.
Howard Rosenberg, University of California
Mirna Solis, CRLA
Ed Faust, City of Livermore
Jodi Blom, CFCA
Mike Herges, Granite Rock
Deborah Gold, DOSH

Lorenzo Morales
Olimpia Dominguez
Elizabeth Treanor, Phylmar Regulatory Roundtable
Michael Lovell, Weather Advisory Service
Patrick Bell, DOSH
Petra Tinoco, CRLA Advisory Board
Ana B. Flores, CRLA Advisory Board
Rick DeLao, Communications Workers of America
Martin Tamayo, CalTrans
Gade Mobley, Flatiron
Carl Borden, California Farm Bureau Fed.
Bruce Wick, CalPASC
Judi Freyman, ORC Worldwide
Steve Hooper, Unger Construction
Margaret Wan, Kaiser Permanente
Peter Lupo, T.B. Penick & Sons
Loren Hormigoso, Federal OSHA
Bob Hornauer, NCCCO
Don Anderson, Peck and Hiller Co.
Stella Beckham
May Shiu, EBMUD
Mike Bennett, Pioneer Hi-Bred
Reyna Castellanos, Dolores Huerta Foundation
Juan Calderon, WCGFI
John Robinson, California Attractions & Parks
Dan Leacox, Greenberg Traurig
Robert Nakamura, DOSH

B. OPENING COMMENTS

Chair MacLeod introduced Mr. Guy Prescott, new Labor Representative to the Board, and Mr. John Duncan, Director of the Department of Industrial Relations. Mr. Duncan then administered the Oath of Office to Mr. Prescott.

Mr. Duncan then addressed the Board, thanking the Board on behalf of California workers for their work on occupational safety and health standards. California leads the nation in many ways, and as recently as the last meeting, the Board made history again with a first-in-the-nation, ground breaking, unanimous vote approving the Aerosol Transmissible Disease standard designed to provide guidance on how to protect workers with duties that increase their risk of exposure to infectious diseases that are well-known, such as tuberculosis, and those that are novel, such as the recent H1N1 virus. Accompanying that standard was the Zoonotics disease standard, which addresses infectious diseases originating from animals. The day the two standards were adopted, calls came from around the world to ask for information about them.

Mr. Duncan then spoke regarding the proposed emergency amendments to the heat illness prevention requirements. He stated that the Board would wrestle with many questions today, but he stated that we need to move quickly before extreme heat arrives, as it has in past years. He reminded the Board that Governor Schwarzenegger was the one who first called for the leadership demonstrated by the

Board in this area, and when the changes were first proposed, the Governor was the one who proposed moving forward on an emergency basis. The Division was out in the fields recently and continued to find problems with compliance, despite the progress made and the unprecedented educational effort made by the Division. Enforcement alone cannot solve the entire problem. Although the Division did shut down some businesses during the first heat wave of the season, we prefer to encourage compliance through education and partnership. In addition, despite a concerted effort at education, the Division found that there is still confusion regarding the requirements of the regulation, demonstrating the need for clarity in the regulation. He stated that it would be better to adopt the proposed emergency regulation now to provide some clarity to employers to make the requirements unambiguous.

When the emergency regulations were announced, Governor Schwarzenegger said in a supporting statement that, "I have worked to protect California outdoor workers, and I will continue to improve and strengthen those standards to protect these men and women." Thus, the proposed emergency regulation is in lockstep with the Governor's direction.

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, stated that heat illness deaths, as with all workplace fatalities, are tragic and should not happen. They are preventable, and thorough training under the current standard is absolutely necessary to prevent further deaths. The Roundtable fully supports the objective of the emergency regulation, which is to significantly reduce the frequency and severity of heat illnesses in the workplace. Although the Roundtable supports the intent of the regulation and several of the clarifying provisions in the proposal, there are three concerns about the proposal.

First, it is inadvisable and ineffective public policy when a problem is in compliance with an existing standard to impose even more stringent requirements. It will not achieve the desired result. Second, although the current situation may be an emergency with compliance and enforcement, the Roundtable is not convinced that it is an emergency with regard to the regulation itself. Third, the companies of the Roundtable have raised specific concerns about the clarity of the provisions involved.

Regarding public policy, the Roundtable has consistently expressed, both before the Board and at the federal level, that if compliance with an existing standard would prevent the injuries, illnesses, and fatalities, then having a more stringent standard is not going to achieve the objective; rather, increased employer awareness and employee training is required. The basic problem, as stated by the Board in its Finding of Emergency, is that of an unexpected increase in noncompliance. These employers would still remain noncompliant. One analogy, although a poor one, is to say that if the Board is concerned about the number of deaths on a highway because people are not wearing seatbelts, another regulation requiring people to wear seatbelts and helmets is necessary. If the basic problem is lack of compliance, a more stringent regulation will not change it. The Roundtable continues to encourage the Division to aggressively enforce Section 3395 where employer compliance is less consistent. Employers who are compliant with existing requirements, who have controls in place that are preventing heat illness and that are not seeing heat illness in their workplace, should not be required to comply with more stringent requirements.

With regard to the Finding of Emergency, in March Division staff said that, as far as they were able to ascertain from their data, the existing standard was adequate to protect against heat illness. Regarding the increased number of heat illnesses that are being reported by employers and also are generating workers' compensation claims that are providing the Finding of Emergency, the Division believes that this is a sign that a more stringent standard is required. Another way to interpret this data, however, would be that there is increased employer and employee awareness, and therefore, more of these cases are actually being reported for what they are, which is heat illnesses associated with their workplace. The Roundtable believes that, over time, it is a good start towards effective heat illness prevention programs.

While the Roundtable supports some of the clarifying requirements, such as the requirement that there be enough shade to provide at least 25% of the workforce with shade without having to be in contact with each other, are very helpful, as with many of the provisions of the Question and Answer document issued in March, many questions of clarity remain. For example, with regard to water being "pure," how is "pure" different than "potable"? What is the temperature of "suitably cool" water? How do employers demonstrate that they have encouraged employees to cool down? And what, exactly, is meant by "close supervision of new employees"?

Ms. Treanor concluded by stating that the Roundtable appreciates the opportunity to address the emergency regulation. There is no question that heat illnesses and fatalities are tragic, sad, and appalling, but the Roundtable is not convinced that this emergency regulation is going to achieve the desired objective.

Marti Fisher, Policy Advocate with the California Chamber of Commerce, stated that the Chamber respectfully opposes the proposal to adopt the emergency changes to the heat illness regulation. However, the Chamber does support and appreciates some of the clarifying provisions, such as the elimination of the preventive recovery period to be replaced by the clear provision requiring cool-down breaks in the shade. "Preventive" and "recovery" are opposites, and did not make sense in the same provision. The Chamber appreciates that exception that allows cooling methods other than shade in situations in which it is not feasible to have shade up, and "impracticable" has been included for some provisions to allow for different, unique situations where the proposed requirements cannot be practically met. However, the Chamber does have some concerns.

The Finding of Emergency holds the proposal to be clarification of the existing standard, and while there are some clarifying provisions, there also are a number of new requirements that are more prescriptive and go beyond clarification. In addition, creating new and more prescriptive regulations will not result in more compliance from those employers that choose not to comply with the existing regulation. More effective enforcement of existing requirements to prevent heat illness in outdoor workers can do more to protect those workers than adopting more prescriptive burdens and rules.

Some provisions in the proposal require employers to expend precious resources they do not have to add personnel to monitor and record what they already are doing in compliance with the existing regulation. There is a cost associated with this, and in the current economic climate, there is no extra cash to spend, especially in construction, where they already are losing work. The Chamber asks for caution in evaluating the effectiveness of a regulation, if the Board should adopt the proposal, in the middle of the summer because training already has occurred, and it would be difficult to evaluate the effect of increased regulation when the summer is already underway.

Of primary concern to the Chamber is the creation of triggers for two different levels of temperature, which would require not only taking the temperature on a regular basis but also to write it down. High heat provisions, in particular, create a problem because they are subject to interpretation that can create further unwarranted liability for employers. The Chamber is concerned about the desired objective of the “buddy system” that the effective communication provision will not achieve. Who is qualified to observe employees for signs or symptoms of heat illness? A nurse? A doctor? This creates a liability for employers and for the individuals who are charged with the responsibility of observing for heat illness signs. Would the employer have violated the provision of observing if someone does suffer from heat illness? What is the definition of “fresh and pure” water? If water is not potable, it is not drinkable, so if it is drinkable, and it is potable, what does “fresh and pure” mean? While the Chamber appreciates the provision that provides an exception for having shade up if it is not feasible, what is “infeasible”? What is “feasible”? Ms. Fisher also asked when employers would be expected to have met the new training requirements. Will employers be out of compliance on the day the proposal is adopted if they have not trained their employees to the new requirements?

Ms. Fisher reminded the Board that the Chamber and other business groups have worked very hard to put together the Heat Illness Prevention Network in partnership with the Division. This created a powerful, effective communication tool for Cal-OSHA to notify and alert employers when there is a potential heat emergency and to remind employers of the requirements of the regulation and in recognizing heat illness. Once the Network was operational, the Chamber turned it over to the Division and asked that it be reactivated at this time.

In closing, Ms. Fisher stated that while Chamber appreciates the need for some clarity in the existing regulation, this proposal goes too far. If the Board does adopt the proposal today, the Chamber asks for a full and robust discussion in the advisory committee process when the permanent rulemaking process is undertaken.

Terry Thedell, Health and Safety Advisor for Sempra Energy Utilities, stated that Sempra supports greater enforcement of the existing heat illness standard for all California employers, but the additional proposed emergency measures under consideration would not necessarily reduce the frequency of heat illnesses that do not address enforcement of the existing provisions of the current standard. Furthermore, the proposed measures add an additional regulatory burden for employers with outdoor workplaces and a good record of years of heat illness prevention. Sempra derived its position from observations of at least two underlying assumptions in the proposed emergency action. The assumption exists that all California outdoor work employers are so similar in their lack of understanding of basic heat illness precautions that all employers warrant both clarifying and additional regulatory measures. In addition, there is an assumption by the Division that all California outdoor employers are experiencing an increasing trend of heat-related illness enough to warrant this emergency action across the board.

Sempra challenges both of these assumptions. First, as a California employer with employees working in all of the coastal, inland, and desert weather conditions in Southern California, Sempra has a long-standing work culture of heat illness precautions that pre-date the current heat illness standard, where Sempra’s employees are trained, equipped, and supported in dealing with extreme desert temperatures in accordance with the existing regulation. For example, last July, Mr. Thedell was at a maintenance job at a gas transmission pipeline on the Colorado River, near Blythe. Despite an early morning start, temperatures were well over 100° by mid-morning, and using provisions of the existing heat illness standard, Sempra employees were able to safely complete the job. In the less extreme coastal and inland areas where temperatures are more moderate but do experience heat

episodes, Sempra employees have also had heat illness training and are provided access to a variety of shade options in keeping with the current regulation.

The net result of these heat illness precautions led to the second assumption about perceiving upward trends of heat illness by the Division. Sempra has hundreds of employees working outdoors in the coastal, inland, and desert conditions in Southern California year after year with very few cases of heat-related illness and no upward trends. Sempra is not perfect, as it has had a very few instances of heat-related illnesses over the years, but efforts are redoubled when a heat-related illness occurs. Sempra is perfect, however, in never having a heat-related fatality in the millions of man-hours spent outdoors over the years. Sempra supports the enforcement of the existing heat illness standard but does not understand how the proposed emergency revisions will improve compliance with the existing standard. Furthermore, Sempra understands and applies the provisions of the existing heat illness standard. Sempra asks the Board to take the appropriate regulatory course in keeping with the overall California work experience and not assumptions. What is needed is more enforcement of the current regulation with problem employers.

Carl Borden, Associate Counsel for the California Farm Bureau Federation, also represents California Grape and Tree Fruit League, Nisei Farmers League, Ventura County Agricultural Association, Western Growers, and Breining Institute (collectively, "the Federation"). Mr. Borden stated that last year agricultural employers reported problems related to the current heat illness prevention standard. Those problems stemmed from the lack of clarity and specificity in the standard as to its requirements, especially its provision requiring employers to provide access to shade. The consistent message from those employers was, "just tell us what to do, and we will do it." Accordingly, DOSH was asked for clarification of the requirements so as to promote compliance with the standard and uniformity in enforcement. DOSH responded by revising, with stakeholder input, and releasing on March 17, 2009, the guidance document "Enforcement Questions and Answers."

First issued when the initial emergency regulation was promulgated in 2005, that document interprets the standard so as to guide DOSH personnel in enforcing it and in assisting employers in complying with it. The clarifications provided by the revised guidance document were appreciated, and employers believed those clarifications would promote compliance and enforcement uniformity. After the revised guidance was issued, the Federation coordinated seminars throughout the state at which 4,000 agricultural employers, both growers and farm labor contractors and their supervisors, were trained on the standard's requirements as interpreted by the guidance. Those employers accounted for more than 200,000 persons who worked on the state's farms and ranches in 2008. Seminar attendees were receptive of the interpretation set forth in the guidance, recognizing that by following the guidance's interpretations, employers would be deemed by DOSH as being in compliance with the standard. In addition, the Federation recognized that the clearer standards for drinking water, shade, and heat illness prevention compliance procedures specified in the guidance document would benefit agricultural employees and further reduce the occurrence of heat-related illnesses in outdoor workplaces in California.

To the extent it codifies the guidance document's interpretations, the Federation believes agricultural employers will be able to comply with the proposed emergency standard, especially given the efforts to train and educate them that have already been made during this spring. DOSH personnel, of course, must also be trained to enforce the emergency standard reasonably and consistently throughout the state.

The Federation is concerned, however, that the proposal's high heat provisions, which are new to the standard and not found in the guidance document, will re-inject ambiguity and uncertainty into the standard. Specifically, the Federation is concerned that the opinions of a DOSH inspector and an employer may differ substantially as to whether the employer has implemented one or more of the specified heightened procedures "to the extent practicable." Again, DOSH personnel will need to be carefully trained on how to enforce these requirements reasonably and consistently so as to promote compliance with these new provisions.

Moreover, the addition to the standard of requirements not found in the guidance document will require a quick and extensive supplemental training and education efforts in the midst of the current heat season so as to retrain employers in what will now be expected of them. Coming on the heels of training on the guidance document that should have sufficed throughout at least the current heat season, more training on these new requirements will be inconvenient, frustrating, and confusing for many employers who will need to immediately revise their own heat illness prevention compliance procedures.

Despite its concerns, the Federation believes its members would be able to cope with and comply with the emergency regulation as long as DOSH reasonably and uniformly enforces its provisions. The Federation cautions the Standards Board and the public not to assume the emergency standard, if adopted, would eliminate all heat-related 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 Federation appreciates that the Finding of Emergency recognizes that "it may never be possible to eliminate all deaths and serious injuries due to heat exposure."

Dr. Frisch asked what percentage of the Federation is aware of the existing regulations. Mr. Borden responded that it is impossible for him to say. The existing regulation has been in effect for four years, and the Federation has engaged in seminar training for thousands of employers. The California Farm Bureau Federation has about 35,000 farmers, not all of whom directly employ agricultural workers, but he believes that the licensed farm labor contractors in the state, which employ approximately half of all the agricultural employees in the state, should be aware of the regulation by now.

Dr. Frisch stated that he becomes concerned when he reads in agricultural newsletters and other publications that agricultural workers in environments of 100° or more do not have shade and do not have water. He stated that this is not an issue of tidying up or clarifying the regulation. He asked what is going on when an employer is not providing water and shade in temperatures of 100° or more. It seems that every article he reads has to do with the agriculture industry. It does not matter how many regulations there are, or how clear they are, when it is over 100° and a worker does not have access to shade or water, there is a problem that has nothing to do with the regulation. Section 3203 should address those needs. The employer's injury and illness prevention program should address that. This is already a fundamental part of OSHA regulations in the State of California, and it is a fundamental issue of human rights. Dr. Frisch is appalled when he is reading these articles. For an employer to ask for more clarification is not adequate in this case.

Mr. Borden responded that with respect to clarification of the shade requirement, the current standard merely says that access to shade must be provided to employees who believe they need a preventive recovery period. The proposal will set a temperature at which the shade actually has to be up for at least 25% of the employees.

Dr. Frisch asked why employers need a trigger temperature. He asked why the clarification is necessary; why do employers not put the shade up in any event. He expressed his opinion that the trigger temperature is just an arbitrary number and should not be necessary for employers to realize that people working in the sun are going to need access to shade and water.

Mr. Borden responded that the fiscal realities in the field make it difficult to provide shade for crews of two and three hundred employees all at once.

Dr. Frisch stated that at 70° or 80° employers will have the same difficulties.

Mr. Borden stated that the proposed emergency standard recognizes that below a certain temperature, in this case 85°, the risk of heat illness from not having shade is low enough that to impose this requirement is not necessary.

Dr. Frisch expressed the hope that Mr. Welsh's briefing would provide some science to support that statement, because he is not convinced.

Silas Shawver, a staff attorney with the California Rural Legal Assistance Foundation (CRLA), stated that it is tragic to see farm workers die every summer from heat illness. Although the proposal will improve the health and safety of the workforce, there are provisions in the proposal that will actually weaken the existing standard by lowering protections for the workers. He expressed his belief that the Board does not have the authority to adopt an emergency standard that lowers the protections in the existing standard. The emergency process is not a process for lowering standards. CRLA has submitted written comments that suggest language that eliminate that weakening of the standard.

The primary weakening in the proposal is with regard to shade. The current standard mentions examples of shade, and the emergency standard adds new examples such as trees and vines as sources of shade for workers. He stated that vines do not provide adequate shade, and they present hazards such as dust, wasps, and spiders. If employers in the grape industry determine from the provisions of the proposal that vines are adequate shade, workers will have much less protection and much less access to shade. The season will start in full in about a month, and the proposal is going to make the problem much worse in a very rough industry with thousands of workers.

In addition, the proposal provides clarification about the proximity of the shade to the workers. However, it states that the shade can be no further than a five-minute walk from the work area to the shade. If workers have the right to ten-minute rest periods, they will spend their entire rest break walking to and from the shade with no time to actually sit and rest in the shade. The employer may as well not have the shade for all the good it would do to be so far away.

Mr. Shawver went on to state that the 25% requirement means that 75% of the work force must either forgo the shade or find shade in an unsafe, unsuitable place that does not provide the same cooling effects as the shade. Simply stating that the shade must be adequate for 25% of the workforce does not address the problem of the workers not having access to shade because it indicates that the other 75% do not need access to shade. Further, there is nothing in the proposal that gives the worker the right to use the shade. It states that the shade must be up, but it does not have to be available to workers on their rest periods or during meal periods. It simply has to be there. The trigger temperature in the proposal requires the worker to attempt to make a medical assessment

of his or her health and then ask for some extra special treatment. There is an economic reality in the field that prevents workers from doing that.

The exception for infeasibility is not in the existing standard, and it provides a mechanism for the employer to argue that because it is infeasible to put shade up, it is not necessary. That puts the burden on the worker who is trying to keep his or her job to ask for shade. Although such an exception may be necessary for construction or road work, infeasibility is not a valid argument in agriculture. Agricultural employers can put up shade in the area where the work is occurring.

Although it is known that workers need to use the shade and they need to take a rest in the shade to cool down, the only way the worker gets it is by having to know whether or not he or she actually needs it as protection from overheating; it requires the worker to request something different than what the other workers do not get and it puts the worker's job at risk.

Josefina Morales, an agricultural worker, stated that she was picking string beans last year when the temperature reached approximately 103°. She told her husband that she was not feeling well, and he told her to sit down and drink some water, but there was no shade available. Drinking the water did not alleviate the symptoms because she was not in the shade. Shade is as necessary as water to help the workers in the fields.

Dr. Frisch asked whether Ms. Morales's employer made shade available to her. Ms. Morales responded in the negative.

Lorenzo Morales, an agricultural worker and Josefina's husband, stated that he performs different kinds of agricultural work such as topping garlic and onions and picking olives. He stated that while picking string beans in extreme heat last year, he began to feel nauseous and weak. When the farm labor contractor arrived, Mr. Morales was sitting. The farm labor contractor asked Mr. Morales what was wrong, and Mr. Morales told him that he was not feeling well. The contractor told Mr. Morales to take a break and come back to work when he felt better. When Mr. Morales did not feel better after a rest period, the contractor suggested that the illness was the result of the road Mr. Morales took to work in the morning or perhaps the driver of the minivan had the air conditioner up too high on the way to work. The foreman told Mr. Morales to turn a box over and sit under it for shade because there was no other shade available. Mr. Morales stated that similar incidents occur during the grape harvest. The employer indicates that there is sufficient shade in the form of vines, but there are tall vines and short vines. The vines do not provide adequate shade.

Dr. Frisch asked whether Mr. Morales had ever received training about heat illness. Mr. Morales responded that the contractor never said anything about heat illness.

Olimpia Dominguez, an agricultural worker, stated that while her parents were working in the garlic field, they saw that everything was really bad in the workplace. They called the CRLA office to ask that the bathrooms and the water be checked. In addition, her mother complained that the shears for cutting the garlic had not been provided to the workers, nor were the scissors for cutting the leaves. She also complained that the bathrooms were dirty. The same day, Ms. Dominguez's parents were fired, and they have not been offered a job since that time. Ms. Dominguez stated that a lot of people are afraid to speak up because they are afraid to lose their jobs. There are always consequences.

Elicelda Morales works with her parents during summer vacations from school. During the last three or four years that she has been working with them, there was no shade. This year, when she was

working with her parents again, there was shade, but she had to walk longer than five minutes to reach it. The restrooms are dirty, also. Yesterday, a man came and told the workers that they need shade and they are to wash their hands every time they have to wash their hands. When the man spoke to the employer about the dirty restrooms and the lack of water, the employer told him that he was busy doing something else. So, the man moved the restrooms closer to the workers himself, filled the tank with water so the workers could wash their hands, and cleaned the restrooms himself.

Adeleo Leyva has worked in the fields for the last 17 years harvesting fruits and vegetables. He stated that grapevines are not adequate shade, and the shade that is available is five minutes away. On a 15-minute break, he has to walk five minutes to the shade and five minutes back, leaving him only five minutes to rest. When he has to walk for five minutes to reach the shade, he arrives tired, and walking five minutes back leaves him feeling even more tired. In this case, 15 minutes is not enough. The shade provided by the growers is under the grapevines, but you cannot sit under the vines because of the pesticides, insecticides, and insects. Certain insects can cause infections, and the workers do not want to sit under them.

Petra Tinoco has been working in the fields all over the central valley for many years. She began when she was 14 years old. She stated that there are supposed to be two bathrooms for each gender, but there are not. In addition, for many years there was no potable water, and the workers had to get their water from the canals, rivers, or creeks. Ms. Tinoco stated that agricultural workers harvest the food that the Board and the public eat, the work is difficult, and workers need to have shade and water. She stated that drinking too much water when she is in the sun makes her feel sicker. Ms. Tinoco expressed her hope that the Board would adopt the proposal to make shade more available to the workers in the field.

Dr. Frisch asked Ms. Tinoco when she had to get water from canals, etc. Ms. Tinoco responded that that had occurred in the 1970s.

Ephraim Camacho, a Community Worker with the Migrant Farmworker Project of CRLA, stated that he has had experience not only working in agriculture but also observing. Although employers have supplied more shade this year, there are still crews that lack shade. In fact, on the way to the meeting this morning, they passed a field that had shade up, but there was a car parked under it. Of major concern are the vines. For example, when working with raisin trays, the vines are very short, and it is impossible to sit under them without exposing at least part of the body to the sun. Another problem is wasps, black widow spiders, and other insects. In addition, workers are afraid to ask for shade or water for fear of retaliation, sometimes including job termination. A trigger temperature of 85° is too high when people are performing strenuous work such as moving ladders and carrying heavy sacks.

Reyna Castellanos, representing the Dolores Huerta Foundation (DHF), stated that she has served the farm worker community for many years and has been a farm worker herself. She stated that she has seen firsthand a person spending their last minutes in a hospital bed. She was in the hospital during the death of Jorge Riva, a 37-year-old who had been working in the fields for 19 years. Mr. Riva had had the same employer for all of those years, and the day he died the temperature started at about 95° and grew progressively hotter. Having worked in the fields for so many years, he did not think anything of it when he started feeling a little tired. He thought perhaps he was working too hard, but he did not think it had anything to do with the heat. He had never had training regarding heat illness, and he did not know the symptoms of heat-related illness. He left behind a wife and two young children. Governor Schwarzenegger asked the workers to prove that there were incidents where no

shade was being provided, where workers had no access to water, so they provided such proof. They traveled throughout the area between Sacramento and Manteca, and they were able to demonstrate that there were many worksites where shade was not being provided, where restrooms were not being provided, and where there was no water available for the workers. It is difficult to believe that after all of the effort that went into the existing standard, there are still workplaces where workers are not provided with shade, water, or restrooms. It is apparently too difficult for employers to care for their employees when those employees are caring for the land.

Anne Katten, with CRLA, stated that vines are not an acceptable form of shade, and it is offensive to her that they are being proposed as a method of shade. If workers are sitting in the vineyard under the vines, they cannot be adequately viewed by their supervisors, and if they develop symptoms of heat illness, no one will know. She stated that the concept of high heat procedures is a really good idea, and the sort of heat procedures needed to address the emergency are extra hourly breaks at 95° and above, shade for all workers and rest breaks readily available. The provision for a buddy system is also an appropriate measure, but the requirements of having a communication system, observing workers for heat illness, and encouraging them to drink water are basic requirements at any temperature. The state's own data show that in 2005, there were heat illnesses at temperatures as low as 75°. In 2006 there were incidences at temperatures as low as 80°. Some of them occurred at the tail end of a heat wave, and people were worn down by the heat of the preceding days. This year in Salinas, heat illness has already occurred below 90°. In addition, shade needs to be provided for all of the workers, not just 25%. The work can be staggered if shade cannot be provided to all of the workers at one time. It is critical that the shade is closer than a five-minute walk, and CRLA believes that shade is always feasible in agriculture and any standard should be based on safety of providing shade rather than feasibility. She stated that the provisions in the proposal for water, training, and having someone designated in charge of emergency response are acceptable, and the 25% shade provision is acceptable as an interim measure, although it should be for the entire workforce.

Chair MacLeod asked Ms. Katten whether she would prefer the proposed emergency standard without any changes or the existing standard. Ms. Katten responded that she would prefer the current regulation because the proposal weakens the existing standard. She agreed with Mr. Shawver that it is within the Board's power to make amendments to the proposal or adopt only parts of it.

Dr. Frisch stated that the stories from the farm workers range from frightening to appalling. He asked Ms. Katten how much of the problem out in the field is due to lack of compliance with the existing standard and how much is due to not understanding the requirements. Ms. Katten responded that although it is difficult to quantify, the testimony heard today also spoke to the problem that workers do not have the power to take voluntary breaks, so it speaks to both—there is a big enforcement problem but also within the current regulation too much relies on individuals taking action that they do not have the power to take.

Suzanne Murphy, the Executive Director and supervising attorney of WorkSafe, also spoke on behalf of the Southern California Committee on Occupational Safety and Health (SoCal COSH). She stated that the proposal is an abuse of the emergency rulemaking procedure. The alleged emergency has been going on for four years, or at least a full year, during which time there was ample opportunity for a regular rulemaking. However, despite numerous requests from worker advocates, Cal-OSHA had refused to undertake a regular rulemaking. The same emergency will occur every year from now until eternity until Cal-OSHA gets serious about adopting a clear and strong set of heat illness regulations, not the give-a-little, take-a-little mishmash that is before the Board today, which takes away more protections than it provides.

If Cal-OSHA did not know before, they learned last summer that there is widespread noncompliance with the heat illness standard, especially among farm labor contractors. There is a lot of dispute and confusion about just what the regulations require, and there have been inconsistencies in enforcement policies and practices. Although Cal-OSHA has ramped up its enforcement efforts and has been working hard to improve training and consistency about citation criteria, Cal-OSHA now tries to claim that eight Orders Prohibiting Use (OPUs) that were issued this year in an eleven-day period between May 11 and May 22, which were issued mostly against small farm labor contractors that employ an infinitesimal fraction of California farm workers, none of which were challenged on review through DIR, establish a pattern of significant noncompliance with the existing heat illness standard and constitute an emergency that threatens the public health, safety, and general welfare. WorkSafe and SoCal COSH applauds Cal-OSHA's forceful use of OPUs, but they have to wonder whether the emergency upon which Cal-OSHA and DIR are focused is the fiscal emergency in Sacramento, not the human emergency in the fields.

Perhaps more than anything, this proposal is an exercise of creative definition writing. Grapevines are viewed as shade, never mind that the vines do not necessarily block sunlight, workers have to crouch under them to get any relief, and they may be exposed to pesticide residues, dust, and black widow spiders when they do. However, Cal-OSHA is saying that the shade that 17-year-old Maria Vasquez was entitled to was that provided by the vines she was trimming the day she died in May 2008 in temperatures that never reached 95° in Lodi. She was working a nine-and-a-half-hour shift, and she was a minor. Ms. Murphy asked how the redefinition of shade addresses the claimed emergency, and what good are the so-called high heat procedures, which would be triggered at 95°, and would not have been triggered in the case of Maria Vasquez.

Equally puzzling is Cal-OSHA's use of the term "emergency." Ms. Murphy stated that it cannot be an emergency if it has been occurring for over four years. The emergency amendments include a few minor improvements over the existing standard, but they mostly make significant concessions demanded by growers and other employers—vines as shade, shade as far as a five minute walk away, and exceptions where required measures are infeasible, in the case of the shade requirement, or not practicable. For all the heightened requirements, these are exceptions that are broad enough to drive a truck through, and these amendments will weaken or negate many of the existing protections for many workers in many contexts.

The decision to rush this mixed bag of amendments through the Standards Board on an emergency basis with only one week's notice to worker advocates not only bypasses the usual years-long stakeholders process that Cal-OSHA touts as the best way to craft the regulations effectively prevented workers from being able to provide the necessary input to support real improvements to strengthen the heat illness regulation, which would genuinely protect California farm workers and other who perform strenuous work outdoors in the summertime from illness and death, and this proposal if adopted will only lock in significant concessions to growers for another season and through the end of the year. WorkSafe and SoCal COSH urge the Board to halt the proposal, or at a minimum, to eliminate the provisions that will weaken existing legal protections before sending it on to the Office of Administrative Law.

John Vocke, an Attorney with the Pacific Gas and Electric Company (PG&E), stated that PG&E supports the comments of the Phylmar Regulatory Roundtable and the California Chamber of Commerce regarding the proposed emergency standard. In terms of the necessity of an emergency proposal, PG&E also supports Ms. Murphy's comments. PG&E does not believe that the proposal

meets the definition of an emergency standard as defined in Government Code 11346.1. This type of serious worker concern can be addressed through the normal rulemaking process, which should be perpetuated to let all of the stakeholders participate in the process.

Larry Pena, Manager of Corporate Safety Policy and Regulation for Southern California Edison, spoke in support of the California Chamber of Commerce and the Phylmar Regulatory Roundtable. He stated that Southern California Edison has many employee classifications that can be captured under the wide net of “outdoor workplaces” where the high heat procedures and the definition of when it becomes practical to establish a buddy system would be impractical. Such employee classifications include helicopter personnel, specifically pilots, personnel that are dropped off on a mountaintop with a pack and hike down these mountainous areas to perform surveys, meter readers, field service representatives, and patrolmen that patrol dirt roads from end to end, tens of thousands of miles of distribution transmission voltages. Beyond the electrical utility industry, there are other areas that are of concern, such as postal carriers, California Highway Patrol motor officers, Department of Forestry, etc. He concluded by asking the Board to carefully consider the proposal before adopting it.

Chairman MacLeod broke for a ten-minute recess at 11:40 a.m. and reconvened the meeting at 11:50 a.m.

Rick Delao, President of the Communications Workers of America (CWA), stated that CWA commends Cal-OSHA for establishing the current heat illness prevention standard and strongly supports the proposed amendments. Within the State of California CWA represents 51,000 workers who are often exposed to unsafe and unhealthy working conditions often exceeding 85°. They perform the work above-ground, within underground confined spaces, and confined attic spaces in people’s homes performing their construction, engineering, insulation, maintenance work for the communications companies.

CWA often receives complaints about unsafe and unhealthy working conditions from telecommunications technicians performing their work in hot environments. Issues of concern include inadequate protective equipment, supplies of fresh, potable water, excessive work periods with inadequate breaks, lack of training and education specific to heat illness, and work in hot environments. Fortunately, with the union’s input, in most cases the great majority of member safety and health concerns are successfully dealt with through the contractual and joint labor-management process before the involved workers develop severe health problems related to heat illness. However, given the general lack of compliance with the current heat illness standard by employers of CWA represented telecommunications employees within California, these worker complaints continue to be received frequently. Unfortunately, this conduct has been directly related to members’ loss of life.

For example, during July 2004 a former technician and member of CWA Local 9511 in Escondido, California, was overcome by excessive heat and died of heat stroke while placing telecommunications cable in the extremely hot, arid working conditions in the high desert east of San Diego. If this employer had been in compliance with the provisions of the Cal-OSHA heat illness standard, as well as the proposed amendments to the standard considered today, he would still be alive. Instead, the effects of his early death are experienced every day by his wife and children, as well as his union brothers and sisters. Therefore, CWA supports Cal-OSHA’s action to ensure covered employers are providing California workers, including affected telecommunications technicians, with safe and healthful working conditions.

In particular, CWA stands strongly in favor of the agency's proposed revisions that would put in place procedures regulating when and how to provide shade and other protective high-heat procedures as well as the development and provision of training of both workers and supervisors and the translation of employer procedures for compliance with the standard's requirements into written documents with such documents being made available to workers and their representatives upon request.

Dr. Frisch asked Mr. Delao whether the employer was found to be out of compliance with the existing regulation in the fatality he cited in his presentation. Mr. Delao responded that the employer was found to be out of compliance with the existing regulation in 2004.

Cynthia Rice, the Director of Litigation, Advocacy, and Training for CRLA, stated that this does not have to be an up or down vote, which has been suggested. While CRLA shares the opinion of many other stakeholders that this proposal, as written, does not address the emergency and is actually outside the scope of the Board's authority, some of the provisions will improve and address the emergency situation that has been identified in the Finding of Emergency. However, CRLA believes that a motion approving or adopting the recommended amendments with certain exceptions would improve the situation for California workers.

A motion to adopt the emergency regulation but to delete the provision in subsection (d) that refers to vines as part of the definition of shade would eliminate the problem of increasing the risk to workers by subjecting them to taking their shade under a vine where they might be exposed to dust, spiders, or wasps. Similarly, under the access to shade, section (d)(1), eliminating the five-minute walk to shade eliminates the definitional threshold that many employers will begin to impose as opposed to determining what the most practicable, closest place that shade can be located in order to afford respite to the workers.

The "exemptions" section, section (4)(A), and its infeasibility standard is a major diminution of the current regulatory section, so eliminating that would eliminate at least one argument that it does not fulfill the emergency criteria, and it does not increase the risk to workers by creating an exception you can drive a truck through. The fundamental problem with the high heat procedures is that all of the provisions, with the exception of the "buddy system" provision, should exist and be addressed in the injury and illness prevention plan now and to suggest that they are only triggered when high heat conditions are in effect at 95° or greater suggests that employers do not have to implement these procedures when otherwise appropriate. Thus, in order to keep the proposal within the emergency regulation statement of purpose, the reference to high heat procedures should be eliminated, and the proposal should just indicate that these procedures should be included with respect to all plans to address heat illness and prevention. With those changes, the proposal would improve compliance with and enforceability of the standard and provide additional protections to workers and be within the emergency power. Without the changes, it is beyond the power of the Board to adopt the proposal.

Mr. Washington asked in what way the suggested changes would help with the enforcement or compliance of the regulation. Ms. Rice responded that the changes would help by specifically identifying some circumstances under which shade has to be provided and by articulating the steps necessary to prevent heat illness.

Dr. Frisch asked whether, since CRLA is encouraging the Board to consider modifying the proposal, Ms. Rice considered the revisions to the shade provisions as suggested by other commenters within the Board's power as well. Ms. Rice responded affirmatively. Dr. Frisch stated that he is not inclined, after previous experience, to try to make changes to the proposal at a Board meeting because it becomes very difficult. Ms. Rice responded that while she could sympathize with Dr. Frisch's reluctance, CRLA's suggestions are fairly manageable.

Chair MacLeod echoed Dr. Frisch's concerns about revising the proposal during the Board meeting. He stated that one of his greatest fears when he was the Executive Officer was that the Board would modify regulations at a meeting on the spot. There is no vetting process, no legal counsel, or any of the other safeguards built into the regular rulemaking process. He expressed his belief that it is not the right thing to do.

Dr. Robert Harrison, an occupational health physician at U.C. San Francisco, a senior epidemiologist with the California Department of Public Health, and a former member of the Standards Board, stated that a lot of people look to California to lead the way in occupational safety and health regulations, and he expressed his belief that the Board should be congratulated for adopting the existing standard in 2006 and for revisiting it in this way. He stated that it is clear that all involved are engaged in trying to improve worker safety and health.

Dr. Harrison stated that in 2005, he sat on the Board and in many advisory committee meetings during the development of the emergency standard in 2005 and the permanent standard in 2006, and he heard many of the same arguments heard today. There really is not anything substantially different or new about the arguments. When the emergency standard was adopted in 2005, it was with the acknowledgement that it would provide the opportunity to fully vet, refine, and improve a permanent standard. However, the 2005 emergency standard and the permanent standard adopted in 2006 are almost the same. There is a momentum that comes into play in the adoption of an emergency standard in which the permanent standard tends to look very similar to the emergency standard.

Dr. Harrison went on to state that when the standard was adopted in 2006, it was a very substantial step forward, but it was not sufficient. He stated that, physiologically, many individuals can go from nausea, dizziness, fatigue to heat prostration and death within a couple of hours. Therefore, a sufficient high level is necessary to protect workers from heat illness. In 2006 when the permanent standard was adopted, that thin margin was not apparent. In the intervening years, it has become clear that something needs to be done to improve the current standard.

Dr. Harrison expressed his belief that it is not just a matter of compliance. Cal-OSHA has done more to aggressively enforce this health and safety standard than any health and safety standard that he voted on during his four years on the Board. They should be applauded and encouraged in those efforts, but there is not much more in the way of compliance that can be done. This is a time of diminished resources, and it is unrealistic to think that Cal-OSHA can do more than they have in the way of compliance.

Based on his own research and analysis, Dr. Harrison stated that the rates of heat-related illness have not decreased significantly since 2005 and 2006. Some of that may be due to more workers coming forward and reporting, but just looking at the rates, it does not appear that the standard has had an effect on the occurrence of heat illness. Cal-OSHA has demonstrated that in the Finding of Emergency. Dr. Harrison favors taking some action to improve the existing standard, and the

question before the Board is to consider whether adopting the proposed emergency regulation moves the ball further down the field or if the proposal is fatally flawed.

He expressed his opinion that the proposal improves certain aspects, including the establishment of a trigger temperature, which he favored in 2005. Whether 85° or 95° is the right temperature level requires further discussion. He expressed his opinion that the definition of vines as shade is a fatal flaw; simply put, cows and dogs can rest under trees and vines, but humans should not. It is a matter of common sense, dignity, and humanity, and that provision should be eliminated. The five-minute distance begins to move toward a concept that shade needs to be readily available.

In 2006, a clear message was needed that the employer, either the crew boss or the supervisor, needs to be trained and have an understanding that when the temperature gets too high, it is incumbent upon the employer to proactively inform workers that they need to take a work break. The language in the proposed emergency standard is “encourage,” and that may be subject to a lot of interpretation, but it begins to move in the right direction of taking a proactive step to inform workers in the fields that it may be time to take a break. The current standard does not contain that provision, and it is an important step.

Dr. Harrison closed by stating that he supports the Board in considering either adopting the proposed emergency standard with amendments or instructing the Division that there needs to be serious stakeholder engagement to develop an improved permanent standard that would take into account the concerns expressed. The risk in going that route is that there will not be anything better in place for this summer, and it is probably going to be a very hot summer.

Dr. Frisch asked Dr. Harrison whether there is a “bright line” at 85° or 95° or should a much lower trigger temperature be established. Dr. Frisch stated that he is struggling with establishing a threshold for shade, given that, based on what he has read, there is not a bright line. Dr. Harrison stated that there is a continuum, but if it helps employers to have a line, it is not unreasonable to look at a trigger temperature around 75° or 80°.

Dr. Frisch asked Dr. Harrison whether he believes the existing regulation is enforceable as written. Dr. Harrison responded that he would leave the question of enforceability to Mr. Welsh, as he had more knowledge of that area. He stated that his concern is not as much about enforceability as it is about whether or not there is a sufficient margin of safety.

Dr. Frisch asked whether Dr. Harrison believes the existing regulation is understandable as written. Dr. Harrison responded that there is a basic understanding of the regulation as written, but the question is whether the Board can provide the Division with more tools that would help with enforcement and compliance and therefore improve the standard.

Dr. Frisch stated that he has seen repeated examples of people who are either not understanding the rules or not understanding what the regulation is intended to capture, and Dr. Harrison had spent a lot of time and effort trying to get a regulation that was understandable. Dr. Harrison responded that he understood it.

John Robinson, CEO of the California Attractions and Parks Association (CAPA), expressed concern about treating every industry and every outdoor worker the same. The approach that works in a rural field is not the same environment as working in an amusement park, and there is a vastly different sort of work with different demands regarding exposure to heat. CAPA asked the Board to realize

the differences between industries before imposing such far-reaching and broad requirements for outdoor workers. Amusement park workers have access to shade, and they work in an environment with very aggressive cooling methods. It is vastly different than working in a field or on a construction site. The cooling methods recommended for agricultural environments do not make sense in an urban environment such as a theme park or an amusement park.

Dr. Frisch asked Mr. Robinson whether there have been heat illness cases in the amusement park industry. Mr. Robinson responded that there were two or three in a Santa Clara water park. He further stated that although the industry is not immune from heat illness, requirements for access to water and shade tend to be written for agricultural work or construction work, and the environment in an amusement park or theme park is not taken into account.

Dave Harrison, Safety Representative for Operating Engineers Local No 3, stated that there had been a number of comments today about heat illness incidents that all could have been prevented with compliance with the current regulation. He stated that although the Finding of Emergency had included a table that indicated the number of heat illness injuries since the existing standard was adopted, he would like to see the number of citations for violation of the heat illness standard that were issued and the number of inspections performed, specifically employee-generated inspections. He stated that the majority of the testimony received today had been from the agricultural industry, and there is a general fear of retaliation against employee complaints. He stated that before the Board adopt a standard that will be a blanket standard, perhaps an industry-specific standard should be adopted.

Greg Avalos, Safety Coordinator for Pioneer, stated that the worker protections addressed by the proposal are not new and neither are the basic human needs of access to shade and water. He stated that the temperature definition in the proposal is unclear whether temperature is to be measured by a thermometer or a calibrated monitor, and that requirement should be clarified. He expressed concern regarding the clarity of the proposal, including the "cuculoris affect" from trees and vines, the definition of blockage of direct sunlight, how to prevent pesticide residue from contaminating the water for the employees, whether the exception in subsection (4)(A) is applicable to personnel that spend only a few minutes in the field, acclimatization requirements, and clothing requirements.

Jay Weir, Senior Environmental Health and Safety Manager for AT&T, stated that in the 2004 fatality cited by Mr. Delao, he was the senior investigator on that case, and heat was not the direct cause of the fatality.

Don Bradway, representing the Associated General Contractors of California (AGC), spoke in support of the comments made by the Phylmar Regulatory Roundtable and the California Chamber of Commerce. He expressed the opinion that an emergency standard is not necessary at this time. Given a choice between the existing standard and the proposed emergency standard, the AGC would prefer the existing standard. If changes are necessary, they can be developed through the regular rulemaking process with full stakeholder input and the advisory committee process. He stated that when the existing standard is enforced, it does work, and AGC believes that Cal-OSHA is doing a good job. He stated that there are employers that do not care what the standard says; they are bad actors, and they should be cited. However, in trying to address the few bad actors, the employers that are good actors should not be punished as well. He stated that proper training is the most important factor in whether or not employers and employees pay attention to the signs and symptoms of heat illness and how to prevent it. In addition, training ensures that employers are aware of legal ramifications of noncompliance with the standard. He stated that the AGC would like to see more

enforcement of the existing standard, with a focus on the employers that are not complying with the existing standard.

Mr. Prescott asked Mr. Bradway whether, from an insurance standpoint, the increased training has increased reported incidences of heat illness. Mr. Bradway responded that although there is an increased awareness of heat illness because of the training, he was uncertain whether the reported incidents had increased as a result of the training.

Peter Lupo, representing the San Diego AGC, spoke in support of Mr. Bradway's comments. He stated that a poor economic climate is not an acceptable excuse for a lack of enforcement. He stated that the employers that are willfully noncompliant with the existing standard will not comply with the proposal either, should it be adopted. He stated that the contractors that comply with the existing standard are being hurt by those that do not comply because compliance with the standard costs money, and those noncompliant contractors are submitting lower bids. He stated that enforcement of the existing standard could level the playing field.

Bruce Wick, Director of Risk Management for the California Professional Association of Specialty Contractors (CalPASC), spoke in support of the California Chamber of Commerce position. He stated that if the emergency proposal is adopted, CalPASC would like to work with the Division on understanding and giving good examples of what is infeasible and what is not infeasible so that employers have some real guidance for the shade requirement.

Steve Johnson with the Associated Roofing Contractors of the Bay Area Counties (ARC-BAC) spoke in support of the comments made by AGC, the Phylmar Regulatory Roundtable, and the California Chamber of Commerce, and he stated that roofers face unique situations and challenges as far as providing shade to their employees. He stated that the ARC-BAC would appreciate the opportunity to work through the advisory committee process to craft a regulation that would be fair and equitable to all industries.

Steve Hooper, Safety Manager for Unger Construction Company, spoke in support of the AGC and the California Chamber of Commerce. He expressed the opinion that the proposed emergency standard would not clarify the existing regulation; rather, the detailed requirements in the proposal could create more problems.

John McCoy, Safety/Environmental Consultant with Lakeview Professional Services, stated that as soon as the existing standard was proposed in 2005, his company developed a program of training employers and employees in both English and Spanish on how to recognize the signs and symptoms of heat illness and how to prevent it. He stated that additional amendments and changes to the existing standard may not be the answer, but training and enforcement may be more effective. He agreed with Mr. Lupo that compliant employers are losing business to employers who are not compliant with the existing standard.

Kevin Bland, speaking on behalf of the California Framing Contractors Association and the Residential Contractors Association, spoke in support of the comments made by Phylmar Regulatory Roundtable and the California Chamber of Commerce. He expressed the opinion that the issue is not one of enforcement of the existing standard but rather of compliance. He stated that perhaps the educational and community outreach efforts should be increased and maintained. He stated that there is no one-size-fits-all approach that will work for all industries.

Howard Rosenberg with the University of California, Berkeley, stated that he has trained employers regarding the requirements of the existing standard for several years. He stated that there is a need for clarification of the existing standard, and he appreciates the stated purpose of the proposed emergency regulation, but the proposal leaves important questions unanswered and it raises new questions. He stated that the cause of noncompliance with the existing standard appears to be poor understanding. He expressed concern that elements of the proposal deviate from the Division's Question and Answer document and other presentations. He stated that the efforts that would be involved in implementing the proposed emergency changes would be more effectively spent in helping employers better understand the dynamics of heat illness.

Bill Taylor, representing the Public Agencies Safety Management Association (PASMA), expressed the opinion that the Finding of Emergency was based on flawed conclusions. He stated that the fact that there is widespread noncompliance with the existing regulation is not a reason to promulgate an emergency regulation.

Michael Herges, Safety and Health Services Manager for Granite Rock, spoke in support of the proposed trigger temperature, stating that there is nothing in the proposal preventing employers from erecting shade at lower temperatures, but it is advantageous to set a point where employers know they are required to erect shade. He stated that the proposal would also be helpful in avoiding different interpretations of the requirements when it comes to enforcement and appeals of citations.

Jere Ingram asked how the current budget crisis would affect the Board. Ms. Hart responded that it has been a challenge to cope with spending restrictions and freezes, she did not have any insight as to what would happen next. She asked Mr. Duncan if he had anything he could share, and he responded in the negative. He stated that the Governor's May Revise proposal, contained a proposal to move both the Division of Labor Standards Enforcements budget and the remaining portion of the Cal-OSHA programs budget from the General Fund to user funding in lieu of deep spending cuts.

Mr. Bland, speaking on behalf of the Pacific Drywallers Association, urged the Board to vote affirmatively for the Rolling Scaffold proposal on the Business Meeting Agenda. He stated that the proposal had been developed through a consensus among labor, management, and the Division through the advisory committee process, and it is a very good, workable, safe regulation. He also welcomed Mr. Prescott to the Board.

C. ADJOURNMENT

Chair MacLeod adjourned the public meeting at 1:17 p.m.

II. PUBLIC HEARING

A. PUBLIC HEARING ITEM

Chair MacLeod called the Public Hearing of the Board to order at 1:18 p.m., June 18, 2009, in the Auditorium of the Harris State Building, 1515 Clay Street, Oakland, California.

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

1. TITLE 8: **GENERAL INDUSTRY SAFETY ORDERS**
Division 1, Chapter 4, Subchapter 7, Article 4
Section 3277
Fixed Ladders

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.

Bill Taylor, Safety Manager for the Public Agency Safety Management Association, stated that when larger workers reach the top of the ladders, where the distance between the guardrails is 24 inches, they do not fit and there is a danger of the workers unhooking the ladders, which defeats the purpose of the safety system. He suggested that the distance be extended to 36 inches to avoid that problem. He also stated that workers prefer a harness system rather than a safety cage. Mr. Taylor suggested also that the platform guardrail be extended higher rather than extending the entire cage.

John Vocke, an attorney with Pacific Gas & Electric Company, recommended that the ladder safety systems for tower, water tank, and chimney ladders required in subsection (m) be extended to all fixed ladders, as the ladder safety system provides more effective protection than the ladder cage.

2. TITLE 8: **GENERAL INDUSTRY SAFETY ORDERS**
Division 1, Chapter 4, Subchapter 7, Article 116
Section 5306
Electric Blasting in Proximity to Radio, Television or Radar Transmitters

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 on this proposal.

Mr. Jackson expressed concern regarding the difference between thoroughfares and roads regulated by the Manual on Uniform Traffic Control Devices (MUTCD) and private roads where there is no authority. He asked whether the required language for the sign for private roads is any different than the language required by the MUTCD. Mr. Manieri responded that there is a slight difference, as the MUTCD tends to be slightly more stringent regarding pre-manufactured signs. Subsection (d) refers to a sign that could be made by the employer on the job site. The basic requirements as far as color, size, and lettering are essentially similar, however.

Mr. Jackson suggested that the language requirement be the same for all roads, whether or not they are regulated by the MUTCD. He stated that small employers may not understand which roads are governed by the MUTCD, and requiring the same language for all roads would eliminate confusion for those employers.

Dr. Frisch asked whether pedestrian traffic near blasting zones needs to be addressed in addition to vehicular traffic. He expressed particular concern for pedestrian traffic on mountain trails. Mr. Manieri responded that most blasting would take place on private roads or remote areas where there would be little, if any, pedestrian traffic.

Mr. Washington expressed confusion regarding what employer-employee relationship would exist in a blasting situation on private property. He asked why, if the road is not governed by the MUTCD, such a situation would be enforced by the Division. If there is no employer-employee relationship, the Division has no standing to enforce the regulation. Mr. Manieri responded that the Division has jurisdiction over mining operations and other, similar worksites that might be on private property.

B. ADJOURNMENT

Chair MacLeod adjourned the Public Hearing at 1:37 p.m.

III. **BUSINESS MEETING**

Chair MacLeod called the Business Meeting of the Board to order at 2:36 p.m., June 18, 2009, in the Auditorium of the Harris State Building, 1515 Clay Street, Oakland, California.

A. PROPOSED EMERGENCY SAFETY ORDER FOR ADOPTION

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

Mr. Welsh stated that the proposed emergency regulation is primarily a response to the net results of the Division's efforts since last year to try to effect acceptable progress in compliance with the existing heat illness prevention standard. Last summer, the Division conducted the highest number of enforcement inspections it had ever conducted for compliance with the heat illness standard. In 2008, the Division conducted over 2,500 heat-related inspections in contrast to just over 1,000 conducted in 2007 and approximately 600 conducted in 2006. As indicated by these statistics, there was a dramatic increase in the Division's enforcement presence. This year, the Division already has conducted well over 1,200 inspections. Mr. Welsh expects that the number of inspections conducted this year will exceed those conducted last year. The Division is unable to conduct any more inspections with the staff it has currently. If it tries, it will seriously jeopardize the inspections in all other areas that it enforces. Last summer, a new rulemaking action could have been considered, but the Division believed that progress in compliance with the existing standard was being made, and it was very cognizant of the poor economy and mindful of concerns that business not be over-regulated. The Division then embarked on a program of planning for a massive outreach and education effort, which it conducted during the winter and spring months of this year. The Division has conducted a large number of training sessions since the beginning of the year, looking for every opportunity to convey to the regulated public what needs to be done in order to prepare for heat and in order to comply with the standard.

As it conducted discussions on what it could do to improve, the Division heard from stakeholders a consistent complaint that Cal-OSHA inspectors themselves could not seem to agree on what the regulation required, and employers did not agree on what the regulation required. The Division convened a stakeholder meeting in March to try to organize how to receive comments from stakeholders on their concerns about the regulation, and the lack of uniformity and the lack of clarity was a consistent theme. For example, at the March meeting, employers disagreed among each other as to whether the shade requirement in the existing regulation means that the shade is provided upon

employee request or that the shade device is erected at the beginning of the shift and at what temperature the shade should be up. These discussions led rapidly to the concept of a trigger temperature of 85 degrees. Although that temperature can be debated during the crafting of a regular rulemaking proposal, a trigger temperature is necessary to eliminate the room for interpretation in the existing regulation.

The Division thought that the concerns regarding inconsistencies in compliance and enforcement could be remedied in the Question and Answer (Q&A) document published shortly after the stakeholder meeting in March. The concept of the trigger temperature was introduced in that document, but the Division made it very clear that it did not consider temperature to be any kind of trigger for compliance. The trigger in the Q&A document was to trigger having shade actually up as opposed to having it available upon request. The standard always applies; it is just a question of how to comply with it, given different environmental conditions. Thus, the Q&A document was published in the hope of helping the regulated public to comply with the existing regulation and to provide guidance for the enforcement staff, and the Division maintains that it is not an underground regulation, as it has been called, because it needs a mechanism to instruct Division staff about how to interpret the regulation. If there is no guidance, inspectors make their own judgments and there is a tremendous amount of inconsistency in the judgments being made.

After the publication of the Q&A document, the Division made plans for the greatest enforcement presence possible for this heat season, and it was ready for the first hot spell that occurred in the middle two weeks of May. It sent out nearly 20 teams during that period, and the results of those inspections indicated that there was still substantial and pervasive noncompliance with the standard, and the shade requirement in particular. Although there is more compliance overall as a result of the training sessions and discussions conducted with stakeholders, there still is a significant segment of employers, primarily those in the lower echelons of sophistication, that are not complying with the standard, and that noncompliance is obvious. That led the Division to conclude that if there is another very hot summer similar to that of 2008 or 2006, which was a record-breaker, there are going to be a significant number of deaths, and at least some of those deaths are preventable. Performing sweeps and issuing Orders Prohibiting Use (OPUs), while it sends a clear message to employers, is not the most effective way to operate. The Division will continue to issue OPUs in situations where employers expose employees to the imminent hazard of heat of 90 degrees and above without protection; however, achieving a way to get employers into compliance without having to put them through the OPU process first is a much better use of government resources.

When there is a lack of compliance, the Division has a limited number of alternatives. It can increase enforcement and penalties or the consequences of noncompliance (i.e., Orders Prohibiting Use), it can increase awareness and training, and it can increase specificity in areas where language can be interpreted in such a way as to make the alleged violator become better accountable for the violation. The Division cannot increase enforcement any more than it already has with the current resources, especially in the face of a potential diminution of resources caused by the current budget crisis. The Division is well over 2,000 inspections per year on heat illness, which is reflected in a slight decrease in inspection resources in other areas. Currently, there is no way to increase penalties. Mr. Welsh has approached some district attorneys about trying to pursue criminal prosecution for some of the noncompliant employers; the decision to prosecute criminally lies with the district attorney, not with the Division. Traditionally, they don't prosecute unless an employee died or was seriously and irreversibly injured. It is necessary to get them interested in following up on these cases in some way when the death or the serious illness has not yet occurred. For example, some of the Orders

Prohibiting Use that have been issued have been sent to the appropriate district attorneys to see if they want to do anything about them.

The Division also has done virtually everything possible to increase awareness and training. It has submitted a Budget Change Proposal that would allow it to leverage the media a little more with more resources. There is currently a large segment of staff performing training and consultations. The only remaining tool is to make the existing regulation more clear, and although people may not like the clarity, the proposed emergency regulation is certainly clearer than the existing regulation, particularly regarding the shade requirement. The proposal makes it clear exactly when the shade must be up, the difference between having the shade up and providing access to it, and the circumstances under which it must be provided are spelled out.

Mr. Welsh disagreed with one of the earlier labor commenters who stated that the proposed regulation diminished the effectiveness of the regulation by removing the preventive recovery period language. He stated that subsection (d)(3) makes it very clear that “[E]mployees shall be encouraged to take a cool-down rest” whenever they feel the need to do so, and the original language is retained, stating that “[S]uch access to shade shall be permitted at all times.” The shade must be up, it must be available, the employees must be able to use it, and the employer must encourage employees to use it.

Mr. Welsh further stated that he is encouraged by the increased use of the phrase, “the Cal-OSHA program,” because when most people hear the phrase “Cal-OSHA,” they think of the Division—the cops on the beat going out and doing the inspections, or maybe consultants if they are thinking more broadly—when in fact it is not just the Division. It is the Standards Board, the Appeals Board, and the Division all working together in an effective manner. Part of the clarity issue is going to go not just to how employers perceive the regulation or the message given to noncompliant employers, but also to how the administrative law judges who hear appeals go in to review the language and how the Division’s citations are going to fare on appeal.

We are at the beginning stages of a tidal wave of appeals of heat citations. The next thing that comes from all of the increased inspection effort and the numbers of citations that have been issued is the employer appeals and the litigation that is going to ensue from them. The more we rely on performance-based standards, the more flexibility we give employers to comply, the more we also give employers latitude on appeal to make legal arguments as to why our citation is not appropriate under the circumstances. When we take away the ambiguity and the discretion and lean more toward specificity, a lot of the legal issues go away and the appeal process becomes a lot less complicated, a lot faster, and you see fewer appeals because everybody knows where they stand in advance. We have a chance to put into Title 8 language that is more clear, that will have less of a tendency to invite appeals, let people know where they stand, and provide for more effective enforcement. One of the ways to make enforcement more effective is to set it up so that the Division can see the violations as easily as possible and to depend as little as possible on witnesses, like those agricultural workers who testified today. Those witnesses have an amazing tendency to disappear by the time the appeal comes around and the Division has to present a case. There is broad criticism about how much penalties get reduced on appeal, and a big part of the problem is that evidence goes away after time, particularly when that evidence is dependent upon an employee testifying and potentially risking his or her job. If the employee is not documented, he or she could be risking more than that. Therefore, any time a requirement can be included that minimizes the need for witness testimony against the employer, it maximizes the Division’s ability to identify a violation just by observation.

The shade trigger will make it crystal clear that above 85° the shade must be up, making it possible for enforcement staff to do drive-by inspections and spot violations of the shade requirement. That is partially why there were eight Orders Prohibiting Use issued in May. The Division was trying to maximize enforcement effectiveness, and enforcement staff was looking for the worst violations—no shade being up. Those employers are going appeal the citation (some of them already have) and the number one issue on appeal is whether the standard actually requires the shade to be up. That issue is going to be litigated, and it is going to be litigated for a long time before the Appeals Board can provide an answer. Being able to spot violations in a drive-by inspection does not eliminate the need for an inspection, but it will reveal the worst violators.

Mr. Welsh went on to state that the trigger temperature of 85° Fahrenheit does not create a documentation requirement. The language was crafted to make it as simple as possible to get good, effective compliance. The employer does not need anything more than a liquid-based thermometer available at any hardware store to know whether the temperature outside is exceeding 85° or 90°. A thermometer may be off by one or two degrees, but they are very accurate, and they do not need to be calibrated. The purpose is to encourage the employer to get into the habit of checking the temperature, to make it his or her business to know when the temperature reaches 85° or 90° and to act accordingly and responsibly. The employer is not required to document the temperature reading; he or she is simply required to be aware of the temperature. If the employer can demonstrate to an inspector in good faith that he or she is monitoring the temperature, there will be no citation.

Commenters expressed concern about the requirement that the shade be adequate to accommodate 25% of the employees on the shift. Mr. Welsh stated that shade adequate to accommodate 25% of the employees present at any time provides a good margin to have shade available when necessary. There is the issue of breaks and lunch, and the employer has an obligation to ensure that shade is ready for employees when they want it, and if that creates a crowding problem, the employer has an obligation to institute a rotation procedure to deal with that or to provide more shade. If it is 105° out and an employee wants to get out of the sunlight, that employee must be able to get out of the sunlight, and there must be some reasonable procedure that will reasonably assure that is going to happen.

Mr. Welsh stated that he appreciates that some stakeholders may have some concern regarding the revised definition of shade, but he does not think they are giving the revised definition a full and fair consideration. There are vines that provide total and complete shade for hundreds of square feet. Natural shade (i.e., *complete* shade provided by trees or vines) is significantly cooler than that provided by a canopy or umbrella. He did concede that the language regarding vines could be abused by someone who really wants to abuse it, but the other language in the definition makes it clear that the shade provided must be real shade, and the employee should not have to crouch or stoop to access it. A vine that is four feet off the ground is not sufficient; it has to be a vine that completely blocks the sunlight or comes close to doing so in a way that employees can sit comfortably and be completely out of the sun. Mr. Welsh is confident that, for the most part, once employers get into the hot season and realize that they have to have the shade up, they are just going to have it up and keep it up because that is the procedure. It is too complicated to watch the thermometer and pull the shade down once the temperature drops below 85°.

Mr. Welsh then addressed the exceptions. With respect to subsection (d)(4)(B), which allows non-agricultural employers to use measures other than shade, if Cal-OSHA conducts an inspection and the inspector thinks that the employer is not effectively providing a measure other than shade for employees, then the employer is going to get a citation, and on appeal it is the employer's burden of

proof to show that the method used is at least as effective as shade. That approach has been used many times before in standard rulemaking packages, and it has been effective. There are situations under the standard as it exists now in which it simply is not possible to put up shade. There are some jobs that are basically roving jobs in which the employees are constantly moving, and there simply is no way to have shade up for them in a way that is meaningfully reachable for them within a reasonable period of time. The only option there is for them to bring the shade with them, and those employees can control whether they can put the shade up if they need to and if they have a device with them to use—that could be a beach umbrella or something similar. Employers are already doing it and they have done it informally with less input from the Division. The proposed language simply acknowledges a reality that already exists. There are going to be cases in which the shade cannot be up, but the employer always has a duty to ensure that shade is available if the employee wants it. With this exception, it enables the employer to devise an alternative procedure when it is not feasible to have the shade up. The burden is on the employer to demonstrate that the alternative method is at least as effective as providing shade.

Mr. Welsh stated that the high heat procedures outlined in the proposal was the first attempt to craft language that would provide employers with guidance for how to protect employees during periods of extreme heat. This does not mean that the employer has to become a doctor to diagnose when someone may be suffering from heat illness. It means what it says—that employers and supervisors should be trained to recognize the signs and symptoms of heat illness. This is in keeping with the concept that strong emergency response is necessary. The Division's studies show that in most cases, there could have been a chance to save a victim of heat illness if there had been effective emergency response in fatal cases. The provisions came from comments received at the stakeholder meeting and the Division's observations during inspections. Mr. Welsh expressed confidence that the implementation of these procedures will make a significant difference to the health of employees when temperatures reach or exceed 95°.

The training provisions for supervisors, including the designation of a person to ensure that emergency procedures are invoked when appropriate and training supervisors to monitor weather reports and how to respond to hot weather advisories, were intended to make it clear that training must be completed before an employee works in the heat, not afterward. Mr. Welsh stated that a lot of it is common sense, but it is good to have in the regulation so there are no doubts as to what is required. He added that the employers are not being told how to monitor weather reports, but rather letting them know that they must confront this issue in the training of their supervisors and tell their supervisors how monitor reports and how to respond to hot weather advisories. Employers need to have that information and they need to be tracking weather reports and heat advisories. Mr. Welsh expressed confidence that once employers get in the habit of monitoring the weather, they will know what to do about it.

As to why 85° was designated at the trigger temperature, the Division's enforcement experience since 2005 a full 74% of fatalities occurred at or above 95°, 15% of fatalities occurred above 85°, and 11% occurred below 85°, and two of those cases occurred below 80° in 2005 when the tracking procedure and the research into heat-related fatalities were still in their infancy. The medical examiner was not entirely certain that these two cases were heat-related; there was substantial question in both cases, but there was enough doubt that she considered them to be heat-related. Although a third case occurred at 84° in 2008, the four previous days had been consistently above 100° each single day, and two of those days were 107°. Mr. Welsh stated that if the high heat procedures had been in place and triggered by the 85° trigger temperature, the employers would have known to provide shade and those employees may not have died.

Mr. Welsh stated that the analogies to seat belts were somewhat accurate, in that although everyone knows that they are supposed to use seatbelts, they generally tend not to use them unless they are constantly reminded. The “Click it or Ticket” signs are well-known on the highways and everybody knows what the phrase means. That is not the case with the heat standard, and particularly with the existing shade requirement. Everyone does not know what that means and there are many different interpretations.

Mr. Welsh further stated that there had been comments made relating to “bad actors” among employers. He stated that while that is true, there are also employers who simply do not know the standard or completely understand it. Usually when there is a real problem with compliance, it is because a certain level of employer is not being reached, generally those that are less sophisticated than the larger companies. In many cases, it is a new employer who was recently and employee. In fact, the bulk of the OPUs were issued to unsophisticated employers, some of whom did not speak English. In translating a standard to another language, it is helpful to have the requirements clearly spelled out and to be able to say, “It’s the law.”

The language regarding “suitably cool, pure, and fresh water” already exists in Section 3457, the Field Sanitation standard, and Mr. Welsh felt it would be a good idea to include it in the heat illness standard for the sake of clarity. Employers want to be able to read one regulation that spells out clearly what is required. The heat illness standard already states that employers must comply with Section 3457, but including the same language makes the bottom line more obvious. It is not enough simply to state that the water must be potable; there can be potable water that is quite unappetizing, and there can be potable water that is not suitably cool. Employees are not going to drink water that is not appetizing, regardless of the fact that it may be potable. In order to encourage them to drink it, the water must be as attractive as possible to the employees.

Some of the commenters had expressed concern about not having enough time to train supervisors and employees should this regulation be adopted and become effective. Mr. Welsh stated that if employers are in compliance with the existing regulation, there is very little to add to the employee training; it could be completed in two or three “tailgate meetings.”

Mr. Welsh concluded by expressing his appreciation for the work done by the Board and Board staff. He understands the difficulties involved in this proposal. He stated that at the last Board meeting in May, it was the first time that the adoption of a standard received applause from the meeting attendees. He thanked the Board for what they do, stating that this will be a tough vote, however they vote, and he respects their decision.

Chair MacLeod called for a motion to vote on the proposal, but none was forthcoming. Mr. Beales stated that if it is the Board’s pleasure to discuss the proposal without a motion on the table, a motion is not necessary.

Dr. Frisch expressed concern that the proposal does not meet the criteria necessary to qualify as an emergency regulation. He stated that when Ms. Heza addressed the Board on this issue during the March meeting, she was asked whether the issue was enforcement or how the regulation is written. Ms. Heza’s response was that the issue was enforcement, not that there was a problem with the way the regulation is written. Dr. Frisch questioned why the regulation could not be modified in the regular rulemaking process, which would provide the opportunity to have an advisory committee with stakeholders, rather than in an emergency regulation. His biggest concern with doing it as an

emergency regulation is that there is no opportunity to modify the language in response to public comment and concern. He is concerned that the adoption of the proposal could have unintended consequences that may not be addressed in a subsequent rulemaking package. His preference would be to proceed with a regular rulemaking package and to begin with an advisory committee meeting to carefully consider the public comments received today.

Specifically, Dr. Frisch stated that while he appreciates Mr. Welsh's defense of the use of trees and vines as shade, the way the language is written is ripe for misuse given that employers do not seem to understand that when it is 95° you take care of your people and when it is 100° you take care of your people. Giving such employers the opportunity to flaunt their violation of the standard by relying on trees and vines is not acceptable to Dr. Frisch.

Dr. Frisch also expressed concern about the requirement that the employer-provided shade accommodate 25% of employees on the shift, stating that the way the language is written could indicate every employee working for the employer, including those that are indoors and those that are miles away from the worksite. He expressed further concern that the burden of proof on the employer to show the feasibility of methods other than shade may be subject to numerous appeals. He stated that subsection (e) uses very ambiguous language, and he asked whether the term "buddy system" is defined anywhere in Cal-OSHA regulations, what is the definition for an employee who is working alone in the field, he does not understand how those requirements would be implemented, and he is concerned about appeals in the future.

Dr. Frisch went on to state that subsection (e)(3), "Observing employees for alertness and signs or symptoms of heat illness," is not specific as to who is supposed to be observing the employees, nor does it indicate how often this is to be done or how it is to be done. He stated that he recognizes that may seem like it should be common sense, but unfortunately, there are indications that the requirement of having water available to employees in 100° weather is somehow not common sense, so it is difficult to believe that this requirement is going to be treated any better.

Dr. Frisch stated that making the regulation more complicated by adding more detailed provisions is not going to help an unsophisticated employer. He further stated that employers that allow their employees to be in an environment where there is high heat or even moderate heat without ready and reasonable access to water and shade is, in his personal opinion, criminal. That is a human rights issue, not an occupational safety and health issue. If there is not water, if there is not access to shade, that is tantamount to how slaves were treated. Thus, perhaps it is time to think about broadening the consequences for not complying with the heat illness standard; perhaps the legislature needs to consider establishing criminal penalties for noncompliance. From his point of view, Dr. Frisch does not believe that changing the existing regulation is going to improve compliance or prevent any more heat illness deaths in California; if, at the end of the day, an employer is irresponsible enough to behave in a manner that is going allow employees to go without water and shade, more regulation is not going to change that behavior.

Dr. Frisch asked Mr. Welsh whether any of the OPUs were not in the agricultural industry. Mr. Welsh responded that they were all agricultural. Dr. Frisch then asked what percentage of the vital issues cited overall since the existing standard was enacted in 2005 were non-agricultural. Mr. Welsh responded that roughly 35%. Dr. Frisch asked whether that 35% had been all construction or whether they were in other industries as well. Mr. Welsh responded that they were in all outdoor employments, such as pizza delivery people, oil drillers, utilities, landscaping, etc.

Mr. Welsh responded to Dr. Frisch's comments by stating that he appreciates Dr. Frisch's concern that some of the new provisions would themselves lead to appeals, but the bulk of appeals work currently in progress is over shade, and if everything except the new shade regulations came out of the proposal, the Board would be performing a great service to employees and their protection from heat illness. He stated that he had no doubt there would be more heat-related deaths this summer, and he had no doubt that some of those deaths would be preventable. He believes that clarifying the shade requirement is going to result in fewer employees dying from heat illness. That is the emergency. Although in hindsight, perhaps the revisions should have been made last fall, the Division has been doing everything in its power to enforce the existing regulation and to educate and train employers and employees, but once it had the miserable enforcement experience in mid-May, there was no choice but to present an emergency regulation. Mr. Welsh expressed the belief that if the emergency regulation is not adopted, employees will die.

Although the emergency regulation is not perfect or a complete "fix," the shade requirement has been an issue since the first heat illness regulation was adopted. That was evidenced by the number of different interpretations of the shade requirement the Division heard at its stakeholder meeting in March. That is the core of this regulation, and if the Board does nothing more than clarify the shade requirement, it will have done a great service.

Mr. Jackson asked whether the Appeals Board has ruled on the shade requirement in the existing regulation. Mr. Welsh responded that it had not ruled yet, but there are appeals pending. Mr. Jackson commented that right now, then, the Division and some employers disagree about the meaning of the language in existing subsection (d). Mr. Welsh responded affirmatively. Mr. Jackson asked how soon the appeals from the first round of citations would be heard by the Appeals Board. Mr. Welsh responded that there have been a number of appeals filed, but getting this issue resolved through adjudication is years away. He stated that it will pay off to be thinking how to how to improve the regulation in a way that will eliminate issues on appeal. Mr. Welsh stated that he understands the Board's concern that the emergency regulation may create more issues, but he does not think it will.

Mr. Jackson expressed concern that the Appeals Board might decide that the employers' interpretation is the right one and about trying to change the regulation to fit what the Division thinks it should be rather than accepting the employers' interpretation. Mr. Welsh responded that that is the point of the proposal. If the Board decides that employers are correct to assume that they need only have shade available upon request, that is a problem because that means they do not have to have the shade up even if it is 105° out.

Mr. Jackson stated that a regular rulemaking proposal is called for, because the proposal clearly does not meet the statutory requirement for an emergency regulation. Even if the Board could get past expediency, convenience, best interest, general public need, or speculation, the Finding of Emergency does not explain why this could not have been done in a regular rulemaking process. As Dr. Frisch stated, as recently as March, the Division said this was an enforcement problem, not a problem with the regulation. He stated that he did not know how it became an emergency between March and June 1.

Mr. Beales stated that the question is not whether the regular rulemaking process could not have been used, the point that needs to be explained is why it was not used. In other words, it still could be an emergency addressed by an emergency regulation where a rulemaking could have been done but it

was not. That does not mean it is not an emergency and it cannot be addressed as an emergency, so long as the failure to address the emergency sooner is explained.

Mr. Prescott expressed concern regarding the shade issue. He stated that the construction industry has interpreted the existing regulation in a manner that the shade must be readily available, not that it must be deployed. During the process of creating the existing regulation, the construction industry fought very hard for that requirement because if the shade were to be deployed, especially in the case of roadside construction operations, semi trucks driving past at 65 miles per hour creates a much higher hazard when the wind hits the shade structures. He stated that he understands and can appreciate the exemption in the case of infeasibility, but he is concerned that the proposed regulation puts the burden of proof on the employer to prove infeasibility. Mr. Welsh responded that that is part of the problem because it was the understanding of a lot of employers that is not the way the regulation is to be interpreted. He stated that the existing language is that “employees shall be provided access,” not that shade will be readily available. He stated that that was the point of the proposal—people have interpreted the language differently, and that needs to be clarified. Mr. Welsh further stated that if an employer needs an answer to a question, that employer can ask the Division for an opinion.

Mr. Prescott stated that he shared the concerns of both Dr. Frisch and Mr. Jackson that the proposal does not meet the criteria for an emergency. He asked why this was not being done in a regular rulemaking process, especially considering the diversity of the public comments received today. Mr. Welsh responded that a regular rulemaking package is not being proposed now because the heat season will most likely be here in July, and this standard, if adopted as an emergency regulation, would be in place for the heat season. If done as a regular rulemaking package, the proposal will not be effective until the fall at the very earliest. Mr. Prescott stated that even the agricultural employees had stated today that they would rather have the existing regulation than the proposal. Mr. Welsh expressed uncertainty that the farming industry employees had said that. He stated that he is still looking at fatality statistics from last year and anticipating another summer of fatalities, and he wants to prevent as many as possible.

Mr. Prescott asked whether Mr. Welsh had considered creating a regulation that would apply exclusively to the agricultural industry, as it appears that is where the majority of the compliance problems exist. Mr. Welsh responded that he had thought about it.

Dr. Frisch asked whether Mr. Welsh had considered separating the shade issue, as that appears to be where the majority of the problems exist. Mr. Welsh responded that that is worth considering. The fact of the matter is that there are fatalities in the construction industry; it has the second most frequent fatal incidents. He stated that the data collected this year focused on the agricultural industry; he cannot necessarily state that construction is the same, but the experience of the past and the ratio of violations and fatalities in the past suggest that the construction industry shares some features in common with the agricultural industry, including the risk of dying from lack of shade.

Mr. Washington stated that if there is a requirement that the shade be deployed, it makes the Division’s job easier because they are easily visible. However, he expressed concern that the scope of the proposal is too broad, when it appears to be aimed at the agricultural industry although it is not stated clearly in the proposal. He also expressed concern that the proposal was so loaded with conditions that it would be more difficult for employers to comply. Mr. Welsh responded that he does not think the proposal is loaded; he thinks it is fairly spare. Most of the revisions concern the

shade requirement, which is the core problem. Mr. Welsh stated that fatalities will continue to occur unless shade is deployed where it is feasible to have it deployed.

Chair MacLeod stated that the Board has received two briefings from the Division since the current regulation was adopted in 2006. As was indicated earlier, the Board was told that the language was fine and the regulation was fine, but the problem existed in enforcement. Now, the Division is stating that shade has been a problem since the regulation was adopted. He stated that the comments received today indicated that the circumstances do not warrant an emergency standard. He asked Mr. Welsh for his response to that aspect of the comments, stating that it really is not the Board's responsibility. If the Board adopts the proposal, it will go to the Office of Administrative Law (OAL), and OAL will make a determination whether or not it meets the emergency criteria. Mr. Welsh responded that he believes the criteria for an emergency standard have been met. The Finding of Emergency explains why it was not done before, the Division got data that was truly surprising in May with eight OPU's in two weeks compared to four for the entire year in 2008, even after a massive effort at public education. He stated that the Division was doing everything it could, given the economic climate, to penetrate the industry with a message that would bring employers into compliance.

Mr. Welsh stated that most of the time, the Division is criticized for not trying an approach of public outreach first, but it seemed particularly compelling this time, because the economy was so bad. He stated that Ms. Heza was questioned about the standard at the March meeting, and she said that from her point of view the existing language was sufficient, and at that time the Division thought it would be with the supplemental work being performed in training and education. However, the data collected did not support that supposition, and there was no way to collect that data before the first hot spell in May. That was the first opportunity the Division had had to test the success of its training efforts, and it was a surprise to find such frank noncompliance in temperatures well over 100°.

Mr. Prescott stated that as a native Californian from the Central Valley, he does not ever remember such high temperatures in mid-May. He stated that those temperatures broke records from the 1950s and the 1900s. He asked whether the lack of compliance could have resulted from the fact that the weather caught a lot of employers off-guard because it has rarely been that hot in May. Mr. Welsh responded that he did not believe so because of the training and the media outreach program. The basic message had been "Be on guard for hot weather."

Chair MacLeod expressed concern that the adoption of an emergency regulation would do little to stem the pervasive and substantial noncompliance experienced in May. He stated that there clearly is not a culture of safety in some quarters of the agricultural industry, and no matter what the Board does, those employers are not going to respond. He asked whether the Division could explore the possibility of imposing criminal prosecution on noncompliant employers as another tool in the arsenal. Mr. Welsh responded that the Division has done that by speaking to district attorneys and asking them to examine the issue, and Mr. Welsh has been speaking to the Attorney General for months. They do not typically prosecute these cases, and it is not the Division's or the Board's decision. All that can be done is to recommend that the cases be prosecuted. Chair MacLeod agreed with Dr. Frisch that it is not entirely a workplace safety and health issue; it is as much a human rights issue and should perhaps be addressed legislatively. Mr. Welsh agreed that perhaps legislation could be introduced; however, right now, the Division is trying to do what can be done with what currently is available, which is to propose a standard that will help. That may not be a complete solution, but

adding clarity to a provision which clearly is creating problems in terms of interpretation on a fundamental issue is calculated to make a significant difference.

Mr. Washington stated that the ability to criminally prosecute both violations and fatalities already exists in AB 1127. When that bill was written, it also provided for civil prosecution, because the evidence that the Division gathers can be used in the courts in prosecution for wrongful death and similar suits. When it became law, the bill created a separate department that was solely responsible for such prosecutions. The Division refers the case to that department, they assemble the case, and they have provisions to perform an investigation, and they make a determination whether or not to prosecute. District attorneys are funded to examine these cases. The driving force behind whether or not to prosecute appears to be whether the case is winnable. If they do not think it is winnable, they will not prosecute. Every year, a book detailing the cases reviewed is published and the disposition of those cases. The discussion of legislative action to impose criminal penalties is moot because those provisions already exist.

Chair MacLeod stated that perhaps further clarification of those provisions was necessary. He stated that he was not familiar with AB 1127, but that it was his impression that that culture does not exist in some quarters. Further action may be necessary to create such a culture of safety.

Mr. Jackson stated that even if the proposal were in effect it would have a negligible effect on those less sophisticated and/or non-English speaking employers. Changing the existing regulation does not improve the outcome. Mr. Welsh responded that Mr. Jackson is arguing that changing any regulation would not have an effect if an employer does not speak English. He stated that there were special training in Spanish for Spanish-speaking farm labor contractors and supervisors. At those training sessions people always asked if the Division would teach what was required under the law. The Division would explain what it thought the employers should do and it would also explain the requirements under the regulation. He stated that that is part of the problem—because the specific requirements in the emergency proposal are not part of the existing regulation, the Division cannot tell the Spanish-speaking employers that it is the law that they have to have the shade up.

Mr. Jackson asked how many of the employers who had received OPUs had attended the Division's Spanish training sessions. Mr. Welsh responded that two of them had attended the training. Mr. Jackson then asked whether the training had not been understood or whether the employers just did not care. Mr. Welsh responded that the employers did not have a lot to say about it. Once they see the inspector and receive the citation, they do not want to talk, so he does not have an answer to that. There reasons will be heard when they testify, and the Division will certainly cross-examine them.

Mr. Prescott asked what the Division's next move would be should the proposal not be adopted today. Mr. Welsh responded that he did not know. The Board's consider taking up a similar proposal at the next meeting would be one option. The only other option would be to institute the regular rulemaking process.

Chair MacLeod stated that even if the emergency regulation were adopted, the Board would be required to institute the regular rulemaking process anyway. Mr. Jackson suggested that the Board did not need to adopt the emergency rulemaking proposal to start the regular rulemaking process; it could simply direct staff to expeditiously start the rulemaking process.

Dr. Frisch stated that two things are necessary, and Mr. Welsh does not need the direction, but he would suggest that the Board could advise Mr. Welsh to tighten up the proposal to deal solely with the shade issue and the ambiguity over the term “access to shade, as it would be more in keeping with the criteria for an emergency. He stated that he would like to see the trigger temperature be lowered, because it is his opinion, as a health professional, that 85° is too high. He further stated that employers may be over-dramatizing the difficulty associated with erecting shade structures. Dr. Frisch stated that the second suggestion would be that, clearly, there are other opportunities within the existing regulation to clarify or improve it and those opportunities should be considered through a normal rulemaking process.

He stated that he is very upset when he reads about people dying from heat illness in 2009 in the State of California, but he does not believe that the existing language as it is written is going to help with that. He does think that the regulation needs clarification to make it effective. He asked that the Division make another attempt at a regulation, concentrating on the specific issues discussed.

Chair MacLeod again asked for a motion to adopt the revisions as proposed, but none was forthcoming. Dr. Frisch moved for a proposal directing the Division to create a more directed emergency proposal to deal specifically with the ambiguity around the provision of and employee access to shade and also to open a normal rulemaking procedure with an advisory committee to be able to address some of the questions raised during today’s proceedings. Chair MacLeod seconded the motion.

Mr. Washington asked whether the emergency regulation would be specific to the agricultural industry or whether it would apply to all outdoor employers. He expressed his opinion that having any trigger temperature causes debate, whether it is 85°, 88°, 75°, etc. He recalled that discussion of the existing regulation four or five years ago had centered around the fact that, during most ordinary years in California, from May through the end of August and into September, the average ambient temperature is around 80° to begin with, so if the trigger temperature is dropped below 85°, the question of when shade is required to be up would be moot.

Mr. Prescott asked whether the new proposal would be for all industries or addressed solely to agricultural employers. Dr. Frisch responded that his proposal is for Mr. Welsh to re-craft the regulation to deal only with the specific ambiguity in the current standard, so it would apply to all industries. Mr. Prescott expressed concern about the shade-up requirement as it applied to the construction industry. Dr. Frisch responded that he had said nothing in his proposal that would preclude Mr. Welsh from including exclusion language for methods other than shade.

Mr. Beales stated that although the Division works with the Board on rulemaking matters, as a separate part of state government, the Division has the discretion to proceed as it deems appropriate regardless of any motion adopted by the Board of the nature of Dr. Frisch’s motion. Further, the Division can take guidance from the Board’s comments without the necessity of a motion. If the Board wanted to formalize Dr. Frisch’s suggestion in the form of a motion, it is free to do so, but if the Board chose not to do so, Mr. Welsh could take guidance from the Board’s discussion of the proposal.

Mr. Welsh stated that he understands the intent of the Board’s discussion, and he would craft a regulation in keeping with the Board’s suggestions. He further stated that he appreciates Mr. Prescott’s concern regarding the construction industry. He stated that that is why the feasibility exception is included, and he will attempt to retain that exception in the emergency regulation. He

also stated that he would discuss the issue with stakeholders and try to come up with a workable solution.

Dr. Frisch stated that it was clear that Mr. Welsh understood what the Board was asking, and thus in the interest of expediency, he withdrew his motion.

B. PROPOSED SAFETY ORDERS FOR ADOPTION

1. TITLE 8: **CONSTRUCTION SAFETY ORDERS**
Division 1, Chapter 4, Subchapter 4, Article 11
Sections 1598 and 1599
Use of High Visibility Apparel
(Heard at the October 16, 2008, 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: **CONSTRUCTION SAFETY ORDERS**
Division 1, Chapter 4, Subchapter 4, Article 22
Sections 1637 and 1646
Riding on Rolling Scaffolds
(Heard at the February 19, 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 Mr. Jackson and seconded by Mr. Prescott that the Board adopt the proposal.

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

3. TITLE 8: **GENERAL INDUSTRY SAFETY ORDERS**
Division 1, Chapter 4, Subchapter 7, Article 14
Section 3466(j)-(l)
Marine Terminal Operations—Vertical Tandem Lifts
(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. Prescott that the Board adopt the proposal.

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

4. TITLE 8: **GENERAL INDUSTRY SAFETY ORDERS**
Division 1, Chapter 4, Subchapter 7, Article 98
Section 5006.1
**Mobile and Tower Crane Operator Qualifications—
Accreditation of Certifying Entities**
(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. Washington that the Board adopt the proposal.

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

C. PROPOSED VARIANCE DECISIONS FOR ADOPTION

Mr. Beales stated that all of the variances on the consent calendar, with the exception of the Headlands Reserve Matter, be granted. The recommendation for Headlands Reserve is that the application be granted in part and denied in part.

MOTION

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

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

C. OTHER

1. Experimental Variance Update

Mr. Smith stated that no experimental variance applications have been received since his previous briefing in October, but the Division has been in communication with one prospective employer that is exploring the possibility of an experimental variance for lab hoods. That employer had a meeting with the Division and the Board's technical staff last month after which the employer indicated that an application for an experimental variance would be filed. That application has not yet been received.

Chair MacLeod asked how many lab hoods would be covered under the application. Mr. Smith responded that there would be one lab hood for certain with a possible second hood.

2. Legislative Update

Mr. Beales stated that AB 1494, regarding the serial meeting provision of the Bagley-Keene Act, has passed the Assembly and was approved on June 9, 2009, by the Senate Government Operations Committee and referred to the Senate Appropriations Committee.

Dr. Frisch asked whether SB 478 would impact the Title 8 regulations that make reference to certified, competent, conveyance mechanic (CCCM), and would the CCCMs be subject to the regulations that heretofore applied to them. Mr. Beales responded that he did not know. He stated that this bill applies to certain lifts in certain settings, and he did not know the extent to which the Title 8 regulations apply to those lifts in those settings.

3. Executive Officer's Report

Ms. Hart stated that the update on the performance-based conveyance standards would be rescheduled for a future meeting.

4. Future Agenda Items

D. ADJOURNMENT

Chair MacLeod adjourned the Business Meeting at 4:18 p.m.