OCCUPATIONAL SAFETY
AND HEALTH STANDARDS BOARD
2520 Venture Oaks Way, Suite 350
San Diego, CA 95833
(916) 274-5721
FAX (916) 274-5743
Website address www.dir.ca.gov/oshsb

SUMMARY
PUBLIC MEETING/PUBLIC HEARING/BUSINESS MEETING
October 20, 2011
Sacramento, California

I. PUBLIC MEETING

A. CALL TO ORDER AND INTRODUCTIONS

Chairman John MacLeod called the Public Meeting of the Occupational Safety and Health Standards Board (Board) to order at 10:01 a.m., October 20, 2011, in the Auditorium of the State Resources Building, Sacramento, California.

ATTENDANCE

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

Board Members Absent

Board Staff
Marley Hart, Executive Officer
Mike Manieri, Principal Safety Engineer
David Beales, Legal Counsel
Chris Witte, Executive Secretary

Division of Occupational Safety and Health
Suzanne Marria, Special Counsel
Deborah Gold, Deputy Chief, Health
Steve Smith, Principal Safety Engineer

Others present

Terry Thedell, SDG&E
Dave Harrison, Operating Engineers #3
Kevin Thompson, Cal-OSHA Reporter
Kate Smiley, AGC
Dan Leacox, Greenberg Traurig
Bill Taylor, PASMA
Rasto Brezny, MECA
Joan Lichterman, UPTE-CWA 9119
James Jack, Capitol Strategic Advisors
Jora Trang, WorkSafe
Tina Kulinovich, Federal OSHA
Bruce Wick, Cal PASC
David Shiraishi, Federal OSHA
Mitch Seaman, California Labor Federation
Jim Hay, State Fund
Cynthia Rice, CRLA, Inc.
Robert Schwager, CWA
Elizabeth Treanor, PRR
Joan Gaut, CTA
Shane Gusman, Broad & Gusman

Jay A. Weir, AT&T
Wendy Holt, CSATF/AMPTP
Patrick Singh, Safeway, Inc.
Mark Stone, Epic Insurance Brokers
Gail Bateson, WorkSafe
Corey Friedman, WorkSafe
Mike Donlon, DOSH
Anne Katten, CRLAF
Jeff Clark, USW Local 5
Elda Brueggemann, Western Ag.
Michael Monasky, Sac. Public Health
John L. Boze, Boze and Wynne Law Firm
Mark Roy McGrath, AIDS Healthcare Fndn.
Jim Rucker, Safeway, Inc.
Wayd LaPearle, Pipe Trades Trng Ctr. Lcl 393
Judi Freyman, Mercer ORC
Dorothy Wigmore, WorkSafe
Kim Heroy-Rogalski, ARB
Jeremy Smith, State Building Trades
John L. Bobis, Aerojet
Bryan Little, Central Farm Bureau
Jim Hallum, CRT

Mr. MacLeod introduced the recently-appointed Area Director of the Oakland Area Office of Region IX of Federal OSHA, David Shiraishi.

Mr. MacLeod also congratulated Mr. Kastorff for being named the 2011 Safety Professional of the Year by the Sacramento Chapter of the Associated Society of Safety Engineers.

B. OPENING COMMENTS

Mr. 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

Mr. MacLeod asked that the public first comment on any item regarding occupational safety and health in general first, then on vehicle exhaust retrofits, and finally on employer duty to pay for personal protective equipment (PPE), in that order. Thus, if someone wishes to speak on both vehicle retrofits and PPE, he or she would have to speak twice.

Mark Roy McGrath, a public health policy consultant with AIDS Healthcare Foundation, spoke in favor of a petition (now the subject of an advisory committee) regarding the use of barrier protection (notably, condoms) by performers in the adult film industry.

Mr. McGrath has had the opportunity to tour numerous companies and he noted that their workforce includes personnel from a variety of fields including information technology, marketing and sales, warehouse management and distribution, and many have staff lawyers. For these employees, companies exercise a high degree of corporate citizenship. They have health insurance and offer generous benefit packages. They offer flex-time and telecommuting. One company even allows its employees to bring their dogs to work. On the production side, however, the vast majority of adult film companies are, simply stated, poor corporate citizens. Production-class employees are continually exposed to preventable workplace hazards. They continue to bear the full cost of medical monitoring, a clear contradiction to current California law.

Mr. McGrath echoed his past comments to the Board by stating that the California Supreme Court ruled in 1988 that the production of adult film is legal. In doing so, the Court created a de facto workforce which deserves the same basic rights and protections as any other legal industry in California. Cal-OSHA has always prided itself as an agency of last resort for those workers most at risk. It is in this spirit that Mr. McGrath asks the Board to thoughtfully and favorably consider the Division and the Board's efforts with heat illness prevention for migrant workers. Striking parallels can be drawn to the adult film industry. There is a transient workforce, there are exposures with significant health consequences, and there are easy and cost-effective measures to implement to limit those exposures. The Board's efforts will provide the industry with much-needed, unambiguous rules and allow workers a modicum of health and safety. The message is simple. In this Golden State, in this Bear Republic, all workers should be afforded a standard of common-sense protection.

Vehicle Exhaust Retrofits

Dave Harrison, Director of Safety for the Operating Engineers Local 3, urged that some changes be made to the exhaust retrofit proposal before it is adopted. Specifically, the proposed Section 1591(m)(5)(B)(3) exception regarding rotating cabs should be deleted. Anyone that has ever operated an excavator knows that one cannot block the view to the rear and continue to operate the vehicle safely.

Kate Smiley, speaking on behalf of the Associated General Contractors of California, expressed support for Mr. Harrison's comments regarding the exception language. She also said that a note at 1591(m)(6)(C) be modified, in essence, as indicated by the following stricken and underlined words:

> NOTE: Exhaust stack modifications that ~~may~~ shall be considered to reduce the driver's view include, but are not limited to, the following:
> 1. Increasing the diameter of an exhaust stack,
> 2. Moving an exhaust stack closer to the driver, ~~and~~ or
> 3. Moving an exhaust stack from a location where it is hidden from the driver's view by a part of the vehicle, such as the cab frame, to a location where it obstructs the driver's view.

Finally, no vote should be taken today, and if a vote is taken, Ms. Smiley would recommend a no vote.

James Jack, speaking on behalf of the Emission Control Technology Association Diesel Retrofit Committee, asked for the Board to reject the proposal before it today because: (1) the record of the rulemaking does not demonstrate by substantial evidence, including fact studies and expert opinion, the need for the regulation, and (2) there is a major issue with consistency (for instance, original equipment manufacturers' devices are not being held to the same standard as retrofit devices). Moreover, the reduction in retrofit applications that would be a result of this regulation will result in a higher level of exposure to toxic exhaust for equipment operators.

Bruce Wick, Director of Risk Management for the California Professional Association of Specialty Contractors was also speaking on behalf of **Kevin Bland,** who represents the California Framing Contractors Association and the Roofing Contractors Association, expressed agreement with the comments of Mr. Harrison and Ms. Smiley. He also confirmed that the totality of Section 1591(m)(6) states and clarifies that it prohibits reducing an operator's view by moving an exhaust stack from the peripheral view of that operator into his operational view.

Mitch Seaman, with the California Labor Federation, expressed his agreement with the comments of Mr. Harrison, Ms. Smiley, and Mr. Wick.

Mr. Harrison retook the podium to clarify that the Operating Engineers are not asking for a no vote today. They are recommending an additional 15-day modification.

Employer Duty to Pay for Personal Safety Devices and Safeguards

Mr. Beales briefed the Board on this issue, the main points being that: (1) The current status quo per California Supreme Court's *Bendix* decision and other legal authority is that if personal protective equipment (PPE) is required, then the employer has to pay for it, without exception. (2) The proposal before the Board does not say that every conceivable piece of PPE must be paid for by the employer. It states very carefully that if a regulation in Title 8 says that PPE must be provided, then the employer must pay for it, which is different, in Mr. Beales' opinion, from the perception voiced by some of the stakeholders in written comments. (3) There are two elements of necessity that the Board staff believes exists for this proposal. One is that the proposal resolves an ongoing disagreement with Federal OSHA as to whether California's standards are at least as effective as the Federal OSHA regulations. The second element of necessity has to do with clarity because it is obvious from the many written comments received in this matter that there is a lot of misunderstanding as to what the legal status quo in California really is with respect to the payment for PPE. (4) As to the issue of exceptions, the Federal regulation does have exceptions, but no exceptions are proposed at this time. Attempts to draft California exceptions have been problematic and controversial, which indicates that further consideration should be given to the issue of exceptions as with an advisory committee.

Ms. Marria stated that the Division agrees with the Board staff's recommendation that the Standards Board adopt the regulation as currently proposed and without exceptions. In addition, California has one important difference from the Federal program, which is that we adopted a standard for an effective injury and illness prevention program much earlier than the Federal program has, and that also is well-tailored to this issue because it directs the employer to survey the workplace for hazards to identify hazards unique to the specific job assignment and then to provide necessary required personal protective equipment so the two complement each other well.

The following speakers supported adoption of the proposal, largely because it provides clear, concise direction, and it is consistent with current California law:

Wayd LaPearle, Apprentice Coordinator for Steam Fitters, Plumbers, and Refrigeration Apprentices in San Jose

Corey Friedman, WorkSafe
Anne Katten, CRLA Foundation
Shane Gusman, on behalf of the Teamsters, United Food and Commercial Workers, and the California Conference of Machinists
Joan Lichterman, UPTE-CWA 9119
Robert Schwager, Communication Workers of America Local 9417
Tom Alexander, Steamfitter with Local 393, San Jose Plumbers and Steam Fitters
Mitch Seaman, California Labor Federation
Cynthia Rice, CRLA Foundation
Mike Holmaneski, respiratory therapist

The following speakers opposed adoption of the proposal, in large part because employers need reasonable exceptions:

Kate Smiley, AGC of California and AGC of San Diego
Bruce Wick, Director of Risk Management for Cal-PASC and on behalf of **Kevin Bland** for CFCA and RCA
John Boze, on behalf of Cal-PASC
Dave Harrison, Operating Engineers Local 3
Bill Taylor, Public Agency Safety Managers Association (PASMA)

C. ADJOURNMENT

Mr. MacLeod adjourned the public meeting at 11:27 a.m.

II. PUBLIC HEARING

A. PUBLIC HEARING ITEM

Mr. MacLeod called the Public Hearing of the Board to order at 11:27 a.m., October 20, 2011, in the Auditorium of the State Resources Building, Sacramento, California.

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

1. TITLE 8: **GENERAL INDUSTRY SAFETY ORDERS**
Division 1, Chapter 4, Subchapter 7
Article 4, Section 3276
Article 5, Section 3287
Use of Portable Step Ladders

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

There were no public or Board comments on this proposal.

Mr. MacLeod then introduced the next item noticed for Public Hearing:

2. TITLE 8: **GENERAL INDUSTRY SAFETY ORDERS**
Division 1, Chapter 4, Subchapter 7, Article 4
Section 3276
Portable Ladders—Frequency of Inspections

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

Terry Thedell, Health and Safety Advisor for SDG&E, summarized his written comments.

Patrick Singh, Director of Safety & Loss Control for Safeway, Inc., stated that Safeway has ladders that do not get used monthly in some locations, and they have six or seven different sized ladders. On occasion, ladders may only be used every six months. He suggested that a monthly inspection requirement would create an unnecessary inspection and documentation burden, and he indicated that a "before use" inspection requirement is sufficient.

Judi Freyman with Mercer ORC Networks spoke in support of the comments made by Mr. Thedell and Mr. Singh.

Bill Taylor of PASMA stated that if public agencies such as cities and/or counties were to designate one employee to conduct monthly portable ladder inspections, that is all that one employee would be doing, which would not be a cost effective use of that employee's time. There are ladders on maintenance trucks that are used almost every day that are inspected before each use, and there may be a ladder in a library or in a WIC office that might be used once a year. It seems unreasonable to have to inspect all of those ladders monthly.

John Bobis, speaking on behalf of Aerojet and the Bobis Group, expressed his agreement with the previous speakers that a "before use" inspection requirement will facilitate compliance more than a monthly inspection requirement.

Elizabeth Treanor, Director of the Phylmar Regulatory Roundtable, expressed her agreement with the preceding speakers.

Mr. Kastorff stated that all of the speakers had all made some very logical, reasonable comments indicating their dislike of the proposal. There is already a requirement that a ladder shall be inspected by a qualified person for visible defects frequently, and the definition of frequently has been more than 12 times a year. He stated that he agrees with the speakers, and then asked what they would like to see.

Mr. Prescott stated that Section 3207 defines frequently as more than 12 times a year, and this is why the initial proposal was to change the inspection requirement to at least monthly for clarity. He stated that based on the public comments, however, perhaps the terms frequently or monthly

need to be discarded in favor of "before use" or something similar that would be in keeping with the Federal requirements but not create the added documentation burden on employers.

Mr. Washington expressed concern that a "before use" requirement will not meet the "at least as effective as" requirement for the Federal standards, particularly for ladders that are used infrequently.

Mr. MacLeod then introduced the final item noticed for Public Hearing:

3. TITLE 8: **GENERAL INDUSTRY SAFETY ORDERS**
Division 1, Chapter 4, Subchapter 7, Article 54
Section 4188
Definition of General Purpose Die

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

Mr. Bobis, speaking on behalf of Aerojet and the Bobis Group, spoke in support of the proposal.

Mr. Jackson asked whether the employer whose appeal was granted was engaged in the rulemaking process to ensure that the employer thinks that this solves the problem.

Mr. MacLeod asked why ANSI had dropped the definition of Press Brake Die from its requirements.

B. ADJOURNMENT

Mr. MacLeod adjourned the Public Hearing at 11:55 a.m.

III. BUSINESS MEETING

Mr. MacLeod called the Business Meeting of the Board to order at 12:12 p.m., October 20, 2011, in The Auditorium of the State Resources Building, Sacramento, California.

A. PROPOSED SAFETY ORDERS FOR ADOPTION

1. TITLE 8: **CONSTRUCTION SAFETY ORDERS**
Division 1, Chapter 4, Subchapter 4
Article 2, Section 1504
Article 10, Section 1591, New Appendix A
Article 11, Section 1597
GENERAL INDUSTRY SAFETY ORDERS
Division 1, Chapter 4, Subchapter 7
Article 25, Section 3363

Article 93, New Section 4925.1
MINE SAFETY ORDERS
Division 1, Chapter 4, Subchapter 17, Article 17
Section 7016
Vehicle Exhaust Retrofits
(Heard at the February 17, 2011, Public Hearing)

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

MOTION

Mr. Prescott moved to send the proposal back to staff to develop a third 15-day notice making three changes. The first would be to eliminate the exemption for rotating cabs; the second would be to make clarification changes in the note changing may to shall and the word "and" to "or;" and the third would be to clarify that an exhaust retrofit stack cannot be moved from an area that is the driver's peripheral vision to an area within the operator's operational vision.

Ms. Hart asked in which section or sections those changes were to be located.

Mr Prescott responded that the changes would be located in Section 1591(m)(6)(B) and (C) and in the note following Section 1591(m)(6)(C). Mr. Prescott stated his proposal in the form of a motion, which Mr. Thomas seconded.

Mr. MacLeod expressed the opinion that two of the changes were mentioned in the comments at the public meeting this morning. Mr. Prescott responded that he believed all three were mentioned at the public meeting.

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

2. TITLE 8: **GENERAL INDUSTRY SAFETY ORDERS**
Division 1, Chapter 4, Subchapter 7, Article 10
New Section 3380.1
Employer Duty to Pay for Personal Safety Devices and Safeguards
(Heard at the January 20, 2011, Public Hearing)

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

MOTION

Mr. Thomas stated that in looking at the exceptions and noting that they were approved by Van Howell of Federal OSHA before they were removed from the proposal, he has a problem with the

proposal as presented because, in his opinion, there is room for reasonable exceptions. If there are no exceptions, then everything is going to be considered a personal protective device of some kind, including shirts and pants. Before the Board votes on it, the proposal should go back to an advisory committee to discuss reasonable exceptions. He made a motion to that effect, and Mr. Kastorff seconded the motion.

Mr. McDermott asked whether there is any downside to withdrawing the proposal now and bringing it to an advisory committee.

Ms. Hart responded that there are two issues, which Mr. Beales addressed in his earlier presentation this morning. The first is the issue of making the California standards at least as effective as the Federal standards, which they have asked us to do for several years, and the second is to put the requirement into Title 8 where the regulated public knows where it is instead of having to go outside to a Supreme Court decision and other case law to know what the rule says.

Mr. Beales stated that the proposal as written does not lead to a situation where anything and everything in the world can be considered PPE. The standard says that whenever any safety order in Division 1 of Title 8 requires the provision, furnishing, use, or wearing of PPE, then the employer has to pay for it.

Mr. Prescott stated that, although he understands what Mr. Beales is saying, he can see a large problem in this area if an employer's IIPP, which is required under Section 3203, says that a waitress must wear a closed-toed shoe. That closed-toed shoe has now become required PPE, which the employer must provide for the employee. There are a lot of areas in the construction industry in which the IIPP will state that the employees need to wear long pants, which then becomes required PPE that must be provided by the employer.

Mr. Jackson stated that this proposal is a solution in search of a problem. The status quo and case law from the Appeals Board already says this is what is happening. Thus, we are responding to an opinion from Federal OSHA. There is no evidence that what we are doing in California is any less effective than anything that the Federal agency is doing. He expressed his agreement with Mr. Thomas that we should back off of this a little bit because it is very difficult to undo the unintended consequences once a regulation is passed. We should do it right the first time to ensure there are no mistakes.

Mr. Washington expressed some concern about the frequency with which the employer must replace required PPE, which is a subject that should also be included in the advisory committee. He also spoke in favor of an approach that would be based on guidance rather than exceptions.

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

3. TITLE 8: **SHIP BUILDING, SHIP REPAIRING, AND SHIP BREAKING SAFETY ORDERS**
Division 1, Chapter 4, Subchapter 18
Articles 1, 3, 4, 6, and 8
General Conditions in Shipyard Employment, Federal Final Rule (Horcher)
(Heard at the September 15, 2011, Public Hearing)

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

MOTION

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

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

B. PROPOSED VARIANCE DECISIONS FOR ADOPTION

1. Consent Calendar

Mr. Beales stated that a variance hearing was held just prior to today's Board meeting, and the hearing panel recommends adoption of the proposed Gen II decision that is in the Board packet, and the Board is requested to adopt those items and the other items on the consent calendar.

MOTION

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

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

C. OTHER

1. Legislative Update

Mr. Beales stated that two of the bills that the Board have been tracking have passed the legislature, they went to the Governor, who signed them, and they have been chaptered, which means that they have been enacted into law. They are AB 1136, regarding hospital lifting, and SB 617, which impacts administrative procedures.

Mr. Jackson asked whether either of the chaptered bills require any Board action. Mr. Beales responded SB 617 does not, but AB 1136 may require a Section 100 or other rulemaking action because it impacts what employers are supposed to include in their IIPPs.

2. Executive Officer's Report

Ms. Hart stated that there is a draft of the 2012 meeting schedule in the Board packet, but since it was put in the packets, she has decided to propose a change for the January meeting. In light of the travel restrictions and the budget concerns, she is going to propose that we hold the January meeting in either Sacramento or Oakland, mainly because there are no public hearing items for that month, and it seems to be more cost effective to hold such a short meeting closer to home rather than have Board members and staff travel to San Diego. We will still have meetings in Costa Mesa in April, Oakland in July, and Burbank in October, so we will continue to fulfill our obligations to meet throughout the state.

In addition, we are currently actively seeking to fill the position vacated by Tom Mitchell's retirement in June. We have notices out to either fill the position as a Senior Safety Engineer or as a Senior Industrial Hygienist. We have advertised for both classifications, trying to broaden the number of applicants we may get. We have also indicated that we would consider downgrading those to associates for recruitment purposes to get the proper person into the position. We are hoping to be able to conduct interviews for the position in November, depending on the number of applications we receive.

Mr. Jackson asked when the application window closes. Ms. Hart responded that for the Senior Safety Engineer, it closes on Friday, October 21, 2011, and for the Senior Industrial Hygienist, it closes Wednesday, October 26, 2011. That is when the posting will be pulled from the VPOS system; however, we can consider applications that come in after those dates until the position is filled. Our main function in filling this position is getting the health background.

3. Future Agenda Items

Board staff is to report back to the Board at the November 17, 2011, meeting as to the manner in which the PPE-payment advisory committee is likely to be scheduled.

D. <u>CLOSED SESSSION</u>

The closed session was cancelled.

E. <u>ADJOURNMENT</u>

Mr. MacLeod adjourned the Business Meeting at 12:48 p.m.