

CAL-OSHA ADVISORY COMMITTEE MINUTES of July 7, 2011 MEETING



Department of Industrial Relations
Christine Baker, Acting Director

Division of Occupational Safety & Health Ellen Widess, Chief
Christopher Lee, Deputy Chief for Enforcement
Deborah Gold, Deputy Chief for Health and Technical Services

Oakland-Elihu Harris State Building
1515 Clay Street-Room 1304
Oakland, California
(510) 286-7000

OPENING REMARKS

Report from Christine Baker, Acting Director for Department of Industrial Relations (DIR)

Christine Baker, Acting Director for Department of Industrial Relations (DIR), opened the meeting by expressing pleasure with the new departmental appointees, including Ellen Widess, Chief of the Division of Occupational Safety and Health (DOSH), Deborah Gold, Deputy Chief of Safety and Health for the Division of Occupational Safety and Health, and Julie Su, Labor Commissioner. Other appointments are forthcoming. Director Baker also conveyed the goals of Labor Secretary, Marty Morgenstern, and the administration, of greater effectiveness, efficiency, and collaboration between the divisions of DIR for maximum impact in protecting California's workers. These efforts are also aimed at leveling the playing field to ensure that employers in California who are complying with laws and regulations are not put at competitive disadvantage by employers who skirt California's labor laws.

Report from Ellen Widess, Chief of Cal/OSHA

DOSH Chief, Ellen Widess, reported on her vision and priorities for the Division. She welcomed the input and involvement of the Cal/OSHA Advisory Committee and all the other advisory committees working with the Division. Given the limited resources at hand, she plans to use all these resources most effectively by targeting enforcement efforts to address the most serious hazards, occupations, and workplaces. Where egregious violations are found, the Division will seek maximum impact and deterrence through substantial penalties, referrals to city and district attorneys and other agencies for their added enforcement powers. The value of the Consultation Program's free, voluntary services cannot be overstated, and the Division is hoping to expand these resources as well, particularly to benefit the many smaller businesses with high hazards that could substantially reduce health and safety hazards with information and training. She also hopes to expand the recognition programs to acknowledge the exemplary health and safety efforts of certain employers. Chief Widess noted that the foundation for sound regulation and policy is good scientific and technical knowledge. This has allowed California to be a leader in standard setting such as the ATD standard, heat illness prevention, diacetyl and others. She welcomed the ongoing partnerships with and input of labor, employer and professional organizations, such as those participating on the Advisory Committee, to help the Division anticipate changes in occupations, worker exposures, industries, and technologies that put workers at risk. She also indicated her commitment to fairness, transparency and openness in the Division's work.

ENFORCEMENT REPORT

Christopher Lee, Deputy Chief for Enforcement, reported on the outcome of several enforcement actions since the last report. Cal/OSHA responded to a complaint in September 2010 against the Bay Area Rapid Transit (BART) facility in Richmond, alleging unsafe work procedures due to work in proximity to an energized third rail operating at 1,000 volts. The Division issued two willful and other serious citations, with penalties of \$135,000 for BART's failure to comply with high voltage safety requirements. In the case of T.L. Pavlich, a Southern California construction contractor, failure to comply with Title 8 requirements led to serious worker injury. A welder was assigned to work on a pipe

located in an abandoned gas field without properly calibrated gas monitoring equipment. The worker sustained severe burns. After Cal/OSHA hung an Order Prohibiting Use (OPU), Pavlich violated the OPU by sending other employees into the hazardous environment 11 times. Cal/OSHA issued willful and serious citations, and also made referrals to the District Attorney and the Contractors State License Board. These types of referrals are an example of Cal/OSHA's intention to increase collaboration with sister agencies to maximize the impact of the Division's enforcement efforts to deter employers from putting workers at risk.

Mr. Lee also reported on California C & R, Inc., a case involving a San Francisco-based roofing fatality handled by the Cal/OSHA's San Francisco District office. Mr. Lee commended Regional Manager Cora Gherga and Associate Safety Engineer Chris Kirkham for their outstanding work. They referred this case to the San Francisco District Attorney's office, which prosecuted the company for the death of employee, Antonio Martinez, aged 39. Mr. Martinez was working on a roofing project of a four story apartment building in San Francisco when he fell 38 feet to the sidewalk below. There was no fall protection, railing, scaffold, or any other barrier to prevent the fall, nor safety policies or training. In May, both the owner, Sam Hyung Goo Shim, and his foreman were sentenced to one year in San Francisco County Jail.

Deputy Chief Lee then provided an update on issues related to Fed/OSHA. At the Occupational Safety and Health State Plan Association (OSHSPA) meeting held at the Fed/OSHA Technical Center in Salt Lake City, Utah, participants heard reports about the federal budget process, its potential impact on federal OSHA funding and the new National Emphasis Program. Fed/OSHA reported that, depending on Congressional action, there could be cuts as high as 20% to state OSH programs. This would have severe implications for Cal/OSHA's Enforcement and Consultation Programs that now receive approximately \$34 million. The National Emphasis Program will be focusing on state adoption of federal requirements, so as to increase effective collaboration between Fed/OSHA and the state programs. Fed/OSHA also reported that a new and improved, web-based information management system, OIS, will replace the current flawed Information Management System (IMIS) that Cal/OSHA and other state plans have had to use for years. Fed/OSHA estimates that it will be rolling out the OIS program in spring 2012.

Mr. Lee concluded by reporting that the Division will be submitting its final responses to the most recent Fed/OSHA evaluation of Cal/OSHA, called the EFAME. The EFAME evaluation by Fed/OSHA is done annually for each state program.

In response to a question from the audience about Fed/OSHA funding, Acting DIR Director Baker explained that California receives Federal funding and tries to spend as much of that money as possible in the limited amount of time that we have. We will not be returning any funds back to Fed/OSHA.

CONSULTATION PROGRAM REPORT

Vicky Heza, Program Manager of Cal/OSHA Consultation, reported on recent successes in the Consultation Program. MHS Heating & Air Conditioning Company wrote to the Division about how effective the Consultation Program was in improving the company's health and safety program.

Consultation has contracted to have key Cal/OSHA resource documents for employers and workers translated into Spanish, including the *Pocket Guide to Construction Hazards*, *Trenching Safety Fact Sheets* and *Illness and Injury Prevention Programs for High Hazard Employers*. The translations should be completed within 60 days. DIR is assisting with this work.

Ms. Heza noted some changes in procedures with regard to VPP Construction and SHARP Construction Programs, required, in part, by the new Fed/OSHA policy. An employer due for re-certification in VPP Construction will now be visited by Consultation representatives from all of the area offices where the company has an active construction site in California. This program modification is in response to resource considerations within the Consultation Program. Regarding SHARP Construction, future applications must be submitted on a site specific basis, as opposed to a regional exemption basis. Existing employers that are in the SHARP Construction program and have a regional exemption will be grandfathered into the program and maintain the regional exemption, until such time as re-certification is due. The re-certification applications will then become site specific. This programmatic modification is in response to Fed/OSHA policy requirements.

RESEARCH & HEALTH STANDARDS REPORT

Deborah Gold, Deputy Chief for Health, reported that progress is being made at the federal level on adoption on the "Globally Harmonized System" for labeling hazardous chemicals by using a uniform, internationally-developed identification system. Under this system, chemicals brought into any country will be required to be properly labeled using the system and supporting documentation, like "MSDS's" which instead will be called "SDS's", will be required to be attached. Rulemaking in the US was initiated in 2009, with the involvement of the EPA, the FDA, the Consumer Product Safety commission and Fed/OSHA. The OSHA rulemaking is at the Office of Management and Budget, which is the final rulemaking stage. Adoption of the Globally Harmonized System in California will involve review of various California statutes, such as Proposition 65, and legislative changes may be needed. The Research and Health Standards Unit is following the progress of work at the federal level and will be evaluating the types of regulatory and statutory changes needed to comply in California.

An Advisory Committee met regarding occupational lead. There will be another meeting to consider the remainder of the California Department of Public Health (CDPH) proposal, which includes specific triggers for some of the requirements like hygiene.

DOSH's Research and Health Standards staff is continuing to work on the hazards caused by the Brazilian Blowout hair treatment. This is one of those issues where the Globally Harmonized System should help. A number of companies are importing this

product directly from Brazil and do not realize that in doing so they are now responsible for complying with the MSDS and labeling standards. DOSH inspects these workplaces and must issue citations when the warning signs about formaldehyde and other protective measures are absent. Cal/OSHA has been working closely with Fed/OSHA to track the products in use, worker exposures, and issuance of citations.

On June 7th, an advisory committee met regarding health hazards in the adult film industry. As the Division considers the next regulatory step, DOSH field and legal staff are moving forward to ensure that enforcement efforts under the existing standards are effective to protect workers in this industry.

The Division is renewing its staff training, and plans to start a robust series of different training programs in the fall. This effort was delayed due to the demands of the heat season and heat illness prevention efforts. Planned courses include sampling techniques, technical trainings in both health and safety for field inspectors, and Cal/OSHA's administrative staff will be offered more advanced computer software and database training.

A new database initiative for the Public Safety permit programs (including Amusement Rides and Tramways, Elevators, and Pressure Vessels) has begun. The initiative will integrate records created by these programs into an upgraded database system that will improve service, reporting, fee collection, and program evaluation. The new information system is called Public Safety SIMS.

RESEARCH & SAFETY STANDARDS REPORT

Joel Foss, Acting Principal Safety Engineer, reported on the Division's efforts to reconcile existing GISO crane requirements with the new construction crane requirements, recently adopted without substantive changes from the new Federal construction crane requirements. Mr. Foss said that Crane Unit and Research & Standards Development Unit staff would be attending an advisory committee on October 4 and 5 to clarify confusing language that was adopted as part of a "Horcher" process. He said the Division also planned to submit a Form 9, to make changes to the GISO crane standards in cases where the new construction crane standards provided more safety protection. The long-term plan is to narrow the differences between the GISO and CSO crane standards, or get the list of differences limited to a few issues like crane operator certification.

Mr. Foss also addressed an issue that has been causing confusion in the California construction industry relating to the height trigger for fall protection in residential construction. In the past, Fed/OSHA has permitted residential framers and residential roofers to work without conventional fall protection and without a written fall protection plan with controlled access zones (CAZs) and monitors. On June 16th, Fed/OSHA began circulating a document that would require residential framing contractors and roofing contractors to use either conventional fall protection or a written fall protection plan. Fed/OSHA was asking state OSHA plans asking for guidance. Fed/OSHA advised California that this approach does not affect the existing standard in California at all because Cal/OSHA does not permit the use of fall protection plans in place of conventional fall protection equipment. The Research and Safety Standards Unit is in

frequent contact with Fed/OSHA and in the event Fed/OSHA changes its view on the application of its standard in California, DOSH will advise stakeholders.

LEGAL UNIT REPORT

DOSH Chief Counsel Amy Martin reported under recent litigation, regulatory matters and the BOI (Bureau of Investigations).

Under litigation, Ms. Martin reported Cal Pro v. DOSH, is pending in Los Angeles Superior Court. Cal Pro, an entity representing portable amusement ride operators, brought suit against the Division alleging that the newly promulgated fee structure for inspections and permits was improperly adopted and unenforceable. A preliminary injunction was granted by the superior court against the Division prohibiting application of the new fees to portable amusement ride permits and inspections. Both parties have moved for Summary Adjudication. The matter remains unresolved.

In Patient Zero v. DOSH, the case was filed in San Francisco Superior Court. Patient Zero, a performer in the adult film industry, tested positive for HIV and allegedly made one film after having the test results, potentially exposing other adult film performers in violation of the regulations on blood borne pathogens. In the course of investigating the incident, the Division requested certain records pertaining to Patient Zero's work history from the medical clinic that performed the HIV test and that regularly provides information regarding adult film performers' medical status to adult film producers. Patient Zero sought to prevent the Division from obtaining the employment history. Summary Judgment was granted in favor of the Plaintiff and the Division is considering whether or not to appeal.

Bautista v. State of California, DOSH and Len Welsh (in his capacity as Chief of DOSH) was filed in Los Angeles Superior Court. Bautista and other plaintiffs brought suit alleging that the Division fails in various ministerial duties required of it by statute in regards to agricultural employees and enforcement of California's Heat regulations. Procedural and discovery disputes continue between the parties. The matter remains unresolved. United Assoc., Local Union 246 v. Cal OSHAB (Harris Construction), is pending in the Third District Court of Appeal. The Cal/OSHA Appeals Board appealed to the Third District after a Superior Court overturned the Appeals Board's Decision after Reconsideration in Harris Construction. The Superior Court found that the Appeals Board failed to comply with the previous appellate decision in Overaa Construction which stated that the Division does not bear any additional burden of proof when demonstrating controlling employer liability. The parties have submitted briefs and await a decision.

The Division is monitoring the progress of various OSHA-related bills through the California Legislature, including AB 1136-Swanson, the hospital patient lifting and transfer hazard bill, and AB 432-De León, the bill that addresses protections for hotel room cleaners including fitted sheets and long-handled bathroom cleaning equipment.

For regulatory matters, Ms. Martin reported a regulation revising the current penalty structure and a regulation creating an affirmative defense for controlling employers under

the multi-employer statute will be discussed in the coming year. No language is currently pending.

As discussed at previous Advisory Committee meetings, the Bureau of Investigations will be taking a closer look at case referrals and making decisions about which matters are most appropriate for potential criminal prosecution. As a result some fatalities may not result in referral while some non-fatal serious injury cases will be referred. Decisions about referral will be based on evidence of the culpability of the employer.

CAL/OSHA APPEALS BOARD REPORT

Art Carter, Chair of the Appeals Board, reported that the Board will have 3 Administrative Law Judge vacancies which it hopes to fill in order to handle the existing appeal caseloads. Chairman Carter mentioned that the Board is expecting to start seeing cases for decision in October or November, involving citations for serious violations issued after AB 2774 (Swanson), which amended Labor Code section 6432, became effective in January 2011. He added that prior to the bill; California's rate of issuing serious citations was 16 – 17% of all citations, compared to 40 – 42% for Fed/OSHA. He expects California, after AB 2774, will have an average of about 30% serious violations. Mr. Carter also reported that SB 829(DeSaulnier), pertaining to the Appeals Board processes and staffing, is somewhat unclear and is working its way through Legislative committees. Chairman Carter reported that the Board has begun using videoconferences to hold Appeal Hearings close to the venue in which an employer was cited. In closing, Mr. Carter stated the Board is revising some of its regulations. An advisory committee meeting was held on May 25th and the topics raised by the participants included the issues of abatement, expedited abatement and BOI Referrals.

CAL/OSHA STANDARDS BOARD REPORT

Marley Hart, Executive Officer of the Cal/OSHA Standards Board reported that the Crane and Derrick standard adopted by the Board through a "Horcher" process was approved today by the Office of Administrative Law (OAL) and became effective today.

The Standards Board issued at 2nd 15 day notice for public comments for Vehicle Exhaust Retrofit rulemaking. The deadline for submitting written comments is July 20, 2011 in Sacramento.

Ms. Hart noted that, due to state travel restrictions, the remaining 2011 Standards Board's monthly meetings will be held primarily in Sacramento, with one exception. In November, the Board is scheduled to meet in Costa Mesa. The next meeting for Standards Board will be held in Sacramento on July 21st. There will be no public hearings involving regulations at this meeting. A copy of the Board's "Calendar of Activities" for July 2011 is in the handouts at the sign in table.

OPEN DISCUSSION

In response to a question about Cal/OSHA's physicians and medical capacity to address new types of exposures such as in biotech and nanotechnology, Deputy Chief Gold commented that the ATD standard addresses some of the hazards through the biosafety

standard. Chief Widess added that our Medical Unit consists of Dr. Janice Prudhomme, an occupational health physician based in Oakland, and Mary Cochie, an occupational health nurse based in southern California. The Division has requested additional staffing for this essential function, and is collaborating with CDPH's Occupational Health Unit to fill the gap until new physicians, nurses and toxicologists can be hired. Chief Widess indicated her plans to increase collaboration with other agencies with relevant expertise to improve the level of scientific and technical information used in enforcement and in the standard-setting process, and use scarce state resources most efficiently and effectively.

In response to a question about vacancies in Cal/OSHA Acting DIR Director Christine Baker reported that the Department will be submitting exemption requests from the hiring freeze for DOSH. She added the Division is working hard to document the need for additional staff. At the same time, she noted all agencies are being asked to assess how they are doing their work and where the greatest needs exist. She has asked all divisions, including Cal/OSHA, to review their work loads, consider how to better target their resources and to take a close look at staffing, performance, and needs. She noted that DIR is looking at ways to improve the efficiency and effectiveness of inspections through better targeting, to ensure that enforcement is directed where it is most needed, and to increase the coordination with Employment Development Department (EDD) and the Division of Workers' Compensation to get the best data for enforcement efforts. Ms. Baker also stated that during the summer, Chief Widess proposed redirecting resources of the EEEEC (Underground Economy Task Force) to amplify Cal/OSHA's field inspection capacity for heat illness prevention work. DIR is interested in building on this model to increase capacity and effectiveness in other targeted enforcement efforts. Chief Widess added that language capability, meaning the ability to speak languages in addition to English, is a high priority for DOSH among existing staff and in future hiring.

In response to a question asking for a summary of the results of the EFAME audit process and an update on the advisory committee that addressed the complaint process, Deputy Chief Lee responded that the complaint process committee was intended to start a dialogue and to gather information from a range of stakeholders on the issue of complaint response. Mr. Lee stated that Fed/OSHA's EFAME report found the Division was not as responsive as it should be to complaints and the Division is considering how to address this. Mr. Lee observed that the EFAME process allowed the Division to make a strong argument about the benefits of state programs. For example, Cal/OSHA has 40 permissible exposure limits for contaminants that are far more protective than Fed/OSHA. Cal/OSHA has been able to move forward in important areas that the federal government has not, including new standards such as the ATD (Aerosol Transmissible Disease), Diacetyl, and the Heat Illness Prevention Standards. The EFAME also brought up other issues including complaint response times, citation lapse times and adoption of limited standards by the Standards Board, which the Division and Standards Board will address with Fed/OSHA. The final EFAME report had 46 recommendations, 25 of which pertained to the Division. It also included items within the jurisdiction of the Cal/OSHA Appeals Board and complaint investigations handled by the Division of Labor Standards Enforcement (DLSE). Mr. Lee noted that the Division and Fed/OSHA have had constructive meetings about the EFAME findings and the Division is finalizing its corrective action plan.

Art Carter, Chairman of the Appeals Board, responded to the issue of alleged ALJ bias by saying that the Board takes all complaints about the judges seriously and has a 24 hour hotline available for those who wish to express concerns.

Several members of the Cal/OSHA Advisory committee meeting asked whether there were any plans to change the frequency of meetings and composition of the committee. Several commented that it would be a good time to review the purpose, functions and membership of the committee and urged that the meetings continue because they provide a valuable resource for both the employer and labor and worker advocate community. Two members of the committee, Gail Bateson and Judy Freyman, volunteered to draft a survey that could be used for public comment about the Cal/OSHA Advisory committee meetings and changes of interest to the public.

Chief Widess indicated that despite budgetary and travel restrictions, the Division is committed to continuing the Advisory Committee as a means to get broad input on the Division's work and occupational health and safety issues of concern. Members of the Committee and the public are encouraged to give the Division feedback about ways to improve the value and engagement of the Advisory Committee.

Chief Widess, concluded the meeting by thanking everyone for attending, and urged everyone to send in suggestions on how to work collaboratively and effectively to protect California's worker' health and safety and ensure good jobs in the state.

ADJOURNMENT AND NEXT MEETING:

The meeting adjourned at 11:55 a.m. The next meeting will be held as follows:

DATE: November 3, 2011
TIME: 10:00 a.m.
PLACE: Elihu M. Harris State Building
1515 Clay Street
Oakland, CA