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Stakeholders Press Cal/OSHA on COVID Revisions

With COVID cases dramatically dropping in California and the state eyeing a mid-June reopening, stakeholders wonder when Cal/OSHA will revise its controversial COVID emergency temporary standard to reflect new federal guidance and the improving situation. The pandemic is turning into an endemic.

Rob Moutrie, California Chamber of Commerce

The real question asked is, since the pandemic is nearly over and the state about to reopen, what is the need even to keep any COVID regulations? Many states are fully open and have dropped mask mandates. Those states are faring far better than the over-controlled states, both in cases and economics.

The Division of Occupational Safety and Health has been working "day and night" to revise the regulation, says Deputy Chief for Health Eric Berg, and hopes to have a proposal to the Standards Board in time for its May 20 meeting. If that happens, it could be in the hands of the Office of Administrative Law and the revisions in place by the time the state reopens.

Board Executive Officer Christina Shupe notes that in order to put the package on the May agenda, the board will have to receive it from DOSH by April 28. "If we have it in time to put it on the agenda, we would post the draft language," she says. The public would have the opportunity to review it, and the board would vote on it at the May 20 meeting. Assuming it is approved (a safe bet), it would then go to OAL and become effective upon filing, likely late May.

Shupe cautions, though, that if the board recommends additional revisions, "it would push that timeframe back."

At the board's April meeting, several stakeholders urged DOSH and the Board to get the revisions into place as quickly as possible and reflect current national guidelines.

'Now It's Necessary'

Helen Cleary, director of the Phylmar Regulatory Roundtable OSH Forum, acknowledges the "hard work and dedication" of the Division and Board staff on this issue. "It is clear that immediate action to amend the ETS is needed right now," she says.

The biggest issues to employers include a requirement for even fully vaccinated employees to quarantine if they are exposed to COVID, "and the inability for critical infrastructure [employers] to reduce quarantine," even in light of new guidance from the Centers for Disease Control and Prevention. "Individuals can now visit without masks and social distancing, and no quarantine is required for fully vaccinated individuals with close contact. And yet, employers and workers in California are prohibited from following this updated science-based guidance. When employers ask why, the only response is that California requires it," Cleary says.

Helen Cleary, Phylmar Regulatory Roundtable.

"When employers ask why, the only response is that California requires it"
– Helen Cleary, Plymar Regulatory Roundtable

Phylmar asks the board to expedite the ETS amendments and include the CDC guidance on quarantining and testing. "We appreciate the complexities the Division is navigating, and we do not envy their task," Cleary adds. "However, we heard for months from board members, advocates for this ETS and DOSH that this is an emergency and the ETS will be revised when necessary. Well, it's now necessary."

California Chamber of Commerce's Rob Moutrie says, "I've had many members reach out to me and say, 'Okay, the June 15 timeline is coming. What will that do to the regulation?' In

☞

IN THIS ISSUE

It is 7,327 days since our last lost-time accident.

most cases, I actually have been forced to tell them nothing. The regulation stands as independent law. We see it as urgent to keep these things moving together," he said, urging the Board and DOSH to "catch up with the science" as it evolves.

Sarah Wiltfong, Los Angeles County Business Federation.

Sarah Wiltfong of the Los Angeles County Business Federation states that it is "imperative that Cal/OSHA adopt amendments to the current standard. Businesses are doing their best to comply and inconsistencies in the standard make it difficult to conduct business in an already challenging time. Businesses need clarity."

"Businesses need clarity."
– Wiltfong, Los Angeles County Business Federation

Darrell Smith, the former chief of police for Lemoore and now chief relations officer for Daniel C. Salas Harvesting, says the company's main concern is that the ETS does not reflect current guidelines. CDC "basically exempts folks from testing if they're fully vaccinated, unless they're symptomatic," he says. Salas has thousands of employees, he adds, "and throughout this pandemic we have done our very best to keep our employees safe." Smith notes that there is "no end to exclusion pay, and there's no limit on how many times a person could be paid for an exposure. Even a fully vaccinated person could be paid multiple times under this current policy."

Retired Lemoore police chief Darrell Smith, now with Daniel C. Salas Harvesting.

Labor concurs on the need for a revised standard. "I would like to join the number of people who have spoken about the need to move on changes to the [ETS] to update it, to provide stronger guidance for employers," says Maggie Robbins of Worksafe. "What the public input process will be is eagerly awaited by many of us."

California's COVID cases have plummeted from a high of almost 61,000 cases per day in mid-December 2020 to a daily average of just under 2,400 this week. The cases are creating fewer problems, and many are treated with isolation only and no medications. Deaths are decreasing at an exponential pace.

"Even a fully vaccinated person could be paid multiple times under this current policy."

Employers, and people, want less guidance, less interference from the government, and freedom to get on with it. With a recall election coming up, Californians may just take that freedom back.

More Wildfire Citations

Cal/OSHA's Division of Occupational Safety and Health has issued its second set of citations for violations of the wildfire smoke protection standard. The first set was issued earlier this year to a Central Valley farm labor contractor. This time, the employer is a self-storage yard in Davis.

Central Davis Storage, owned by Simmons Real Estate, also was cited for a serious violation of the Injury and Illness Prevention Program standard for allegedly failing to train employees on COVID-19 protections. Simmons is appealing all the citations.

The wildfire smoke citations are issued under General Industry Safety Orders §5141.1(d) and (e). Both are classified as general and come with $390 proposed penalties. The case was based on a complaint. The first instance alleges the employer "did not establish and implement a system for communicating wildfire smoke hazards, including provisions designed to encourage employees to inform the employer of wildfire smoke hazards in the workplace without fear of reprisal. During widespread wildfire, no

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Publisher	J Dale Debber
Editor	Kevin Thompson
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system was in place informing employees of the current AQI [air quality index], and the protective measure available to reduce their wildfire smoke exposures," DOSH says.

The second allegation is that the employer failed to provide employees with training, including the information in Appendix B of the standard.

The alleged serious violation of the IIPP standard is failing to train employees on the occupational hazards related to COVID-19, signs and symptoms, ways to avoid infection, and the employer's procedures for controlling transmission. DOSH seeks a $5,400 penalty for this alleged violation.

Cal/OSHA Takes the Plunge on Technical Diving Safety Revisions

Bolstered by a federal Appeals Court ruling in a Fed-OSHA case, the Cal/OSHA Standards Board has adopted revisions to its diving regulations to preserve standards for so-called "technical" diving. Even Fed-OSHA has agreed to back off an earlier opinion that the proposal was not as effective as the national standard.

The story goes back several years to when the Board moved to adopt Fed-OSHA diving provisions. The state's technical diving community, including zoos, aquariums, television, and film objected, saying the revisions would make violative the techniques they had used safely for decades.

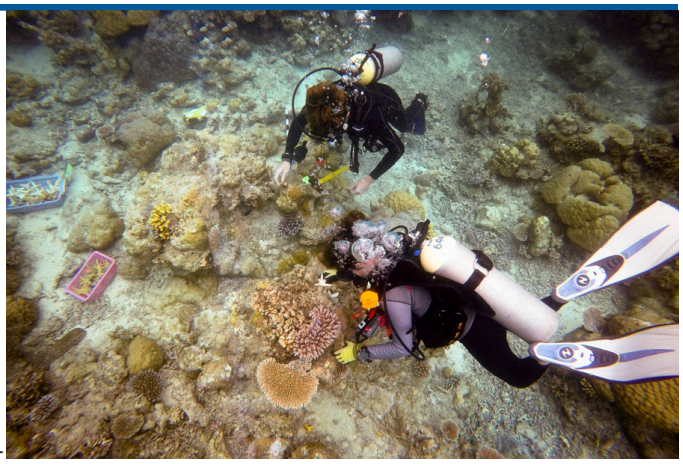
The Board removed the provisions in question, adopted the rest of the federal changes, and then sent the issue to an advisory committee. Technical diving is much more prevalent in California than is commercial diving. The federal regulations were created for commercial diving and contained limited exemptions for scientific diving.

In 2020, the Board issued a formal technical diving proposal, but the Fed-OSHA area director responded that the proposal was not "at least as effective." For instance, the feds do not recognize the term "technical diving, only scientific and commercial diving. The area director also said a provision on operating procedures should have required "continuous visual contact" instead of "effective communication." OSHA also objected to Cal/OSHA provisions on "hookah" or "snuba" diving.

Board staff told Fed-OSHA that it rejected its rejection of "technical diving," saying the Cal/OSHA definition "more accurately reflects occupational diving in specialized environments and therefor more adequately protects divers" in these situations. It also pointed out that hookah diving is a "necessary diving mode for technical divers," and has been performed safely since 1980.

A 'Necessary Component'

The ruling by the United States Court of Appeal for the Fifth Circuit further bolsters Cal/OSHA's case. That decision reversed a ruling by the federal Occupational Safety and Health Review Commission holding that feeding and cleaning operations at Houston Aquarium did not qualify for the "scientific exemption" from Fed-OSHA rules on diving. The Court of Appeal held that "feeding and cleaning dives are a necessary component of its scientific research. It so held because they are a source of regular contact with the animals during which divers can assess their needs and identify potential hazards and abnormalities, and because feeding and cleaning are necessary to the animals' survival."



Aquarium of the Pacific

"Technical" divers now have regulatory recognition of their underwater techniques.

"We have been following these exemptions for years and we know that they work."
– Paul Dimeo, Aquarium of the Pacific

"The court actually recognized the importance of certain diving practices that are unique to technical diving operations," says Standards Board Principal Safety Engineer Michael Manieri. He adds that Fed-OSHA has "agreed to reconsider" the Title 8 revisions in light of the decision.

Paul Dimeo, dive safety officer for the Aquarium of the Pacific, thanked the Board for its work to preserve the California-specific protections. "You will allow those California industries outside the clearly defined scope of commercial diving to continue to operate as they have been, with their exemplary safety records," he says. "We have been following these exemptions for years and we know that they work."

Andrew Solomon, diving safety officer for the California Science Center, comments, "Not only do these proposed regulations preserve the important technical diving definition for the first time in the history of occupational diving regulations, but this definition is also expanded to formally recognize one of this industry's largest stakeholders – zoos and aquariums."

Technical diving is defined as "Diving other than scientific or commercial diving, which requires technical expertise and is not an integral part of an on-going construction, demolition, repair, maintenance, shipbuilding, shipbreaking, or ship repair job. Such activities include, but are not limited to, making or performing observations, measurements, and adjustments, film and TV diving, and zoo and aquarium exhibit diving."

Click here to see the entire adopted revisions to General Industry Safety Orders §§ 6051, 6056, and 6057.

The Date Palm Saga

Both Cal/OSHA and employers in the date palm industry agree that using lift-mounted platforms to place employees in trees to do needed work is better than having them use ladders. But the two sides are having a tough time coming up with language that works for employers and meets regulatory requirements.

Growers hope a site visit to date country by the Standards Board staff and the Division of Occupational Safety and Health will help bring clarity and a regulatory breakthrough. A recent advisory committee meeting with stakeholders could not resolve the impasse.

For the better part of a decade, this saga has been going on first with numerous variances granted to date growers, then a petition seeking to codify practices allowed through the variance process.

Traditionally, laborers in this Southern California industry have used ladders (with fall protection) to get up the trees to prune, pollinate, tie, clean, and harvest. More than a decade ago, the industry, through professional engineer Ralph Shirley, developed platforms designed to wrap around date trees, hoisted by lift trucks. Since 2008, the board has granted more than a dozen variances to growers to use this method. It is considered much safer than ladders, reducing fall and heat illness hazards.

Several years ago, the industry petitioned the board to craft a regulation recognizing the practice because the relevant regulation, General Industry Safety Orders §3657, was not written with these operations in mind and would bar or limit some elements. But Cal/OSHA wants to assure the practice is safe before giving it the regulatory stamp of recognition.

The wrap-around platforms are meant to carry up to eight employees, who would be required to wear fall protection while in the platforms. Employees must ascend trees up to 10 times per season for the various tasks, and climbing up ladders is inherently hazardous. It potentially contributes to heat illness in the hot desert climes where the dates are grown.

Growers say that the variance process takes too long, and given the variety of date palm operations, a general standard makes more sense. There are approximately 200 date growers in the Coachella Valley, where the dates are grown. About half of the growers' members of the California Date Commission, which initiated the proposal.

Standards Board staff has crafted draft language creating a new regulation, General Industry Safety Orders §3458.2: "Use of Work Platforms on Lift Trucks in Date Palm Operations." The existing safety order covering lift trucks, GISO §3657, would be modified to accommodate date palm operations.

As the saying goes, the devil is in the details. And the details have bedeviled the committee. For instance, the industry proposal would allow a single operator to handle up to three lift trucks and crews, with the operator allowed to be within a 150-foot operating area of all the trucks. The industry also wants the regulation to enable hoisted employees to stand on the platform railings to access hard-to-reach areas.

Another area of contention is the area allowed for each employee on the platform. Section 3657 specifies 2'x2', but labor would like to see 3'x3' due to concerns about employee crowding while using sharp tools.

The platforms are mounted on lift trucks and can reach high into date trees for needed work.

'Kill an Industry'?

The industry says its practices, used in at least 15 variances, and honed over more than 13 million work hours, have resulted in zero incidents, proving their safety.

But committee chair David Kernazitskas, senior safety engineer for the Standards Board, says it's one thing to permit these techniques in a variance, but quite another to hardwire them into Title 8. And Fed-OSHA has great sway in these matters. The operator-within-150-feet issue is a prime example. "If everybody in this committee said, "Okay, we could compromise and go up to 75 feet, federal OSHA doesn't allow you to go more than 25," he said. "We would really have to come up with a strong argument because it's very clear. We have to be commensurate" with the comparable Fed-OSHA standard.

> "We would really have to come up with a strong argument, because it's very clear. We have to be commensurate."
> – David Kernazitskas, Standards Board

Additionally, federal regulations prohibit a lift operator from leaving the seat of the vehicle unless the forks are lowered. Kernazitskas commented that the industry likely would have to convince the full Standards Board to direct staff to make these changes. "We would need a lot of labor support," he added. The chair noted that the date palm industry is California-specific, and the federal regulations in question don't consider such operations.

"This really gives me great concern, about the way this process is going," said David Mansheim of Bard Date Co. "We're willing to give a little bit on that, but you're going to kill an industry" if it is held to the 25-foot rule. Mansheim also noted that the federal standard on lift trucks "does not apply to farm vehicles." He added, "I think our performance under the variances is sufficient precedent where these ideas need to be considered. This is a unique opportunity to devise an appropriate standard." ☞

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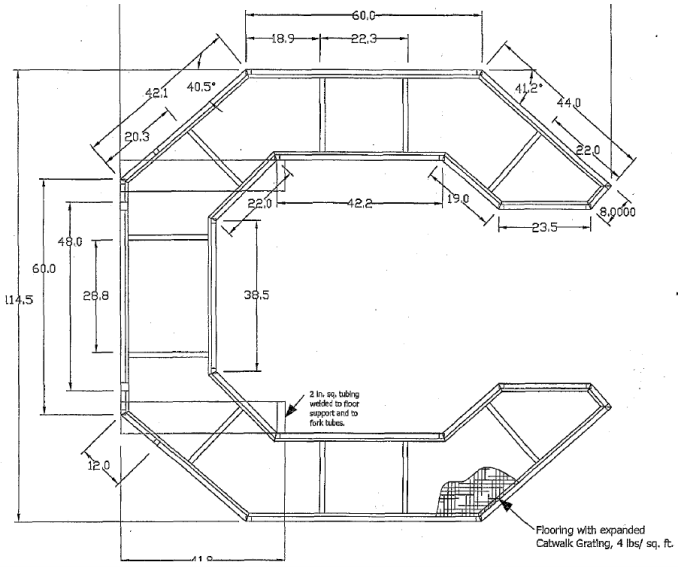
There doesn't appear to be much room on the issue of standing on guardrails. "Nobody has come up with any alternative ideas," Kernazitskas said. "Not only [is this] prohibited by Cal/OSHA regulations, [it is] also prohibited by federal regulation. I don't understand exactly what the need is there, and why it can't be met with long-handle tools or something."

> "I think our performance under the variances is sufficient precedent where these ideas need to be considered."
> – David Mansheim, Bard Date Co.

Another source of contention in the committee is a proposed requirement that a California-registered professional engineer evaluate lift trucks and platforms to ensure the equipment will not be overloaded. The industry objects to the possibility that each lift truck/platform would have to be evaluated by a P.E. It contends that an engineer should design an evaluation system that qualified persons could implement.

In fact, P.E. Ralph Shirley, who designed the date palm platforms, has devised a spreadsheet in which lift/platform characteristics can be inputted to determine how the equipment can be used safely. Shirley says the evaluation should be "a process that's developed by a P.E., rather than the actual P.E. has to be on location doing the evaluation."

A Cal/OSHA representative said a P.E. should be performing the load calculation because qualified persons retire and move on. That could lead to a situation allowing "anybody to determine with or without qualifications ... that a platform is safe to be used," he commented.



Professional engineer Ralph Shirley's design for date palm platforms.

Cal/OSHA also points out that growers don't own the lifts. They rent them each year, so the lift truck-platform pairings are often different.

But Kernazitskas still suggested a "process or an evaluation overseen" by a P.E.

The industry invited Cal/OSHA to visit the Coachella Valley to take a first-hand look at the lifting technique and evaluation system. Standards Board staff previously took such a field trip. Perhaps a second trip will give this regulatory process the lift it needs.

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Workplace Fatality Update – Only Two From COVID

The California workplace fatality count for the first week in April is the lowest in many months, as the COVID-19 death toll continues to plummet.

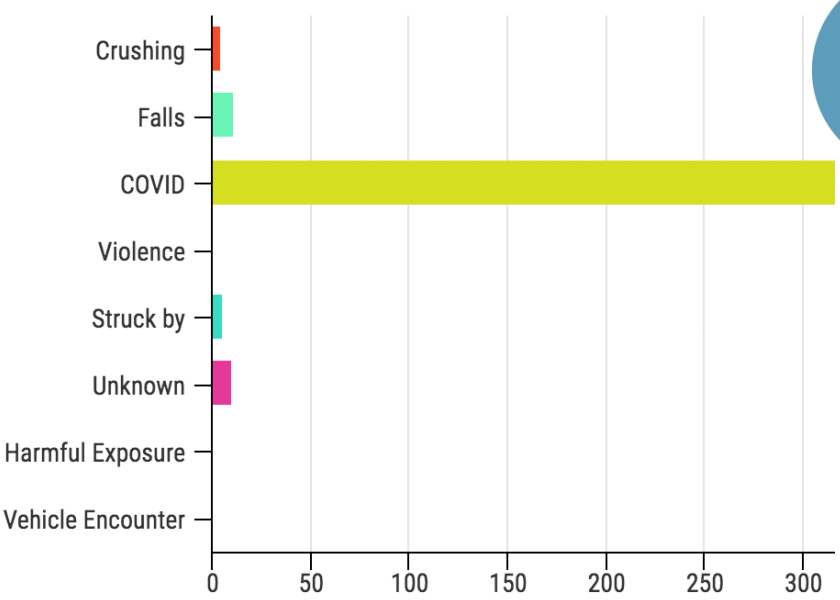
The non-COVID fatality was in Fontana, where an employee of TSG Fleet Services fell from the top of a tank attached to a trailer, succumbing to the resulting injuries.

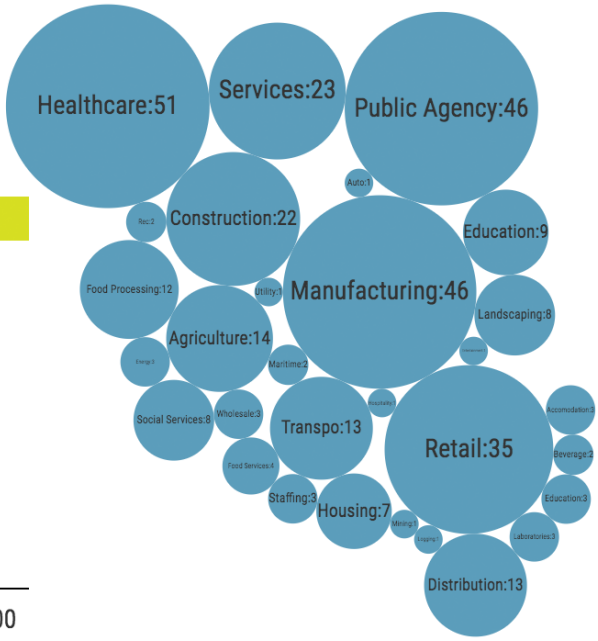
The COVID deaths included employees of:

- California Department of Corrections and Rehabilitation in Van Nuys; and
- Bassani Manufacturing in Santa Ana.

2021 Cal/OSHA Fatality Investigations

as of 4/20/2021





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- Wage and benefits: https://www.dir.ca.gov/dosh/documents/recruiting-inspectors.pdf
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Bilingual candidates are encouraged to apply.

Questions?
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Risk Control Advisor or Senior Risk Control Advisor Northern California

ACWA JPIA is recruiting for a Risk Control Advisor or Senior Risk Control Advisor, depending on education and experience. The candidate will work under the direction of the Risk Control Manager to provide risk management services to member water agencies in northern California. The Advisor conducts general on-site risk management inspections to assess conditions affecting safety, risk control, loss prevention with emphasis on significant loss areas and advises corrective actions, along with training on operations topics and safety issues.

Complete employment application located on JPIA's website, www.acwajpia.com. Clickconnect/Employment Opportunities/Job Openings. Submit JPIA application with cover letter and resume to hr@acwajpia.com with Risk Advisor in subject line by May 6, 2021. You will be required to pass a background check if offered the position.

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Bagatelos Architectural Glass Systems, Inc., a statewide commercial glazing subcontractor, has a job opening in the Southern California region for a Safety Manager.

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Job Duties & Responsibilities:

- Perform field visits at jobsites; assess and monitor level of safe practices and safety culture, coach on safe practices and PPE
- Effective jobsite safety practices; create job specific safety plans with management, develop job specific emergency plans, and maintain relationships with other company safety representatives for project(s)
- Ensure documentation and enforcement of safety policies; program reporting, documentation of JSA, JHA, Toolbox Talks, Safety Meetings, etc.,
- Provide any new and/or ongoing required safety related training; OSHA/Cal-Osha Updates, Title 8 Updates, State law, jobsite specific, etc.

Qualifications:

- At least 5 years of construction safety experience
- Excellent communication, organizational, decision-making, and problem-solving skills
- Ability to work effectively with all company management and all construction groups
- Ability to perform on-site safety responsibilities; managing/administering safety trainings, orientations, procedures, managing/investigating/reporting injuries, illnesses, near misses
- Ability to travel to various jobsite locations throughout Southern California
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- CHST or CSP preferred
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SUMMARIES OF RECENT CAL/OSH APPEALS BOARD DECISIONS

Cal-OSHA Reporter is pleased to provide, for our valued subscribers, graphs indicating cited employers' experience modification rating (X-Mods) over the designated years.

CONSTRUCTION SAFETY ORDERS – INJURY AND ILLNESS PREVENTION PROGRAM (IIPP), METHODS AND/OR PROCEDURES FOR CORRECTING UNSAFE OR UNHEALTHY CONDITIONS, WORK PRACTICES AND WORK PROCEDURES

Cal. Code Regs, tit. 8, §§ 1509(a), 3203(a)(6) (2021) – The Division failed to establish Employer violated §3203(a)(6), which did not apply to the Division's specific allegation that Employer failed to fill out the root cause of the accident on a job hazard assessment. The citation did not concern implementation of corrective efforts, but rather whether Employer effectively implemented its duty to inspect, identify and evaluate hazards, which are more appropriately addressed under §3203(a)(4).

CONSTRUCTION SAFETY ORDERS – RAMPS, RUNWAYS, STAIRWELLS, AND STAIRS, UNPROTECTED SIDES AND EDGES OF STAIRWAY LANDINGS PROVIDED WITH RAILINGS

Cal. Code Regs, tit. 8, §§ 1626(b)(5), 1632(b)(1) and 1626(a)(2) (2021) – The ALJ correctly concluded §1624(b)(5) was not violated because the area from which an employee fell was not the "unprotected sides and edges of stairway landings." The Division established the citation based on Employer's violation of both §1632(b)(1), which requires floor, roof and skylight openings to be guarded by temporary railings and toeboards or by covers, and §1626(a)(2), which which pertains to stairwell guarding.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD – PREHEARING PROCEDURE DISCOVERY, AND MOTIONS, AMENDMENTS

Board reg. § 371.2 (2021) – The Appeals Board concluded the ALJ incorrectly denied the Division's motions to amend its citation to allege violations of §§1632(b) and 1626(a)(2), respectively. Employer failed to demonstrate that its case would be seriously impaired if the amendment were granted.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD – HEARING, POST-SUBMISSION AMENDMENTS

Board reg. § 386(a) (2021) – The Appeals Board concluded the ALJ incorrectly denied the Division's post-submission amendment. The ALJ declined to allow the amendment to conform to proof due to the undue delay in seeking the post-hearing amendment, but the text of the Board's rule on post-submission amendments does not encompass "undue delay" considerations.

— • —

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48 *COR* 40-8405 [¶23,104R]

***Digest** of COSHAB's Decision After Reconsideration dated April 2, 2021, Inspection No. 1173183.*

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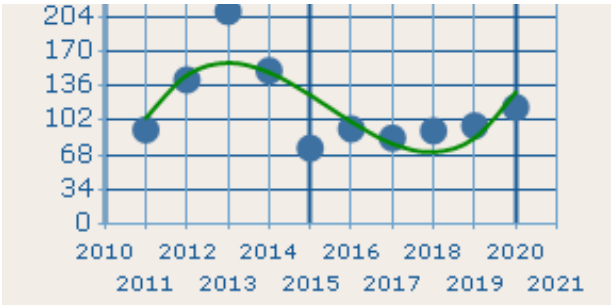
Judith S. Freyman, Board Member

Marvin P. Kropke, Board Member



X-MOD GRAPH FROM COMPLINE

Background. The Division issued two citations, alleging four violations, to Employer, a construction framing contractor. Four employees were working on the second floor of a two-story building under construction; two were framing an exterior wall. To lay the wall flat on the ground, they took out an existing temporary railing; a pony or half-wall was to be placed by the unprotected side or edge. During this process, one employee fell from the unprotected area to the ground below. The edge of the area he fell was more than 10 feet above the first floor.

Employer appealed all citations and an Appeals Board administrative law judge held a hearing resulting in dismissal of all cited violations in a decision dated January 10, 2019 [¶22,904]. The Division petitioned for reconsideration. The only violations remaining at issue were: §1509(a) failure to establish, implement, and maintain an effective IIPP in accordance with §3203(a)(6), classified as general; and §1626(a)(5), failure to provide railings on unprotected sides and edges of a stairway landing, classified as serious.

Decision after reconsideration. The Board first addressed the cited violation of §1509(a). To establish a violation of §3203(a)(6), the Division must either demonstrate the IIPP itself did not have written methods and/or procedures for correcting unsafe conditions, work practices, and procedures, or that the employer failed to implement such written procedures in the IIPP.

The Division broadly argued Employer's IIPP did not contain any specific written methods or procedures for correcting unsafe or unhealthy conditions or work practices, and there was no topic or section heading addressing procedures for correcting unsafe conditions. The Appeals Board disagreed, based on the written contents of the written IIPP, which contained provisions pertaining to correction of hazards. The Board noted that, while the contents may have needed significant improvement, an employer's IIPP need not mirror the regulation in every exact detail. Employer's IIPP minimally met the written requirements.

The Appeals Board additionally declined to uphold a violation on the basis that Employer's written IIPP did not specifically address fall hazards in writing. An employer does not need to have a written procedure for each hazardous operation it undertakes (**OC Communications, Inc**., Cal/OSHA App. 14-0120, DAR (March 28, 2016) [**Digest ¶** 22,576R]). The Appeals Board declined to conclude any deficiency in the written contents of the IIPP amounted to a

NOTE: According to the Appeals Board, ALJ decisions are not citable precedent on appeal, i.e., they cannot be quoted when one is appealing a citation. There is nothing in the California Code of Regulations about this: it is by Board precedent. "(U)nreviewed administrative law judge decisions are not binding on the Appeals Board." (*Pacific Ready Mix*, Decision After Reconsideration of 4-23-82, and *Western Plastering, Inc*., Decision After Reconsideration, 12-28-93.) Decisions After Reconsideration (DARs) are precedential and may be quoted in an appeal.

violation.

An employer's IIPP may be satisfactory as written, but still result in a violation if is not implemented, or through failure to correct known hazards (**National Distribution Center LP; Tri-State Staffing**, Cal/OSHA App. 12-0391, DAR (Oct. 5, 2015) [**Digest ¶** 22,521R]). Section 3203(a)(6) requires employers to have written procedures for correcting unsafe or unhealthy conditions, as well as to respond appropriately to correct the hazards (**National Distribution Center,** supra, citing **BHC Fremont Hospital, Inc.,** Cal/OSHA App. 13-0204, DDAR (May 30, 2014) [**Digest ¶** 22,364R]).

The Division asserted Employer failed to provide it with records of job hazard assessments called for by its IIPP and that no such assessments were completed for the worksite. These allegations, however, did not predominantly concern implementation of corrective efforts, but rather addressed whether Employer effectively implemented its duty to inspect, identify and evaluate hazards. Such allegations are more appropriately addressed by §3203(a)(4), not §3203(a)(6), the Board stated. (See **OC Communications, Inc**., Cal/OSHA App. 14-0120, DAR (March 28, 2016) [**Digest ¶** 22,576R].)

Section 3203(a)(4) requires an employer perform inspections to identify and evaluate hazards under specific circumstances (OC Communications, supra). To prove a violation of §3203(a)(4) based upon a failure of implementation, the Division must demonstrate the employer failed to effectively fulfill its duty to inspect, identify and evaluate the hazard. Here, while the Division alleged Employer failed to to properly fill out the forms and identify and evaluate workplace hazards, the Board declined to uphold a violation of §3203(a)(6) on that basis, because it did not apply to the circumstances. (See **Harris Rebar Northern California, Inc.**, Cal/OSHA App. 1086663, DAR (Sept. 22, 2017) [**Digest ¶** 22,755R].)

The Division argued Employer's failure to establish the root cause of the accident demonstrated failure to implement methods and/or procedures for correcting unsafe and unhealthy working conditions. However, those allegations were more suitable for an assertion of violation of §3203(a)(5), which requires an employer's IIPP to establish, implement and maintain a procedure to investigate occupational injury or occupational illness. Here, the Division's petition appeared to be questioning implementation of Employer's procedures to investigate occupational injury.

In any case, the Board concluded, this deficiency did not rise to the level of a violation of §3203(a)(6). Employer conducted an accident investigation, as called for by its IIPP, and corrective measures with respect to its framing procedures. Employer's failure to fill out the root cause of the accident on a job hazard analysis form did not necessarily mean it did not correct the unsafe or unhealthy working practice or condition. The Division failed to establish a violation of §3203(a)(6).

The Appeals Board noted its concerns with the adequacy of Employer's corrective efforts. While the Board vacated the citation, it declined to characterize it as a complete exoneration; rather, in this specific proceeding, the Division advanced arguments that did not establish a violation of the cited safety order. The Appeals Board strongly cautioned Employer to more diligently establish, implement, and maintain all required elements of its IIPP, particularly as to the fall hazards involved here.

The other safety order at issue, §1626(b)(5), states, "Unprotected sides and edges of stairway landings shall be provided with railings. Design criteria for railings are prescribed in Section 1620 of these safety orders." Unprotected sides and edges are "Any side or edge (except at entrances to points of access) of a walking/working surface, e.g., floor, roof, ramp, or runway where there is no wall or standard guardrail or protection provided" (§1504(a)).

The worksite area from which the employee fell fit the §1504(a) definition of "unprotected sides and edges." The main issue was whether the area fit the definition of a stairway landing, as defined in §3207. The Division claimed the floor area abutting the temporary railings met the definition of a stairway landing in §3207 because it was a platform (elevated working level or open-sided floor) breaking a continuous run of steps.

The Board concluded the top of the last step was a stairway landing. While the evidence did not indicate the exact width of the stairway, the Board concluded the ALJ did not improperly conclude that a reasonable estimate of the width of the stairs at the jobsite was two to three feet. The Appeals Board concluded the stairway landing could not extend four to six feet down the hallway and then several more feet around the corner to the edge at issue and held Employer did not violate §1624(b)(5).

Division's motion to amend. The Board next analyzed the ALJ's denial of the Division's requests to amend the citation to allege violations of §1632(b) and §1626(a)(2). Appeals Board reg. §371.2, concerns pre- and mid-hearing amendments; Appeals Board reg. §386 concerns post-hearing amendments. The Board has discretion to grant or deny an amendment request. (See Labor Code §6603; **Calstrip Steel Corporation**, Cal/OSHA App. 312668825, DAR (June 30, 2017) [**Digest ¶** 22,719R].)

"Inartfully" drawn complaints and other pleadings should be viewed liberally to resolve variances between pleading and proof by allowing amendments before, during and after trial (**Crop Production Services,** Cal/OSHA App. 09-4036, DAR (May 28, 2014) [**Digest ¶** 22,361R]; other citations omitted). However, when evaluating a request to amend, the Board may consider bad faith, failure to cure deficiencies at prior allowances to amend, futility of an amendment, and prejudice (**Calstrip Steel**, supra).

Under Board reg. §371.2, a request for an amendment that does not cause prejudice to any party may be made by a party or the Appeals Board at any time. Where prejudice exists, Board reg. §371.2(a)(2) sets forth different criteria for deciding whether to grant the motion, depending on its timing. The threshold consideration is whether allowing the amendment causes prejudice.

The Division sought to amend the citation to allege violation of §1632(b)(1), which states, "Floor, roof and skylight openings shall be guarded by either temporary railings and toeboards or by covers." The ALJ determined Employer would be prejudiced because the facts and arguments upon which it had relied for nearly two years would need to be completely altered if the Division were permitted to assert that a different safety order applied. Since the ALJ found prejudice, she analyzed the amendment under section Board reg. 371.2(a)(2)(B), which requires good cause for filing a mid-hearing amendment.

However, the ALJ's analysis of prejudice was not in accord with Appeals Board precedent, the Board stated. The non-moving party must establish prejudice through production of evidence; it is not presumed (**Sierra Forest Products**, Cal/OSHA App. 09-3979, DAR (April 8, 2016) [**Digest ¶** 22,577R]). While not required to follow Occupational Safety and Health Review Commission rulings, the Appeals Board concluded the agency's policy considerations, when discussing prejudice in the context of amendments under federal worker safety regulations, applied here. Further, if a party establishes prejudice as well as the other enumerated requirements, the Appeals Board has specified the remedy is to remand the case for further hearings (Board reg. §§371.2(a)(2)(B)(iii), §386(b); **Crop Production Services**, supra).

Employer failed to establish loss of evidence or unavailability of specific witnesses that would have assisted it in establishing prejudice. Employer merely made generalized claims, including: its initial evaluation in deciding whether it should appeal the citations; lapse of time; loss of discovery opportunities; faded witness memory; and unavailability of witnesses. Such general claims did not specifically demonstrate how Employer's case would be seriously impaired if the amendment were granted, the Appeals Board held.

Employer failed to establish prejudice. Under Board reg. §371.2(a)(1), the Board had discretion to grant the Division's request to amend the citation.

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The ALJ's decision concluded the amendment would have been futile on the merits, citing **Webcor Builders, Inc**., Cal/OSHA App. 06-3030, DDAR (Jan. 11, 2010) [**Digest ¶** 21,606R]. The Appeals Board, however, concluded the facts and circumstances governing Webcor Builders were different from this case. In Webcor Builders, the area at issue was the exterior end or edge of a building. Here, in contrast, the area at issue was an opening within the interior of the building, which the Board deemed a crucial difference.

Section 1632(b)(1), states, "Floor, roof and skylight openings shall be guarded by either temporary railings and toeboards or by covers." Section 1504 defines opening as "an opening in any floor or platform, 12 inches or more in the least horizontal dimension. It includes: stairway floor openings, ladderway floor openings, hatchways and chute floor openings." The Board stated this definition is ambiguous because it defines "opening" as an "opening in any floor or platform …" and that dictionaries define "opening" broadly, as a hole or empty space through which things or people can pass.

At the time of the injury accident, employees had removed the temporary railing so they could finish framing the exterior wall, creating a hole or empty space through which people or things could fall. Although the hearing record did not show the exact measurement of the floor opening in the least horizontal dimension, the Board inferred it was more than 12 inches because it also encompassed the stairway. The employee fell through the opening, which was unguarded and unprotected, contrary to the requirement of §1632(b)(1). The Board, as a result, overruled the ALJ, granted the amendment to plead in the alternative a violation of §1632(b), and upheld the violation on this basis.

The Board next concluded the ALJ erred in denying the Division's post-submission amendment. The Appeals Board may amend the issues on appeal or the Division action after a proceeding is submitted for decision (Board reg. §386(a)). Board reg. §386(b) requires notice and an opportunity to show prejudice. If a party demonstrates prejudice, Board reg. §386(b)'s remedy is to continue the proceeding to permit introduction of additional evidence.

When evaluating a party's request to amend, the Appeals Board considers: bad faith, failure to cure deficiencies at prior allowances to amend, the futility of an amendment, and prejudice. Regarding bad faith, the Board declined to find bad faith of the Division in seeking this amendment. As to failure to cure deficiency at prior allowances to amend, the Division issued a notice of intent to classify citation as serious (1BY) to Employer, alleging the Division intended to cite Employer for a serious violation of §1626(a)(2), the regulation to which it sought to amend its citation. The alleged violative description in the 1BY also mentioned "stairwell" several times. When the Division issued the citation, it alleged violation of §1626(b)(5). After the first two days of the hearing, the Division moved to amend it to plead in the alternative a violation of §1632(b), which concerns floor openings. The ALJ denied that motion. After the hearing ended, the Division requested a post-hearing amendment to allege violation of §1626(a)(2), the same regulation it had alleged in its 1BY. The ALJ denied this motion.

At hearing, Employer fully litigated whether the area from which the employee fell was within a stairwell, by questioning witnesses and introducing evidence. Employer argued it would prove the area was not part of a stairwell, a statement that showed Employer's knowledge and preparedness to defend itself against this allegation from the beginning of the hearing. Further, Employer fully briefed the ALJ on this issue post-hearing. The Division's 1BY asserted a violation of this same regulation, which also demonstrated Employer's notice.

As to the third factor, the Board found Employer failed to establish prejudice. Employer's litigation strategy from the commencement of hearing was to rebut the Division's arguments that the unprotected area from which the injured employee fell was not part of the stairwell. Throughout the hearing, Employer introduced evidence and testimony to challenge the Division's claims on this point.

In its decision, the ALJ declined to allow the amendment to conform to proof, due to undue delay in seeking the post-hearing amendment. The Board has denied a request to amend, absent prejudice, based on undue delay and the moving party's failure to explain that delay (**Calstrip Steel** and **Sierra Forest Products**, both supra). Here, however, the Board concluded, "dismissal of a matter solely for undue delay runs contrary to the Board's procedural framework established in its own regulations."

Board reg. §386(a), the post-submission amendment regulation, states that the Appeals Board may amend the issues on appeal or the Division action after a proceeding is submitted for decision. The text of this rule does not encompass "undue delay" considerations. Contrary to Board reg. §386, undue delay may be a consideration under Board reg. §371.2, which governs pre- or mid-hearing amendments. Under Board reg. §371.2(a)(1), a request for an amendment that does not cause prejudice to any party may be made by a party, or by the Appeals Board, at any time. Therefore, if the non-moving party does not establish prejudice, the Board has discretion to grant the amendment and does not need to consider "undue delay." This is not the case if the non-moving party demonstrates prejudice and fails to bring its amendment within a specified timeframe. (See Board reg. §371.2(a)(2).) The Appeals Board noted that its rules do not make failure to establish good cause a sufficient basis to deny an amendment absent a determination of prejudice, and a failure to bring the motion at least 20 days before the hearing.

The reason behind the distinction in Board rules for undue delay considerations under pre- and mid-hearing amendments, versus post-hearing amendments, is because the party that requests a post-submission amendment does not seek to put on new evidence but rather to assert a claim under the already submitted evidence in the record. In this matter, the Division's post-submission amendment request was based on the evidence already presented at the hearing and did not require the Division to put on new evidence. To respond, Employer was not required to put forth new evidence after the Division's request to amend the citation post-hearing, because Employer fully litigated the issue during the hearing; the record contained its arguments against the Division's post-hearing amendment request. The Appeals Board stated that this "crucial difference" explains why Board rules, under certain circumstances, allow undue delay considerations in pre- and mid-hearing amendment requests but do not encompass such considerations in post-hearing amendment requests.

Under the Appeals Board's rules, undue delay does not play a role when analyzing post-submission amendments in Board reg. §386. The Board overruled any part of its prior case law to the extent they may be interpreted contrary to this principle.

Finally, the Appeals Board determined the ALJ erroneously concluded the amendment would have been futile. In its post-hearing amendment, the Division sought to amend the citation to conform to proof, alleging a violation of §1626(a)(2). The issue was whether the unprotected edge, from which the employee fell, was part of the stairwell, and the difference between the Division's theory of the stairwell and Employer's was how many sides the stairwell had.

Addressing the merits of the post-submission amendment, the Board noted Title 8 regulations do not define "stairwell" but that Employer's suggested definition, which was supported by the Construction Dictionary, was too narrow because other dictionaries define "stairwell" more broadly as a vertical shaft or opening that contains the stairway. When faced with two possible interpretations where one is narrower than the other, the Appeals Board must favor the more liberal interpretation that is more protective of employee safety (citations omitted). The Board accepted the Division's more liberal interpretation of "stairwell," noting that it comported with the statutory framework as a whole and that doing so was consistent with principles established by the California Supreme Court and followed by lower state courts for decades.

The Board also upheld the violation on a separate basis. Most of the text of §1626 specifically refers to "stairways"; §1626(a)(2) is the only subdivision that mentions "stairwells." In light of the Standard Board's sole use of the term in this subdivision, the Appeals Board concluded the Standards Board intended for toeboards and railings to be installed around a bigger area than the term "stairway" encompasses or it would have employed the term "stairway" in §1626(a)(2) by requiring railings and toeboards be installed "around stairways." The Standards Board chose to employ the terms "around stairwells."

The Appeals Board held the area from which the employee fell was part of the vertical opening passing through the building. Section 1626(a)(2) requires installation of railings and toeboards meeting the requirements of Article 16 around stairwells. There was no dispute Employer failed to have the railings and toeboards before the employee fell from the edge of the stairwell.

Finally, the Appeals Board rejected the ALJ's determination the area in question was a "foyer," and not a "stairwell," thereby making the regulation inapplicable. The ALJ erroneously focused on finding a single, most appropriate definition that she believed described the feature of the house being built where the accident occurred. The Appeals Board reversed the ALJ on this issue, granted the amendment, and upheld the violation on this basis: the Division supported the cited violation based on both §1632(b) and §1626(a)(2).

Classification. Employer challenged the serious classification of this citation. (See Labor Code §6432(a).) The Division inspector testified there was a realistic possibility of death or serious physical injury if an employee were to fall from the unprotected edge at issue, which actually occurred. Consequently, the Division established a rebuttable presumption of a serious violation.

Employer failed to rebut the presumption because the Board declined to conclude Employer did not know and could not, with exercise of reasonable diligence, have known of the presence of the violation. (See Labor Code, §6432(c).) Employer knew the framers were exposed to the hazard of falling off the unprotected edge and, thus, knew or could have known of the violative condition with exercise of reasonable diligence. Its use of spray paint on the floor to mark the edge and the instructions it provided to its employees were neither effective nor sufficient to overcome the presumption and prove it took all the steps a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent it (Labor Code, §6432(c)(1)).

Penalties. Penalties calculated in accordance with the penalty-setting regulations of §333 through 336 are presumptively reasonable and will not be reduced absent evidence they were miscalculated, regulations were improperly applied or circumstances warrant reduction (**RNR Construction, Inc.**, Cal/OSHA App. 1092600, DAR (May 26, 2017) [**Digest ¶** 22,708R], citing **Stockton Tri Industries, Inc.**, Cal/OSHA App. 02-4946, DAR (March 27, 2006) **[Digest ¶** 20,795R]).

Employer challenged the proposed penalty of $22,500 for the citation. The Board determined the Division properly calculated the penalty, which could only be reduced for size. However, no downward adjustment of the penalty was appropriate here because Employer had more than 100 employees (§336(d)(1)). The Board upheld the $22,500 penalty.