

# CalOSHA Appeals Board, the other Employer Unfriendly Tribunal

*CalOHSAs Citations, Penalties, Procedures, Appeals, and Implications*

Presented by

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# Scope of Presentation

## How CalOSHA Works and its implications to the Employer in both Legal and Monetary Terms

- What is Fed and CalOHSA
- How Cases are handled
- The scope of this presentation will focus on the use and maximization of the following:
  - OSHA Powers
  - Types of Penalties and Citations
  - Levels of Fines
  - Criminal Referrals (always consider)
  - CalOSHA Appeals Board
  - Answer to Citations/Penalties
  - Affirmative Defenses
  - Procedure
  - Settlement/Mitigation and reduction of Citation
  - Implications on collateral matters.

# Occupational Safety and Health Act

## **The Occupational Safety and Health Act of 1970**

**29 U.S.C. ch. 15 § 651 et seq**

The Occupational Safety and Health Act is a law passed by the U.S. Congress in 1970 to ensure safe workplace conditions around the country. It established the federal Occupational Safety and Health Administration (OSHA), which sets and enforces workplace health and safety standards.

# General Duty Clause

The general duty clause of the OSHA Act officially reads:

"Each employer (1) shall furnish to each of his employees' employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees; (2) shall comply with occupational safety and health standards promulgated under this Act."

The act also states:

**"Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Act which are applicable to his own actions and conduct."**



# CalOSHA Act of 1973

## CalOSHA Act of 1973

California is one of several and health program according to the provisions of the Federal Occupational Safety and Health Act of 1970. The OSHA Act permits a state to manage its own occupational safety and health program's structure if it meets certain federal requirements. The California program - Cal/OSHA - is approved by Federal OSHA and is monitored by and receives part of its funding from Federal Government.

# Brief Thoughts on Preemption

**A CalOSHA case can be challenged on the grounds that it is preempted by the Federal Act.**

- Yellow Freight System, Inc., OSHAB 94-2565
- Southern Pacific Transportation, OSHAB 94-3142
- Southern California Gas Company, OSHAB 94-586
- Shea-Kiewit-Kenny, OSHAB 94-2768

Always at preemption when dealing with: Transportation (Interstate and International); Health Care; Fed Contracting.

\* FELA Rail Roads is a Federal Law, litigated in State Courts.

Private Attorney General Action PAGA (B&P 17200) can be brought against Employers and does not violate Federal Preemption.



# Types of Citations

1. **Regulatory** – failure to comply with record keeping or permit requirements: In California every employer is required by law (Labor Code Section) to provide a safe and healthful workplace for his/her employees. Title 8 (T8), of the California Code of Regulations (CCR), requires every California employer to have an effective **Injury and Illness Prevention Program** in writing that must be in accord with T8 CCR Section 3203. **Also germane to specific enterprise.**
2. **General Violation** – when a standard is violated, but the injury it could cause is unlikely to be serious or result in death. **What is observed.**
3. **Serious Violation** – when there is a realistic probability that serious injury or death could result from condition, practices, or operations at work. **Does not need to involve an accident, but most often cited following serious accident.**
4. **Willful** – Failure to obey and or comply with Prior Citations or Willful (Gross Negligence Standards)

# Additional Regulatory

- Citations must be clearly posted for Three (working days) following a Citation.
- They will come back and cite for this following a Citation.
- Employees, will inform on Employers for not posting and can be a basis for a PAGA action.
- If this happens, you may have an EE/Applicant seeding an Applicant/Plaintiff's Attorney.

“So why did you get fired?”



# Value and Exposure of Penalty Citations

1. **General Violation** – up to \$13,277 for each violation.
2. **Regulatory Violation** – up to \$ 13,277 for each violation. (includes failure to post required notifications)
3. **Serious Violation** – up to \$25,000 for each violation.
4. **Willful Violation** – from \$9,483 to \$132,765 for each willful violation.



# Cal-OSHA Citations

## Approach to Penalties and how assessed

\*\*\*\*Critical for Defense Purposes.

1. Penalties are calculated based on severity, extent and likelihood of the violation. **Very Subjective and the Experts have trouble articulating.**
2. Serious violation penalties start at \$18,000 and then can be increased or reduced depending on different factors. **This is holly grail. Its not only cost of the citation but the category.**

# Cal-OSHA Citations

## Employer Adjustments

Penalty adjustments also made for:

Employers History (no citations in past three years)

- No citations in past three years – 5%
- No citations ever – 10%

Employers with less than 100 employees:

61 – 100	10%
26 – 60	20%
11 – 25	30%
1 – 9	40%

# Abatements: Don't be so quick to confess

## Abatement Credit:

General and Serious Violation Penalties reduced by 50%.

As of 2015 Cal-OSHA requires the following to be considered for an abatement credit:

1. The company abated the violation at the time of the initial inspection.
2. The company abated the violation at the time of a subsequent inspection prior to the issuance of a citation.
3. The company submitted a signed statement under penalty of perjury with supporting evidence to show the violation has been abated within 10 working days of the abatement deadline.

Practice Pointer: Offering Abatement of a Willful or Serious may reduce penalty but may cause other ramifications, ie an **Admission** that would later come back to cause other problems. Remember: **Subsequent Remedial Measures Doctrine**.





# Standards for Investigators

- (b) (1) Before issuing a citation alleging that a violation is serious, the division shall make a reasonable attempt to determine and consider, among other things, all of the following: If:
- (A) Training for employees and supervisors relevant to preventing employee exposure to the hazard or to similar hazards.
  - (B) Procedures for discovering, controlling access to, and correcting the hazard or similar hazards. **(Extremely Subjective)**
  - (C) Supervision of employees exposed or potentially exposed to the hazard.
  - (D) Procedures for communicating to employees about the employer's health and safety rules and programs. **\*\* Remember Safety Meeting Sign in sheets.**

# Employer Standards for Replying to Citation

**\*\*Careful what is admitted. Form 1BY  
“You have the right to remain silent”**

- (E) Information that the employer wishes to provide, at any time before citations are issued, including, any of the following:
- (i) The employer's explanation of the circumstances surrounding the alleged violate events.
  - (ii) Why the employer believes a serious violation does not exist.
  - (iii) Why the employer believes its actions related to the alleged violate events were reasonable and responsible so as to rebut, pursuant to subdivision (c), any presumption established pursuant to subdivision (a).
  - (iv) Any other information that the employer wishes to provide.

# Employer Standards for Replying to Citation

**Ergo, careful what you say!**

It is a trap and should not be responded to.

- Can be used as an admission to be used against you in the formal appeal.
- Can be used to add citations
- Can be used to increase citation to willful

Have never heard it is used by Cal-OSHA to say I guess we got it wrong.

**No negative inference can be made on appeal if 1BY is not responded to.**





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# Appeals Process and the CalOSHA Appeals Board (a division of the DIR)

# Appeals

## Appeals are filed with the CalOSHA Appeals Board

- Formal Appeals must be filed within **15 working days** of the **date** of the citation.
- Appeal the Citation and assert Affirmative Defenses
- Also Appeal Penalty Notification.
- Notice of Failure to Abate
- Special Order
- Notice to Take Action



# Options for Resolution

1. Informal Appeal with Admin Director;
2. Formal Appeal to the Appeals Board:
  - Informal Conference with ALJ, District Manager, Compliance Officer (also DIR Counsel);
3. If no resolution, discovery and then Trial. Judge may entertain discovery disputes, petitions, and hold various hearing before setting for trial.

# Affirmative Defenses

1. Employee was trained on safe use (must be documented);
2. Employee Miss-Use and Misconduct;
3. Supervisors know safety rules and company has comprehensive safety program (including IIPP)
4. Inspections routinely done to be sure guarding in place (documented)
5. Employer enforces safety program (Discipline for violations)
6. EE Not supervised by Employer (General-Special EE's).



# Exposure

## What Constitutes Actual Exposure to Form a Citation Title 8 Safety Order

Compliance personnel must establish that one or more employees were exposed to a hazardous condition resulting from a violation of a Title 8 Safety Order.

Employee exposure must have occurred within the six months immediately preceding the issuance of the citation.

**\*EXCEPTION:** If the employer failed to report a serious injury or illness or death as required by Title 8 section 342(a), the time limit for issuing a citation is six months after the Division learned or should have reasonably learned of the violative condition.

- A. Observed Employee Exposure - Employee exposure may be established by compliance personnel directly observing or monitoring the employee .
- B. Unobserved Employee Exposure - Employee exposure may be established VIA a combination of witness statements and other evidence of employee exposure to a hazardous condition resulting from a violation.
- C. Safety Order.
- D. Zone of Danger

\*\* Good Discovery can defeat the basis for the citation.

# Implications to other Forums

## **Serious & Willful (LC §4553)**

Labor Code section 4553.1 provides an alternative method of proving S&W misconduct. By showing that an employer violated a specific Cal/OSHA safety order which resulted in the injury of the employee, and the employer either knew (or it was obvious that) the conditions at the work site made the order applicable, and that the employer's failure to correct the condition constituted a reckless disregard for the probable consequences, the employee might prevail on a S&W claim.

## **Subrogation (LC §§ 3850 through 3865)**

CalOSHA (Final Citations) maybe used to show Employer Negligence and Negligence Per Se, thus offsetting or barring employer recovery.

# S&W Case Law Involving CalOSHA

## 1. Safety Order has to be Specific:

In *Ford Construction Company v. WCAB* (2010, unpublished), an employee sustained injury (and death) when a ripper shank weighing more than 2000 pounds fell from a suspension cable. Even though the employer had violated various Safety Orders, the Court of Appeal had found that those violations did not justify a finding of S&W misconduct on the part of the employer; because, it was not the violation of the relevant safety orders that caused the workers' injury.

# S&W Further Applications

## 2. Proper Application of Safety Orders within the context of LC §4553

Simply complying with the relevant Safety Orders is not a defense either. For example, in the case of *C.C. Meyers v. WCAB* (2012, unpublished), the Court of Appeal concurred with the defendant that it had followed the relevant safety orders with respect to providing back-up sirens on an excavator. However, even though there was no relevant Cal/OSHA safety order violation, the WCAB still found S&W misconduct on the part of the employer for failure to provide a spotter in a loud and tight work environment where a back-up siren might not be heard.

**\*The issue of best practices or past practices comes into play.**

# Nexus to Safety Order

**There must be a strong nexus to the Safety Order and the accident:**

For example, Safety Order 1670 requires a personal fall arrest system for workers operating more than 7.5 feet from the ground. So an employee might show that (1) ER violated the order by not providing harnesses; and (2) the failure to provide a harness proximately caused the injury (because of the fall).



# Who violated the Safety Order

## 3. It must be management that violated or approved the violation

In *Biggest Crane & Rigging Co. v. WCAB (Paul Hunt)* (2010), an employee was injured when a crane operator made a mistake in disassembling a crane at a construction site, and a load fell on the employee's foot. In rejecting Mr. Hunt's efforts to secure additional benefits through a S&W action, the Court of Appeal reasoned that the employee dismantling the crane was not an officer or executive or anyone else with any real authority vested in him by the employer.

- Manager;
- Supervisor;
- Owner;
- Lead.

# More on the Management Role

## In **CLP Resources, Inc. v. W.C.A.B. (Mora, Jorge)**, 78 Cal. Comp. Cases 1025 (writ denied)

Jorge Mora was a temp carpenter in the employ of CLP, who was sent out to a job site with a series of safety problems, including a table saw not secured to a table and with no safety guard on the saw. By the third week, Mr. Mora had attempted to report these safety issues to his temp agency (at least, according to his trial testimony).

Prior to his starting the job, a CLP safety inspector had been to the site, but had not noticed anything wrong. Unfortunately, Mr. Mora lost his balance while working one day and placed his hand on the saw, sustaining cuts to his left hand. **In rejecting this finding, the CoA reasoned that 4553 requires the serious and willful misconduct to be on the part of an executive, managing officer, or general superintendent of the corporation. The CoA found that there was no findings (or evidence to support a finding) that CLP had specific knowledge of a dangerous condition – it's inspection did not reveal it, and Mr. Mora's comments were also vague enough so as not to put CLP on notice of the condition.**

# Post COVID CalOSHA Citations (2020)

## The employers cited for COVID-19 violations include but are not limited to:

- San Quentin State Prison: \$421,880
- Avenal State Prison: \$39,600
- BSF Fitness II LLC Fitness and Recreational Sports Centers: \$57,740
- Kaiser Permanente San Leandro: \$87,950
- Kaiser Permanente Antioch Medical Center: \$56,000
- Kaiser Permanente Walnut Creek: \$45,000
- Mills-Peninsula Medical Center: \$25,250
- North-Bay Medical Center Fairfield: \$25,250
- Fremont Healthcare Center (Nursing Home): \$59,000
- Sunray Healthcare Center Nursing Care (LA) Fatality: \$53,805
- San Miguel Villa Nursing Care Concord: \$32,000
- Coldwater Care Center LLC dba Nursing: \$21,115
- Cardenas Market Grocery Stores Oakland: \$30,670
- Grimmway Enterprises, Inc. Agriculture: \$30,600
- Carter's Children's Wear Stores (Gilroy) Fatality: \$15,125

# Lessons Learned

## Lessons Learned from the Trenches and other Considerations

1. The Employer does not have to talk to the inspector on the employers premises, **Come back with a Warrant-An Inspection Warrant;**
2. A Construction Site is not an Employer's Premises (Work Trailer is);
3. Employer Can Not Prohibit EE's from talking to Investigators;
4. Failure to Report Serious Accident is a Serious Violation;
5. If Paramedics/Police/Fire are called, so will **CalOSHA-Self Report!**
6. Employer still has to right to refuse questions if represented;
7. Applicant Attorney's will report to CalOHSA;
8. Citations are not something that Judicial Notice can be taken off if they are Appealed;
9. Admit and settle only the Violations that Don't create liability problems: Record Keeping, Reporting, and matters with no other legal nexus;
10. You may immunize employees with counsel (Studios are good at this);

# What leads to Citations

## What Generates Inspections that lead to Citations

Imminent hazard;

- Fatality or catastrophe;
- Investigation of serious injury or exposure;
- Formal complaints (EE Filed) **Consider the source**;
- Scheduled inspection, usually of businesses in industries with higher-than-average potential risk (Scaffolding, demolition, Filming) .
- Special Use Permits: Trenching, Blasting, Pyrotechnics.

# CalOSHA Defense as a Practice

1. Large State and National Firms have Cal and Fed OSHA Appeals as part of their practice services;
2. The Subject Matter has a natural Segway to LFLM Practices;
3. Even Review of a CalOSHA file is a good practice;
4. Consultation for client peace of mind should be considered.



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# QUESTIONS?

(Also, we'd like to hear your war stories)

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