

Business and Professions Code section 18832, which requires broadcasters of pay-per-view boxing, martial arts, and wrestling events to pay the Commission a 5% tax on their gross receipts. The court found that the law exclusively taxes one form of entertainment, which is protected by the first amendment. The law thus imposes a content-based restriction which triggers "strict scrutiny," meaning the state must assert and prove that the tax is "necessary to serve a compelling state interest and...narrowly drawn to achieve that end." Because the Commission failed to satisfy this burden, the court declared the statute unconstitutional and enjoined the Commission from enforcing it. [16:1 CRLR 131]

RECENT MEETINGS

At its January 15 meeting, the Commission reelected Commissioner Ernest Weiner as Chair and Commissioner Manuel "Cal" Soto as Vice-Chair.

At its March 26 meeting, the Commission reestablished its Martial Arts Advisory Committee to review proposed rules for the conduct of "submission"-type events for possible Commission approval and promotion in California. "Submission

fighting" is a mix of wrestling and martial arts; participants fight in a cage (not a ring) until one of them "submits" by tapping the canvas. Several submission fighting organizations approached the Commission in November 1998, and were notified that while the Commission has adopted regulations to govern kickboxing, it has no rules to govern submission events. The organizations were instructed to submit proposed regulations to govern various types of submission events. By the March meeting, the Commission had received proposed regulations from various prospective promoters of shootfighting, shooto, and pancrase events, and reactivated its Martial Arts Advisory Committee to review these proposals and make recommendations to the Commission at a future meeting.

FUTURE MEETINGS

- May 13, 1999 in San Jose.
- July 23, 1999 in Los Angeles.
- September 17, 1999 in Burbank.
- November 5, 1999 in Sacramento.

Cal-OSHA

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California's Occupational Safety and Health Administration (Cal-OSHA) is part of the cabinet-level Department of Industrial Relations (DIR). The agency administers California's programs ensuring the safety and health of California workers.

Cal-OSHA was created by statute in October 1973; its authority is outlined in Labor Code sections 140-49. It is approved and monitored by, and receives some funding from, the federal Occupational Safety and Health Administration (Fed-OSHA). Cal-OSHA's regulations are codified in Titles 8, 24, and 26 of the California Code of Regulations (CCR).

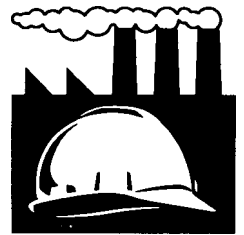
Cal-OSHA's Occupational Safety and Health Standards Board (OSB) is a quasi-legislative body empowered to adopt, review, amend, and repeal health and safety regulations which affect California employers and employees. Under section 6 of the Federal Occupational Safety and Health Act of 1970, California's worker safety and health standards must be at least as effective as Fed-OSHA's standards within six months of promulgation of a given federal standard. Current procedures require OSB to justify its adoption of standards that are more stringent than the federal standards. OSB is authorized to grant interim or permanent variances from occupational safety and health standards to employers who can show that an alternative process would provide equal or superior safety to employees. The Board may also consider petitions for new or revised regulations proposed by any interested person concerning occupational safety and health. OSB holds monthly

meetings to permit interested persons to address the Board on any occupational safety and health matter.

The seven members of OSB are appointed by the Governor to four-year terms. Labor Code section 140 mandates the composition of the Board. At this writing, OSB is comprised of occupational health representative Jere Ingram, who serves as Board Chair; occupational safety representative Gwendolyn Berman; management representatives William Jackson and Victoria Bradshaw; labor representatives Elizabeth Lee and Kenneth Young; and public member Sopac Tompkins.

The duty to investigate complaints and enforce OSB's safety and health regulations rests with the Division of Occupational Safety and Health (DOSH). DOSH issues citations and abatement orders (granting a specific time period for remedying the violation), and levies civil and criminal penalties for serious, willful, and repeated violations. In addition to performing routine investigations, DOSH is required by law to investigate employee complaints and accidents causing serious injuries, and to make follow-up inspections at the end of abatement periods. The Occupational Health and Safety Appeals Board adjudicates disputes arising out of DOSH's enforcement of OSB's standards.

Cal-OSHA's Consultation Service provides onsite health and safety recommendations to employers who request assistance. Consultants guide employers in adhering to Cal-OSHA standards without the threat of citations or fines.



MAJOR PROJECTS

Use of Body Belts, Safety Belts, and Body Harnesses While Operating Aerial Devices

On February 18, OSB held a public hearing on its proposal to amend sections 2940.7, 3207, 3642, and 3648, Title 8 of the CCR, regarding the use of body belts, safety belts, and body harnesses while operating aerial devices, and guardrails for elevating work platform equipment.

Fed-OSHA adopted construction regulations in 29 C.F.R. Part 1926, Subpart M, which prohibits the use of body belts or safety belts for fall arrest protection after January 1, 1998. However, use of these belts is still permitted by Fed-OSHA as part of a personal fall restraint system. According to OSB, some employers are confused as to whether belts are still permitted for use in the basket or bucket of aerial devices; these proposed amendments are intended to eliminate that confusion.

The proposed amendments to section 3207 would define the terms "personal fall restraint system," "personal fall arrest system," "positioning device system," and "personal fall protection system." A personal fall restraint system prevents an employee from falling, and consists of an anchorage, connectors, and body belt/harness; it may also include lanyards, lifelines, and rope grabs. The personal fall arrest system stops the employee once he/she has fallen from a working level. It consists of an anchorage, connectors, and body harness, and may also include a lanyard, deceleration device, lifeline, or suitable combinations of these components/devices. A positioning device system is a body belt or harness system rigged to allow an employee to be supported on an elevated surface and work with both hands free while leaning. A personal fall protection system is the combination of all of the above systems, as well as safety nets and guardrails.

OSB's proposed amendments to section 3642 would change the title of the section to "Elevating Work Platform Equipment," and provide that a platform deck must be equipped with a guardrail or other structure around its upper periphery that is 42 inches high, plus or minus 3 inches, with a midrail. Where the guardrail is less than 39 inches high, an approved personal fall protection system, as defined above, must be used. At the February 18 public hearing, a member of the public testified that the proposed amendment is confusing because the first sentence requires guardrails to be 42 inches plus or minus 3 inches, yet the second sentence sets forth a requirement for guardrails that are less than the minimum height required by the first sentence.

The proposed amendments to section 3648 would require an employee working in an aerial device to be secured to the boom, basket, or tub of the device through the use of a safety belt, body belt, or body harness equipped with a safety strap or lanyard. Safety belts and body belts are prohibited for use

in personal fall arrest systems, but may be used as part of a fall restraint or positioning device system. Safety belts or body belts that are used as part of a positioning device system must be rigged such that an employee cannot freefall more than two feet. The proposed amendments further provide that a body harness may be used in a personal fall restraint, positioning, or fall arrest system. When a body harness is used in a fall arrest system, the lanyard must be rigged with a deceleration device to limit maximum arresting force on an employee to 1,800 pounds, prevent the employee from hitting any levels or objects below the basket or platform, and limit freefall to a maximum of six feet. OSB's proposed amendments to section 2940.7, concerning mechanical equipment, would conform that section with the amendments to section 3648.

At this writing, these proposed amendments await adoption by OSB and review and approval by the Office of Administrative Law (OAL).

Escalators and Moving Walks

On March 18, OSB held a public hearing on its proposal to amend sections 3089 and 3091, Title 8 of the CCR, and sections 7-3089(d) and 7-3091(k), Title 24 of the CCR, regarding escalators and moving walkways. According to OSB, the

proposed action addresses a potential hazard on escalators now in service. The hazard is a pinch point created by a quarter-inch opening that exists between the escalator moving step side and the stationary escalator skirt guard. The quarter-inch opening is a built-in design feature of escalators to provide clearance for the steps to deflect when the escalator steps are moving. However, accidental entrapment of body parts, clothing, or shoes can occur in the pinch point. Some out-of-state agencies have installed brushes or sideplates to deflect articles from the opening or reduce the size of the opening to minimize entrapment.

Because these devices have proven effective in reducing the incidence of entrapment, OSB proposes to amend section 3089(d)(6) to require the retrofitting of existing escalators with brushes or sideplates between the step side and the balustrade skirt guard to protect against the accidental entrapment of body parts, clothing, and shoes. The retrofit must be completed three years from the effective date of this regulatory change. The subsection would also prohibit the brush carrier affixed to the skirt panel from rising more than three-quarters of an inch from the balustrade parent surface; require drawings and specifications on the planned installation of the brushes/sideplates to be submitted to DOSH for review before the brushes/sideplates are installed; require DOSH to review the drawings and specifications to ensure the planned installation and subsequent operation do not conflict with other requirements of Article 13; and require DOSH to inspect the brushes/sideplates for entanglement, entrapment, shearing, or tripping hazards before the escalator is placed in service.

The proposed amendments to section 3207 would define the terms "personal fall restraint system," "personal fall arrest system," "positioning device system," and "personal fall protection system."

Current section 3089(d)(1) requires that a solid balustrade be provided on each side of an escalator's moving steps. The balustrade on the step side is not to have any areas or moldings depressed or raised more than one-quarter inch from the parent surface. OSB's proposed amendments would exempt from this requirement balustrades with brushes.

OSB's proposed amendments to section 3091 would apply the above standards for escalators to moving walkways. Although the Board is not aware of accidental entrapment incidents on moving walkways, it plans to amend section 3091 to permit (not require) brushes to be installed on moving walkways because similar conditions exist.

At the March 18 hearing, a representative of the escalator industry testified that although the installation of brushes or sideplates could prove expensive initially, it may save money in the long run, as well as the unmeasurable cost of human suffering due to accidental injury to users. The Board decided to consider a cost-benefit analysis and statistical information measuring the actual number of injuries before voting on the proposed section.

At this writing, the proposed amendments await adoption by OSB and review and approval by OAL.

Passenger Elevator Emergency Stop Switch/ In-Car Stop Switch

On March 18, OSB held a public hearing on its proposal to amend section 3040(b)(5), Title 8 of the CCR, and section 7-3040(b)(5), Title 24 of the CCR. Section 3040(b)(5) requires each passenger elevator to have an emergency stop switch located in or near the operating panel in the elevator. Because of its readily available location, passengers sometimes accidentally or mischievously activate the emergency stop switch. According to OSB, the elevator industry believes that more accidents have been caused than prevented by misuse of the emergency stop switch. OSB believes that existing section 3040(b)(5) derived from an era when passenger elevators were not fully enclosed, and the switches were needed to immediately stop the elevator car should a passenger's limb or articles become accidentally entangled between the moving car and the hoistway. Modern passenger elevators are fully enclosed, and passengers are protected by numerous new safety requirements that negate the need for an emergency stop switch operable by the public.

Currently, the elevator consensus standard (ASME A17.1-1996) requires only an in-car stop switch that must be either key-operated or located behind a locked panel. The in-car stop switch is not for passenger use; it is for use by elevator maintenance and inspection personnel. Thus, OSB proposes to revise the emergency stop switch requirement in section 3040(b)(5) to be consistent with ASME A17.1-1996. The

proposal would provide an exception to the emergency stop switch requirement for passenger elevators now in service which are equipped with an in-car stop switch that is either key-operated or located behind a locked panel. The proposed amendments would also permit replacement of an existing emergency stop switch with an in-car stop switch in passenger elevator cars.

At this writing, the proposed changes await adoption by OSB and review and approval by OAL.

Bull Float Handles

On April 15, OSB held a public hearing on its proposal to amend section 1698(c), Title 8 of the CCR, regarding bull floats, which are tools used to smooth the surface of freshly poured concrete. Existing section 1698(c) requires the handles on bull floats to be constructed of nonmetallic and nonconductive material. The intent of this regulation is to minimize the hazard of electrical shock should a worker using a bull float come into contact with an energized conductor. However, bull floats

with metal handles and metal handle extensions are widely used and sold by manufacturers in California for use on jobsites where there are no exposures to energized conductors. Some contractors prefer handles made of aluminum when there are no electrical hazards because they weigh less and are easier to extend or retract when extensions are used. Fed-OSHA's equivalent regulation recognizes that there are times when bull floats with metal handles are appropriate for use. Fed-OSHA's regulation, 29 C.F.R. Part 1910.702(h), requires bull float handles used where they might contact energized conductors to be constructed of nonconductive material or to be insulated. Thus, other types of handles made of materials such as aluminum or magnesium are permitted for use when there are no electrical hazards to workers. OSB proposes to amend section 1698(c) to conform it to Fed-OSHA's equivalent regulation. OSB's proposed amendment would require bull float handles to be made of either nonconductive materials or an equivalent insulated metal handle only when the bull float handles could come into contact with energized electrical conductors.

At this writing, the proposed amendment to section 1698(c) awaits adoption by OSB and review and approval by OAL.

Guarding Requirements for Metal Shears

On April 15, OSB held a public hearing on its proposal to repeal section 4226 and amend section 4227, Title 8 of the CCR, to clarify the guarding requirements for metal shears. Section 4226 defines "plate shears" and "squaring shears," but section 4227 only contains guarding requirements for squaring shears. According to OSB, it can be inferred that there are no guidelines for plate shears. In an attempt to clarify

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that section 4227's guidelines pertain to both types of shears, OSB proposes to amend section 4227 to apply its guarding requirement to "metal shears" of all types (including both plate shears and squaring shears), and to repeal section 4226 as unnecessary.

At this writing, these regulatory changes await adoption by OSB and review and approval by OAL.

Fall Protection and Apparel for Electrical Workers

On April 2, OSB published notice of its intent to amend sections 2320.8 and 2940.6, Title 8 of the CCR. These proposed amendments to the Board's High Voltage Electrical Safety Orders and Low Voltage Electrical Safety Orders come in response to a complaint filed by the International Brotherhood of Electrical Workers concerning state regulations addressing (1) the use of specific types of personal fall protection systems at working elevations above four feet and the prohibition of body belts as a fall arrest system component, and (2) the wearing of apparel which will not exacerbate employee injuries resulting from exposure to flame and/or electric arc.

OSB proposes to amend section 2320.8 of its Low Voltage Orders and section 2940.6 of its High Voltage Orders to require employers to provide employees working at elevations greater than four feet on poles, towers, or similar structures with personal fall protection devices (e.g., positioning devices or travel restricting devices) when other means of fall protection are not provided (e.g., safety nets, barricades, parapets, or guardrails). The proposed language would also prohibit the use of a body belt as a component in a fall arrest system. In addition, the proposed amendments would include an exception from the fall protection requirement for qualified persons provided there are no conditions which would prevent the employee from gaining the necessary foot and hand holds to climb the structure safely. The revisions would also require the employer to acquire and provide one of the three fall protection systems to employees working above the four-foot trigger height. The employer would also need to remove from service body belts from any fall arrest systems and replace them with full-body harnesses. Finally, the employer must ascertain the condition of poles and other structures to determine the applicability of a proposed exception for point-to-point travel.

OSB also proposes to add new subsection 2940.6(j), which would require employers to ensure that each electrical worker who may be exposed to the hazard of flames and electric arcs wears outer clothing made of materials which will not increase the likelihood of serious injury sustained by an employee who is burned by flames and/or electric arcs. The proposed language would prohibit electrical workers from wearing garments composed of acetate, nylon, polyester, and

rayon unless these materials are treated with flame retardant. The proposal would also require employers to check apparel worn by employees who may be exposed to flames and/or electric arcs and determine conformance with the proposed requirement.

At this writing, OSB is scheduled to hold a public hearing on these proposed changes on May 20 in Los Angeles.

Permit-Required Confined Space Regulation Amendment

Also on April 2, OSB published notice of its intent to amend section 5157, Title 8 of the CCR, the state's "permit-required confined space" regulation. Section 5157 contains required practices and procedures that protect employees from the hazards of entry into confined spaces. Employers must maintain a "permit-required confined space program" which contains written procedures for controlling via permit and for protecting employees from hazards in confined spaces. OSB intends to conform section 5157 to be at least as effective as the applicable federal standard, 29 C.F.R. Part 1910.146, which was adopted by

Fed-OSHA on December 1, 1998. Specifically, the proposal would expand employee participation requirements by allowing employees and their authorized representatives to observe monitoring and access exposure documentation. The proposal would also expand the training required for rescue providers.

At this writing, OSB is scheduled to hold a public hearing on these proposed changes on May 20 in Los Angeles.

Powered Industrial Truck Operator Training

Also on April 2, OSB published notice of its intent to amend section 3668, Title 8 of the CCR, which sets forth standards and criteria for the training of operators of powered industrial trucks. OSB intends to amend section 3668 to make it as least as effective as the relevant federal standards, 29 C.F.R. Parts 1910.16, 1910.178, 1915.120, 1917.1, 1918.1, and 1926.602, which were adopted by Fed-OSHA on December 1, 1998. As justification for its proposed amendments, OSB is relying on the explanation of the provisions of the federal regulations in the *Federal Register*, Volume 63, No. 230, pages 66238-66270 (December 1, 1998).

The new federal requirements for powered industrial truck operator training are contained in Part 1910.178. This new federal regulation, which became effective on March 1, 1999, revises existing requirements for training and issues new mandates to improve training and reduce workplace injuries and fatalities. Essentially, the federal rule requires that operators of industrial trucks be trained in their operation before they are allowed to drive the trucks independently. The training must consist of instruction (both classroom type and practical training) in proper vehicle operation, the hazards of operating the vehicles in the workplace, and the requirements

of the OSHA standard for powered industrial trucks. The federal regulation also requires that operators who have completed training must be evaluated while they operate the vehicle in the workplace. Operators must also be periodically evaluated (at least once every three years) to ensure that their skills remain intact at a high level and must receive refresher training whenever there is a demonstrated need for it.

The new federal standard replaces existing federal forklift training safety regulations and now mandates a program that bases the amount and type of training required on the operator's prior knowledge and skill, types of powered industrial trucks the operator will operate in the workplace, and the operator's demonstrated ability to operate a powered industrial truck safely. Refresher training is required if the operator is involved in an accident or near-miss incident, the operator has been observed operating the vehicle in an unsafe manner, there are changes in the workplace that affect safe operation of the truck, or the operator is assigned a different type of truck.

At this writing, OSB is scheduled to hold a public hearing on these proposed changes on May 20 in Los Angeles.

Methylene Chloride

On April 2, OSB published notice of its intent to amend section 5202, Title 8 of the CCR, which establishes requirements for employers to control occupational exposure to methylene chloride (MC). MC is a solvent which is used in many different types of work activities, such as paint stripping, polyurethane foam manufacturing, and cleaning and degreasing. Employees exposed to MC are at increased risk of developing cancer, skin or eye irritation, and adverse effects on the heart, central nervous system, and liver. Exposure may occur through inhalation, by absorption through the skin, or through contact with the skin. In amending section 5202, OSB intends to make it at least as effective as the relevant federal standard, 29 C.F.R. Part 1910.1052, which was promulgated by Fed-OSHA on September 22, 1998. As justification for its proposed amendments, OSB is relying on the explanation of the provisions of the federal regulation in the *Federal Register*, Volume 63, No. 183, pages 50712-50732 (September 22, 1998).

The proposed revisions amend the standard regulating exposure to MC by adding a provision for temporary medical removal protection benefits for employees who are removed or transferred to another job because of a medical determination that exposure to MC may aggravate or contribute to the employee's existing skin, heart, liver, or neurological disease. OSB also intends to amend the start-up dates by which employees in certain identified application groups (e.g., those who use MC in certain work operations) must achieve the eight-hour time-weighted-average permissible exposure limit and the dates by which they must achieve the short-term exposure limit by means of engineering controls. OSB's

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proposed regulations are substantially the same as the final rule promulgated by Fed-OSHA.

At this writing, OSB is scheduled to hold a public hearing on these proposed changes on May 20 in Los Angeles.

Use of Plunger Engaging Safety Devices and Monitoring Oil Levels in Hydraulic Elevators

On April 30, OSB published notice of its intent to amend sections 3065, 3067, and 3106.1 of its Elevator Safety Orders in Title 8 of the CCR, and sections 7-3065, 7-3067, and 7-3106.1, Title 24 of the CCR. These regulatory changes concern the use of the plunger engaging safety device (PESD) and the monitoring of oil levels in hydraulic elevators. This proposal contains standards to regulate the permissive use of the PESD, which was recently developed by the elevator industry and is used in some hydraulic elevators in the state. The proposed changes would also require the monitoring of oil levels in hydraulic elevators to detect oil loss that may result in an uncontrolled elevator descent due to sudden loss of oil pressure.

This proposed rulemaking action is the result of several petitions filed with OSB, its formation of an advisory committee to explore the petitions, and of a general consensus opinion reached at advisory committee meetings held in March and May 1998. The committee agreed to permit, but not require, use of the PESD. The committee also agreed to propose regulations requiring hydraulic oil level monitoring in hydraulic elevators.

At this writing, OSB is scheduled to hold a public hearing on this rulemaking package on June 17 in Oakland.

Personal Protective Equipment in the Construction Industry

On April 30, OSB published notice of its intent to amend sections 1515(a), 1516(d), and 1517(c), Title 8 of the CCR, which contain standards for personal protective equipment in the construction industry.

Existing section 1515 requires head protection for employees exposed to hazards that could result in head injury (e.g., falling objects or electric shock) and contains references to ANSI Z89.1-1969, Z89.2-1971 and Z89.1-1981 standards for head protection. Section 1515 specifically addresses head protection in situations where the employee may be exposed to energized conductors above and below 600 volts. This section also addresses head injuries caused by hair entanglement on moving equipment/machinery. OSB's proposed amendments would delete section 1515(a), subsections (1) through (4), which reference the outdated 1971 and 1981 ANSI standards for industrial head protection for industrial workers and electrical workers, and add language to subsection (a) to refer the employer to the existing head protection requirements contained in section

3381 of OSB's General Industry Safety Orders (GISO). The proposed revisions would require employers to consult the GISO prior to determining applicable Title 8 head protection requirements.

Section 1516 contains specific requirements for employees working in locations where they may be exposed to eye injury from flying particles, punctures, abrasions, contusions, burns, or injurious light rays, and addresses the use of safety glasses, face shields, goggles, and laser protection. Section 1516(d) requires eye and face protection to meet ANSI Z87.1-1979 (Practice for Occupational and Educational Eye and Face Protection). OSB's proposed revisions would delete the reference to the 1979 ANSI standard, and replace it with a reference to section 3382(d) of the GISO. The proposed revisions would require employers to comply with the general industry eye and face protection requirements, which contain updated national consensus standard language pertaining to occupational and educational eye and face protection. The proposed revisions would also have the effect of consolidating OSB's eye and face protection requirements at a single location within Title 8, making it easier for the employer to locate and comply with them.

Section 1517 requires employees to wear appropriate foot protection when their feet are exposed to hazards such as crushing blows, penetrating actions, falling objects, and wet or slippery surfaces. Section 1517(c) requires safety-toe footwear to meet the requirements of the ANSI Z41.1-1967 safety toe footwear standard. OSB's proposed revisions would delete the 1967 ANSI reference and replace it with language referring employers to section 3385(c) of the GISO, which addresses the same issue via updated ANSI standard specifications. The revisions would make it easier for employers to locate and comply with the ANSI standard for safety-toe footwear, and the employer would only need to consult the GISO to determine the safety-toe footwear requirements.

At this writing, OSB is scheduled to hold a public hearing on this rulemaking package on June 17 in Oakland.

Update on Other OSB Rulemaking

The following is an update on rulemaking proceedings discussed in detail in Volume 16, No. 1 (Winter 1999) of the *California Regulatory Law Reporter*:

♦ **Implementation of AB 1208 (Migden): Bloodborne Pathogens Standard.** At its December 1998 meeting, OSB adopted emergency amendments to section 5193, Title 8 of the CCR, to implement the threshold requirement of AB 1208 (Migden) (Chapter 999, Statutes of 1998). The amendments are intended to protect health care workers from so-called "sharps injuries," which can transmit bloodborne pathogens in the workplace, by establishing stronger requirements for

employers to use needles and other sharps which are engineered to reduce the chance of inadvertent needlesticks or sharps injuries. Among other things, the emergency amendments: (1) establish new requirements for the use of needleless systems and sharps devices with "engineered sharps injury protection" (ESIP), subject to four exceptions; (2) require employers to keep a sharps injury log; (3) require employers to prepare written exposure control plans that include effective procedures for gathering the information that must be included in the sharps injury log, and for evaluating the effectiveness of the use of needleless systems and sharps devices with ESIP appropriate for the procedures conducted; (4) specifically recognize hepatitis C as a bloodborne pathogen; and (5) clarify a number of existing requirements. AB 1208 requires the Board to adopt emergency amendments to section 5193 by January 15, 1999, and to complete the rulemaking process with the adoption of permanent changes to the section by August 1, 1999. The amendments adopted by OSB in December 1998 required employers to comply with most of the new standards in section 5193 by August 1, 1999. [16:1 CRLR 133-34]

At its January 14, 1999 meeting, OSB reviewed the proposed emergency amendments, changed the effective date for several of the new standards to July 1, 1999, and adopted them. The Board submitted these emergency changes to OAL in early January, and OAL approved them on January 22.

In further compliance with AB 1208 and Labor Code section 144.7, OSB initiated formal rulemaking to permanently amend section 5193 and held a public hearing on February 18. The proposed permanent regulatory changes are essentially the same as the emergency changes. Approximately 30 people—including representatives from

health care provider associations, sharps manufacturers, medical and dental schools, blood banks, and detention centers—testified regarding the proposed amendments. Many of those present suggested language to clarify the proposed regulation, and some urged the Board to adopt a more stringent standard. In response to the comments, OSB decided to make a number of minor changes to the text of the amendments. At this writing, the Board is expected to release the modified language for an additional 15-day comment period in mid-May, and to consider the permanent amendments at its June 17 meeting.

♦ **Orchard Man-Lifts Used for Pruning.** On March 18, OSB adopted proposed amendments to subsections 3641(a) and (b), Title 8 of the CCR, which establish criteria for the construction and stability of orchard man-lifts. Revised subsection 3641(a)(1) requires orchard man-lifts manufactured after September 1, 1991 to meet the construction and stability requirements of either the 1980 or 1992 ANSI editions.

The amendments are intended to protect health care workers from so-called "sharps injuries," which can transmit bloodborne pathogens in the workplace, by establishing stronger requirements for employers to use needles and other sharps which are engineered to reduce the chance of inadvertent needlesticks or sharps injuries.

Revised subsection 3641(b) references both the 1980 and 1992 ANSI editions, and requires a plate or marking stating conformance with the updated standards. [16:1 CRLR 134-35] OAL approved these revisions on April 7.

♦ **Power Process Pressure Piping.** On March 18, OSB adopted proposed amendments to sections 4415, 5468, 5485, and 5504, Title 8 of the CCR. These revisions require sewage piping to conform to the latest ANSI requirements and standards. [16:1 CRLR 135] OAL approved these amendments on April 30.

♦ **Training of Construction Site Flaggers.** On January 14, OSB held a public hearing on its proposed amendments to section 1599, Title 8 of the CCR. Section 1599 regulates the use of flaggers at construction sites, including the placement of flaggers and warning signs, flagger garments, night time operations, and training. Existing section 1599(f) requires that flaggers be properly trained before being assigned to a specific construction site; the Board proposes to add nine new training requirements for onsite flaggers. [16:1 CRLR 135] At this writing, OSB has not yet adopted the proposed amendments.

♦ **Rollover Protective Structures and Protective Enclosures.** On January 14, OSB held a public hearing on its proposed amendments to section 1596, Title 8 of the CCR, which pertains to the installation of rollover protective structures (ROPS) and seatbelts for various types of construction equipment (e.g., rollers, compactors, scrapers, tractors, bulldozers, and front-end loaders). Subsection 1596(b) contains requirements for ROPS design criteria; subsection 1596(f) contains labeling requirements for ROPS; and subsection 1596(h) addresses wheel-type agricultural or industrial tractors. All three subsections require ROPS to be in compliance with or equivalent to SAE standards. OSB proposes to update all three subsections by deleting the references to the SAE standards and requiring the employer to determine whether the ROPS have been approved and, if not, to select a method of approval for its ROPS per the approval language in section 1505, Title 8 of the CCR. The proposed revisions will require employers to ensure that their ROPS are designed and built to meet nationally recognized consensus standards and have engineering documentation available to substantiate that their ROPS are approved pursuant to section 1505 requirements. [16:1 CRLR 135] At its April 15 meeting, OSB adopted the proposed amendments; at this writing, the changes await review and approval by OAL.

♦ **Update of ANSI Reference for Ladder-Type and Needle Beam-Type Platforms.** On February 19, OSB adopted proposed revisions to sections 1637 and 1660, Title 8 of the CCR. These changes update OSB's regulations and require scaffolds and ladder-type and beam-type platforms to conform to the latest ANSI standards. [16:1 CRLR 135] OAL approved these amendments on March 19.

♦ **Update of ANSI References for Fixed and Portable Ladders.** On February 19, OSB adopted proposed revisions to sections 3277 through 3280, Title 8 of the CCR, which

update various ANSI standards for fixed ladders and portable wood, metal, and reinforced plastic ladders, to ensure that equipment recently placed in service meets the requirements of current national consensus standards. [16:1 CRLR 136] OAL approved the amendments on March 19.

♦ **Report of Use Requirements for Regulated Carcinogens.** On November 19, OSB held a public hearing on its proposed amendments to sections 1529, 1532, 1535, 5200-02, 5207-15, 5217-20, and 8358, and adoption of new section 5203, Title 8 of the CCR. New section 5203 would consolidate and standardize "report of use" requirements for all regulated carcinogens into one regulation. Section 5203 would also define various terms used in reporting, specify the conditions that trigger an employer's obligation to report, specify when and where a required written report must be filed, provide a reporting alternative for employers with frequent location changes, require more immediate reporting of emergency situations, and require employers to notify affected employees of the information that is provided in the report of use. [16:1 CRLR 136] At this writing, OSB is expected to consider the adoption of these proposed revisions at its May 20 meeting.

♦ **Exemption of Certain Explosives Manufacturing Activities from Process Safety Management Regulation.** On February 18, OSB adopted proposed amendments to section 5189, Title 8 of the CCR, its process safety management (PSM) regulation for all types of explosives manufacturing operations. New subsection 5189(b)(6) excludes from the PSM regulation nine separate low-risk pre-manufacturing, post-manufacturing, and research and testing activities involving explosives. Exempted are product testing, x-raying, scale-up research chemical formulation work, and failure analysis tests. The new subsection exempts these categories if they are conducted in separate, non-production research or test areas and do not have the potential to cause or contribute to a release or interfere with mitigating the consequences of a catastrophic release from the explosive manufacturing process. OAL approved these amendments on March 31.

♦ **Revisions to Low Voltage Safety Orders.** On January 14, OSB adopted revisions to sections 2320.1 and 2320.4, Title 8 of the CCR, part of the Board's Low Voltage Safety Orders. The Board revised section 2320.1(b) to clarify that only qualified persons shall be permitted to perform any function in proximity to energized overhead conductors unless specified means to prevent accidental contact have been provided. Revised section 2320.4(a)(2) refers to section 3314 for additional requirements. [16:1 CRLR 136-37] OAL approved these amendments on March 3.

♦ **Use of Cylinders Associated with Welding and Cutting Operations.** On January 5, OAL approved OSB's amendments to sections 1740(m), 4649, and 4821, Title 8 of the CCR. Revised section 1740(m), which addresses leaking fuel gas cylinders, requires a fuel gas cylinder with a cylinder valve leak to be removed from the work area and taken outdoors to an isolated area, and further requires notification of the

supplier. Amended section 4649, which contains the requirement for the construction and marking of cylinders, updates the current standard to nationally recognized standards and ensures that connections for gas cylinders meet these standards. Amended subsection 4821(c), which addresses the use of copper tubing in welding, correctly references the title of the appropriate standard (ASTM B88-1996—Seamless Copper Water Tube). [16:1 CRLR 136]

♦ **Power Lawn Mower Labeling.** On March 16, OAL approved OSB's amendments to section 3563, Title 8 of the CCR, regarding power lawn mowers. Among other things, the revised section requires power lawn mowers to be labeled as meeting the requirements of ANSI B71.1-1980 (Safety Specifications for Power Lawn Mowers, Lawn and Garden Tractors and Lawn Tractors), and further requires that power lawn mowers placed into service after the effective date of these changes be approved as defined in section 3206 of the General Safety Orders. [16:1 CRLR 138]

♦ **Industrial Truck Labeling.** On March 1, OAL approved OSB's amendment to subsections 3650(b) and (d), Title 8 of the CCR, regarding industrial trucks. Previous section 3650(b) required that certain industrial trucks be labeled as conforming to the appropriate national consensus standards; the revision updates the national consensus standards and requires employers to label industrial trucks appropriately. The amendment to subsection (d) deletes an unnecessary reference to the ANSI B56.1-1975 standard. [16:1 CRLR 138]

♦ **Illumination Regulation Updated.** On February 11, OAL approved OSB's amendments to section 3317, Title 8 of the CCR, which requires that working areas, stairways, aisles, passageways, workbenches, and machines be provided with either natural or artificial illumination adequate and suitable to provide a reasonably safe place of employment. The regulation contains a table that describes the amount of illumination necessary in several situations. Previously, if a situation were not listed, the employer was referred to ANSI A11.1-1973 (Practice for Industrial Lighting) and ANSI A132.1-1973 (Practice for Office Lighting). The amended regulation refers the employer to ANSI/IES RP-7-1991 and ANSI/IES RP-1-1993, respectively. [16:1 CRLR 138]

♦ **Fall Protection at Elevated Locations.** On December 17, OSB adopted proposed amendments to sections 3210 and 3388, Title 8 of the CCR. Section 3210 sets forth requirements for the use of guardrails and toeboards on elevated locations (such as roof openings, open sides of landings, platforms, and runways) that are more than 30 inches above the floor. OSB proposes to amend section 3210(a) to clarify that it applies only to buildings, and to add new subsection (b) which sets forth exceptions to the fall protection requirement in settings that are not building-related (thus requiring the relocation of two of subsection (a)'s exceptions to subsection (b), which contains exceptions to the fall protection requirement in settings that are not building-related). Section 3388 defines the requirements for approval of safety belts used by employees and the strength requirements for life lines. OSB

proposes to repeal this section, because its amendments to section 3210 will state that fall restraint/fall arrest systems must comply with the requirements in Article 24 of the Construction Safety Orders (Fall Protection). [16:1 CRLR 138] At this writing, the rulemaking record on these proposed changes is at OAL.

♦ **Glass and Glazing and Mechanical Refrigeration Systems.** On February 11, OAL approved OSB's amendments to sections 3242 and 3248, Title 8 of the CCR, regarding glass and glazing and mechanical refrigeration systems. The Board's amendments to these sections update Title 8 to ensure that current installations of glass and glazing and mechanical refrigeration systems meet the latest model code requirements. [16:1 CRLR 139]

LEGISLATION

SB 508 (Ortiz), as amended April 20, would require OSB to adopt, by January 15, 2000, an emergency regulation requiring specific employer measures to protect community health care workers from violence in the performance of their duties. The bill would require the Board, following adoption of the emergency regulation and prior to August 1, 2000, to complete the rulemaking process and adopt a standard meeting criteria prescribed in the bill. [S. Appr]

AB 1127 (Steinberg), as introduced February 25, would increase the penalties available when an employer knowingly creates a hazard for employees, or willfully or repeatedly violates OSHA standards, causing serious harm or death. Specifically, AB 1127 would increase the misdemeanor punishment for knowingly, negligently, or repeatedly violating an order to abate a hazard to include a county jail term not to exceed one year or a fine not exceeding \$200,000 (currently, the punishment is a term in the county jail not to exceed six months or a fine of not more than \$5,000). The bill would set the misdemeanor fine for a corporation or limited liability company that knowingly, negligently, or repeatedly violates an order to abate a hazard at no less than \$100,000, but not more than \$1 million.

AB 1127 would also increase from a misdemeanor to an alternate misdemeanor/felony ("wobbler") the willful violation of an occupational safety or health standard or order that causes serious injury or death; set the misdemeanor penalty for a willful violation of an occupational safety or health standard or order that causes serious injury or death at a term in the county jail not to exceed one year and/or a fine; increase the misdemeanor monetary penalty for the willful violation of an occupational safety or health standard or order that causes serious injury or death from \$70,000 to \$250,000; set the felony penalty for a willful violation of an occupational safety and hazard standard or order that causes serious injury or death as imprisonment in state prison for 16 months to three years; set the felony fine for the willful violation of an occupational safety or health standard or order that causes serious injury or death at an amount no less than \$250,000 but not exceeding \$1 million; increase the felony fine for the

willful violation of an occupational safety or health standard or order that causes serious injury or death by a corporation or limited liability company to no less than \$500,000 and no more than \$5 million; make the second conviction for the willful violation of an occupational safety or health standard or order that causes serious injury or death a felony punishable by two, three, or four years in state prison, or a fine of no less than \$500,000 but not exceeding \$5 million; and set the felony fine for a second conviction of a corporation or limited liability company that willfully violates an occupational safety or health standard that causes serious injury or death at no less than \$1 million and not more than \$10 million. The bill would make it an alternative misdemeanor/felony for an employer to submit a false statement of compliance with an abatement order punishable by either (a) a county jail term not exceeding one year, a fine not exceeding \$100,000, or both a fine and imprisonment; (b) a term in the state prison of 16 months to three years, a fine of not less than \$50,000 but not exceeding \$250,000, or both a fine and imprisonment; or (c) if the violator is a corporation or a limited liability company, the fine shall be not less than \$100,000 but not more than \$1 million.

AB 1127 would provide that OSHA standards are admissible in any personal injury or wrongful death action; presume that OSHA standards are reasonable and proper requirements of safety and are, therefore, admissible in any civil or criminal matter; and place the burden of establishing good cause on the employer who seeks to appeal an order to abate a hazard.

Finally, AB 1127 would repeal Labor Code section 6434, which prohibits civil penalties from being assessed against employers that are governmental agencies for violations of certain employee safety standards. [A. *PubS*]

AB 1655 (Hertzberg). Existing law authorizes employers to apply to OSB for a permanent variance from an occupational safety and health order upon a showing of an alternate program, method, practice, means, device, or process that will provide equal or superior safety to employees; and requires OSB to issue those variances if it determines on the record, after an investigation where appropriate and a hearing, that the proponent of the variance has demonstrated by a preponderance of the evidence that certain conditions relating to the safety and health of employees are met. As amended March 9, this bill would require OSB, on or before April 1, 2000, to report to the legislature on the nature and the extent of investigations conducted pursuant to those provisions. [A. *Appr*]

AB 850 (Torlakson), as amended April 26, would amend Labor Code section 7901, relating to amusement rides. Under existing law, amusement rides are required to be operated under a permit issued by DOSH. The current definition of amusement rides explicitly excludes rides that are permanent

in nature. This bill would expand the definition to include permanent rides with exceptions for certain parks such as playgrounds operated by schools, museums, skating rinks, and amusement rides operated at private events.

This bill was introduced in response to a tragic accident at Disneyland in December 1998, in which two patrons and an employee were struck by a large metal cleat that fell from a full-sized replica of an old American sailing ship. AB 850 would establish the "Permanent Amusement Ride Safety Program," requiring inspection and approval of the rides on an annual basis, liability insurance coverage, safety training for employees, and recordkeeping of accidents. A "qualified safety inspector" must administer the annual inspection and approval. Under the bill, the inspector must be approved by

DOSH, must hold a valid license as a professional engineer, and may be an employee of the park. [A. *L&E*]

SB 973 (Perata), as amended April 21, would establish a system for the permitting and inspection of permanent amusement rides. Among other things, the bill would require OSB to adopt regulations for the safe installation, repair, maintenance, use, operation, and inspection of permanent amusement rides; require semi-annual inspection of permanent amusement rides by DOSH; permit DOSH to fix and collect fees for actual inspection costs; require permanent amusement ride operators to ensure that employees are trained in the safe operation and maintenance of rides, as specified by DOSH; permit DOSH to shut down a hazardous or unsafe ride until the condition is corrected; require the operator to keep specified records regarding injuries and deaths; and specify that if a fatality or injury is caused by the failure or malfunction of an amusement ride, the equipment or conditions that caused the accident shall be preserved. [S. *Appr*]

AB 983 (Correa), as amended April 15, would require an operator of a permanent amusement facility to keep accurate records of each injury occurring within that facility that resulted in death or required first aid or other medical treatment. The operator would be required to file a specified report annually with DOSH. The bill would also require DOSH to report annually to the legislature the injury data it receives pursuant to these provisions. These provisions would be effective until January 1, 2005, unless a later enacted statute extends or deletes that date. [A. *L&E*]

AB 1599 (Torlakson), as introduced February 26, would amend Education Code section 49110 relating to work permits issued by school district personnel to students. The intent of section 49110 is that the school district personnel responsible for issuing work permits to minors have a working knowledge of California labor laws as they relate to minors. AB 1599 would require that the person who issues work permits receive annual training that includes information on child labor laws, health and safety regulations, sexual harassment

and other issues of discrimination, workers' compensation, and issues regarding work permit policies, responsibilities, and compliance.

In addition, when the work permit is issued, this bill would require that the school district provide the student, parent or guardian, and employer with basic information compiled by the state Department of Education which must be signed by all parties. When compiling this basic information, the Department must consult with Cal-OSHA and the Division of Labor Standards Enforcement (DLSE). The disseminated information will include at least child labor, issues related to wages, health and safety regulations, sexual harassment and other issues of discrimination, workers' compensation, and the telephone numbers of local labor law enforcement agencies such as the U.S. Department of Labor, DLSE, and Cal-OSHA. [A. Appr]

LITIGATION

At this writing, oral argument in *Pulaski, et al. v. California Occupational Safety and Health Standards Board*, No. C028525, organized labor's challenge to OSB's "ergonomics" regulation, is scheduled for September 27 before the Third District Court of Appeal. [16:1 CRLR 141-42]

In *Pulaski*, the Third District is reviewing a decision in which Sacramento County Superior Court Judge James T. Ford arguably rewrote section 5110, Title 8 of the CCR, OSB's statewide ergonomics standard intended to prevent so-called "cumulative trauma disorders" (CTDs) or "repetitive motion injuries" (RMIs) to employees. OSB was directed to adopt the regulation in AB 110 (Peace) (Chapter 121, Statutes of 1993), part of a five-bill package aimed at reforming California's workers' compensation system by preventing occupational injuries.

After failing to meet AB 110's statutory deadline of January 1, 1995, OSB finally adopted section 5110 in April 1997; OAL approved it in June 1997. Under subsection 5110(a), the regulation applies to employers with ten or more employees, and where more than one employee has suffered an RMI under all of the following conditions: (1) the RMI is "predominantly caused (*i.e.*, 50% or more)" by a repetitive job, process, or operation; (2) the employees incurring the RMIs were performing "a job, process, or operation of identical work activity," meaning the employees were performing the same repetitive motion task "such as but not limited to word processing, assembly, or loading"; (3) the RMIs are musculoskeletal injuries that a licensed physician has objectively identified and diagnosed; and (4) the RMIs are reported by the employees to the employer within the last 12 months (but not before the effective date of section 5110). Should the above conditions occur, the requirements of subsection 5110(b) are triggered: The employer must establish and implement a program designed to minimize RMIs, including a worksite evaluation ("each job, process, or operation of identical work activity covered by this section or a representative number of such jobs, processes, or operations of identical work ac-

tivities shall be evaluated for exposures which have caused RMIs"), control of exposures which have caused RMIs ("any exposures that caused RMIs shall, in a timely manner, be corrected or if not capable of being corrected have the exposures limited to the extent feasible; the employer shall consider engineering controls, such as workstation redesign, adjustable fixtures, or tool redesign, and administrative controls, such as job rotation, work pacing, or work breaks"), and training (employees must be given a training program that includes an explanation of the employer's program, the exposures which have been associated with RMIs, the symptoms and consequences of injuries caused by repetitive motion, the importance of reporting symptoms and injuries to the employer, and methods used by the employer to minimize RMIs). Subsection 5110(c) states that measures implemented under subsection (b) will satisfy the employer's obligations under that subsection, "unless it is shown that a measure known to but not taken by the employer is substantially certain to cause a greater reduction in such injuries and that this alternative measure would not impose additional unreasonable costs."

Calling the standard weak and loophole-ridden, labor groups sued to invalidate the regulation; in opposition, two trucking associations argued that the rule is too onerous and that too little is known about RMIs to justify the imposition of potentially costly regulations.

On October 16, 1997, Judge Ford released a decision which essentially rewrites section 5110. Instead of upholding it or striking it entirely, Judge Ford found that certain phrases and sections of the rule exceed OSB's statutory authority, and directed OSB to "refrain from giving legal force and effect to them" while enforcing the remainder of the regulation. Specifically, Judge Ford ruled that OSB is forbidden to enforce subsection (a) to the extent that it requires work-related RMIs to be "predominantly caused (*i.e.*, 50% or more)" by repetitive tasks, and to the extent that it permits work-related causation to be determined by the employer rather than by a licensed physician pursuant to subsection (a)(3). The court also struck the word "objectively" from subsection (a)(3) (which required a physician to "objectively" identify and diagnose an RMI). Finally, Judge Ford expanded the scope of the standard to every worker and employer in the state by striking the exception for employers with nine or fewer employees. Judge Ford ruled that these "invalid parts" of section 5110 are severable from the remaining provisions of the regulation "which are valid and can be given full legal force and effect."

The Board and the trucking associations appealed Judge Ford's decision to the Third District. At this writing, section 5110—as originally adopted by OSB on April 17, 1997, and approved by OAL on July 3, 1997—is effective and will remain so until the case is decided by the appellate court.

In *Carmel Valley Fire Protection District v. State of California*, 70 Cal. App. 4th 1525 (Mar. 31, 1999), the Second District Court of Appeal held that the legislature violated the separation of powers doctrine when, in response to the state's

fiscal crisis during the early 1990s, it passed a bill suspending required local government compliance with state mandates—including Department of Industrial Relations executive orders concerning appropriate clothing and equipment for firefighters.

In 1978, DIR adopted executive orders requiring all employers (including local governments) to adhere to OSB's regulations establishing minimum requirements for personal protective clothing and equipment for firefighters, and to provide firefighter employees with the designated clothing and equipment. At that time, state law required the state to reimburse local government entities for the costs they incurred in complying with the regulations ("state-mandated programs"). In 1979, California voters codified the state's obligation to reimburse local governments for costs they incur in complying with specified state-mandated programs in the state constitution by passing Proposition 13.

During the state's fiscal crisis in 1990, the legislature passed a bill enacting Government Code section 17581, which suspended the obligation of local governments to comply with a statute or executive order if (1) compliance with the statute or executive order would trigger mandated state reimbursement, and (2) the legislature specifically identifies the statute or executive order as being one for which reimbursement is not provided for that fiscal year. If a local agency elects to comply with a statute or executive order meeting these two conditions, the local agency may assess fees to those who benefit from that compliance—but the state would not reimburse those costs.

In 1995, the Carmel Valley Fire Protection District submitted a claim to the Commission on State Mandates (which determines whether a law or regulation constitutes a "state mandate") for reimbursement of its costs of complying with DIR's executive orders concerning firefighter clothing and equipment. After the Commission denied the claim, the District filed a petition for writ of mandate in superior court. The trial court denied the writ, finding that the clothing and equipment requirements imposed by the executive orders were validly suspended by section 17581 and that, as a result, the costs incurred by the District by providing those items were not state-mandated costs. The District appealed.

The Second District Court of Appeal reversed, finding that the legislature's enactment of section 17581 usurped the enforcement authority of the executive branch. The court observed that although the legislature may enact, amend, and repeal the laws of this state (including those that create Cal-OSHA and that govern occupational health and safety), it is "without the power to 'exercise supervisory control or to retain for itself some sort of "veto" power over the manner of execution of the laws.'" According to the court, "section 17581

is nothing more than an impermissible attempt to exercise supervisory powers over the manner in which the Department of Industrial Relations executes the laws enacted by the Legislature. Whatever power the Legislature may have to repeal Cal-OSHA in whole or in part, or to enact an inconsistent statute that would accomplish an implied repeal of the

executive orders, it does not have the power to cherry-pick the programs to be suspended—which is precisely what the Legislature has done by suspending the operation of only those 'executive orders, or portions thereof, [that] have been specifically identified by the Legislature in the Budget Act for that fiscal year' [quoting section 17581]....Accordingly, section

17581 is constitutionally infirm as applied in this case and cannot be applied to the executive orders adopted by the Department of Industrial Relations."

The state has petitioned the California Supreme Court for review of the Second District's decision.

RECENT MEETINGS

At its February 18 meeting in Oakland, OSB denied Petition No. 381, submitted by Russell Kinley, which requested that OSB amend section 1637(j), Title 8 of the CCR, with regard to permitting the use of stilts in the construction industry.

Also at its February 18 meeting, OSB denied Petition No. 387, submitted by Foothill Industrial and Mechanical, Inc., which requested that OSB amend section 3583(d), Title 8 of the CCR, with regard to guards for wire wheels, sanding discs, and cut-off abrasive wheels.

FUTURE MEETINGS

- May 20, 1999 in Los Angeles.
- June 17, 1999 in Oakland.
- July 15, 1999 in San Diego.
- August 19, 1999 in Sacramento.
- September 17, 1999 in Los Angeles.
- October 21, 1999 in Oakland.
- November 18, 1999 in San Diego.
- December 16, 1999 in Sacramento.
- January 20, 2000 in Los Angeles.
- February 17, 2000 in Oakland.
- March 16, 2000 in San Diego.
- April 13, 2000 in Sacramento.
- May 11, 2000 in Los Angeles.