



## REGULATORY AGENCY ACTION

*States v. Gaubert*, No. 89-1793, in which a former savings and loan owner is seeking compensation for \$25 million worth of real estate he claims he lost when his Irvine-based S&L went under and was taken over by federal regulators. Thomas Gaubert, a prominent political fundraiser who persuaded former House of Representatives Speaker Jim Wright (D-Texas) to intervene with federal regulators on his behalf, acquired a controlling interest in what later became Independent American in 1983. However, in 1986, the Federal Home Loan Bank Board ousted Gaubert from management of Independent, limited his involvement with any federally-insured thrift, and installed federal regulators to manage the thrift.

Claiming that the institution's eventual failure stemmed from the regulators' negligent management, Gaubert is suing under the Federal Tort Claims Act (FTCA) for \$25 million in capital he pledged to guarantee Independent's net worth. However, the federal government—which is defending 132 similar suits—contends that the challenged actions of the regulatory officials all fit within the discretionary function exception to the FTCA. While the district court agreed with the government, the Fifth Circuit Court of Appeals found that the actions of the federal regulators in managing the failed thrift extended beyond policy decisions into the realm of "operational" activities, which do not fit within the discretionary function exemption.

adopt exposure standards for video display terminals (VDTs) in the workplace, OSB refused to adopt such standards at its June 1989 meeting, and has subsequently refused to reconsider its decision in spite of public and legislative pressure. At a time when VDT injuries are on the rise, Cal-OSHA continues to study the problem (as it has for three years). The latest legislative attempt to require Cal-OSHA to adopt VDT exposure standards—AB 955 (Hayden)—was vetoed by Governor Deukmejian in September 1990. (See CRLR Vol. 10, No. 4 (Fall 1990) pp. 130-31; Vol. 10, Nos. 2 & 3 (Spring/Summer 1990) p. 152; and Vol. 10, No. 1 (Winter 1990) p. 115 for background information.)

This situation has forced many local officials in California to attempt to rectify the problem themselves. On December 17, the San Francisco Board of Supervisors passed an ordinance regulating the use of VDTs in the workplace; Mayor Art Agnos signed the proposal on December 27. The law covers city workers and businesses with fifteen or more employees, and requires employers to provide adjustable work stations, regular breaks, and training on the safe use of VDTs. Employers have four years to make the required changes.

In a related matter, the National Institute of Occupational Safety and Health is currently overseeing a study of VDT radiation effects. The study, which is scheduled to be released in early 1991, will attempt to answer questions about VDT radiation and its effects on workers.

*OAL Again Rejects Asbestos Regulations.* On October 22, the Office of Administrative Law (OAL) rejected OSB's modified version of amendments to section 5208 and its addition of new sections 1529 and 5208.1, Title 8 of the CCR, which would bring Cal-OSHA's asbestos standards in line with the current federal standards governing employee exposure to airborne asbestos fibers. OSB had modified its regulatory package after OAL initially rejected it in May 1990. (See CRLR Vol. 10, No. 4 (Fall 1990) p. 130; Vol. 10, Nos. 2 & 3 (Spring/Summer 1990) p. 152; and Vol. 10, No. 1 (Winter 1990) p. 115 for background information.) In its October 22 disapproval, OAL found that OSB's rulemaking file failed to comply with the consistency and clarity standards of Government Code section 11349.1, and that OSB had failed to make changes to the text available to the public as required by Government Code section 11346.8(c).

At its November 15 meeting, OSB staff announced that the appropriate



## DEPARTMENT OF INDUSTRIAL RELATIONS

### 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 government employees at the state and local levels.

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

The Occupational Safety and Health Standards Board (OSB) is a quasi-legislative body empowered to adopt, review, amend, and repeal health and safety orders which affect California government employers and employees. Under section 6 of the Federal Occupational Safety and Health Act of 1970, California's safety and health standards must be at least as effective as the federal standards within six months of the adoption of a given federal standard. Current procedures require justification for the adoption of standards more stringent than the federal standards. In addition, OSB may 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 their employees.

The seven members of the OSB are appointed to four-year terms. Labor Code section 140 mandates the composition of the Board, which is comprised of two members from management, two from labor, one from the field of occupational health, one from occupational safety, and one from the general public.

The duty to investigate and enforce the safety and health orders 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 making routine investigations, DOSH is required by law to investigate employee complaints and any accident causing serious injury, and to make follow-up inspections at the end of the abatement period.

The Cal-OSHA Consultation Service provides on-site 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.

The Appeals Board adjudicates disputes arising out of the enforcement of Cal-OSHA's standards.

### MAJOR PROJECTS:

*VDT Standards: Local Officials Give Up on Cal-OSHA and State Politicians.* In spite of recommendations by its own Ad Hoc Expert Advisory Committee to



modifications were being made to the rulemaking package, and that staff would develop a 15-day public comment period notice and present the proposals to OSB for re-adoption, if necessary.

#### *Implementation of SB 198 (Greene).*

At its August 1990 meeting, OSB held a public hearing on several proposed amendments to Title 8, section 1509(a) of the Construction Safety Orders, and section 3203 of the General Industry Safety Orders, to implement SB 198 (B. Greene) (Chapter 1369, Statutes of 1989). (See CRLR Vol. 10, No. 4 (Fall 1990) p. 131; Vol. 10, Nos. 2 & 3 (Spring/Summer 1990) p. 152; and Vol. 10, No. 1 (Winter 1990) p. 115 for background information.) SB 198 requires OSB to adopt standards requiring every employer to establish, implement, and maintain an effective injury prevention program with specified elements, including substantial compliance criteria for use in evaluating an employer's injury prevention program. Section 1509(a) would be retitled as "Injury and Illness Prevention Program" (IIPP), and would be amended to require employers to comply with requirements for injury and illness prevention programs contained in section 3203 of the General Industry Safety Orders. Revised section 3203 would require employers to establish, implement, and maintain a written IIPP as mandated by Labor Code section 6401.7. These amendments to Title 8 were adopted by OSB at its December 13 meeting, and now await OAL submission and approval.

*Proposed Civil Penalty Assessment Regulatory Changes.* On December 20, OSB held a public hearing regarding proposed changes to section 336, Title 8 of the CCR, regarding civil penalties and assessments. Labor Code section 6511 provides for a minimum non-adjusted penalty of \$250 for violations of Chapter 6 of Division 5 of the Labor Code, commencing with section 6500. Currently, section 336(a) does not specifically provide for this minimum penalty; as a result, DOSH is proposing an amendment to subsection (a) to provide for a minimum \$250 penalty which will not be subject to adjustment.

SB 198 (Greene) (*see supra*) amended provisions of the Labor Code regarding the assessment of civil penalties for violations of standards adopted pursuant to the California Occupational Safety and Health Act of 1973 commencing with Labor Code section 6300. Other proposed amendments to section 336, to be entitled "Assessment of Civil Penalties," would implement and make more specific the changes to Labor Code sections 6318, 6319, 6320, 6427, 6428, and

6430 included in SB 198. Among other things, the changes would clarify that civil penalties for a serious violation may not be adjusted in any manner except for size, and then only under specified conditions; provide for the revocation of abatement credits where the employer fails to file a statement of compliance with DOSH's abatement requirements within ten working days after the date set for abatement by DOSH; and delete an existing provision limiting a civil penalty from exceeding ten times the amount of the daily additional proposed civil penalty required to be imposed for each day that the violative condition remains unabated. The proposed changes also add stiff penalties for operating an elevator without a permit, in violation of a permit, and/or in an unsafe condition. No public comment was offered on the proposed changes; the rulemaking file is currently being prepared for submission to OAL.

*Shaded Shelter for Farmworkers.* At its October 25 meeting, OSB considered a petition submitted by Olivia Tiscareno, requesting OSB to adopt regulations requiring employers to provide shaded rest areas for farmworkers. Petitioner's sister was fatally injured when a tractor-trailer she was sitting under for shade was unexpectedly moved. Petitioner contended that if a shaded shelter area had been provided, her sister would not have sought shade under the tractor-trailer unit. OSB Executive Officer Steve Jablonsky delivered staff's report, which recommended that OSB deny the petition but amend the training required under the General Industry Safety Orders to specifically include instruction on the safe operation of agricultural equipment.

OSB denied the petition for the following reasons: section 3441(a)(4) of the General Industry Safety Orders already requires equipment operators to ensure that everyone is clear of machinery before starting the engine, engaging power, or operating the machine; prohibiting farmworkers from resting in the shade of machinery would exacerbate hazards associated with heat stress; most harvesters manufactured in the last ten to fifteen years are equipped with extensible awnings or canopies designed to provide shade; according to statistics provided by the Division of Labor Statistics and Research, a total of 51 reports of nonfatal, disabling, heat-induced illnesses were filed during 1985 and 1986, and only two farmworkers were run over and killed by farm vehicles during that two-year period; and the type of regulation suggested would be difficult to enforce

and would not prevent workers from sitting under machinery.

*Inspections of Explosives Manufacturers.* At its November meeting, OSB held a public hearing on its proposal to amend Title 8, Article 119, section 5319 of the General Industry Safety Orders, which applies to workplace inspections of companies which manufacture and handle explosives, blasting agents, ammunition, and fireworks, including raw materials. Two existing exceptions to the provisions of section 5319 exempt (1) processes of manufacturing "special effect" fireworks, as defined (this exception was originally formulated at the request of employers engaged in television, motion picture, and theater productions), and (2) employers manufacturing explosives under contract with the U.S. Department of Defense (DOD) and who have incorporated DOD explosives safety requirements and surveillance. This proposed rulemaking was initiated because Fed-OSHA believes that these exceptions have led DOSH to forego safety and health inspections with respect to explosives manufacturers under contract with the DOD and the motion picture industry. Therefore, Fed-OSHA requested that OSB repeal the two exceptions.

Under OSB's proposed changes, the exception for DOD contractors would be repealed, and the "special effect" exception would be amended to require employers engaged in television, motion picture, or theater productions to comply with all of the provisions of Article 119 (except section 5320 regarding reporting requirements). Various members of the motion picture industry, the State Fire Marshal's office, local fire departments, and the explosives industry expressed concern regarding the proposed changes. At the conclusion of the public hearing, staff withdrew the proposed revisions and announced that it would attempt to identify and address all of the concerns of the affected parties.

*Hazardous Waste Operations and Emergency Response.* At its December meeting, OSB held a public hearing concerning proposed new section 5192 of the General Industry Safety Orders, regarding hazardous waste operations and emergency response. The proposed section would incorporate the provisions of the federal standard, 29 C.F.R. Part 1910.120, pursuant to OSB's obligation under Labor Code sections 142.3 and 142.7 to adopt standards at least as effective as the federal standards for all issues for which federal standards exist. The amendments will regulate the safety and health of employees involved in clean-up operations at uncontrolled hazardous



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waste sites ("Superfund" sites under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601 *et seq.*) being cleaned up pursuant to government mandate; in certain hazardous waste treatment, storage, and disposal operations conducted under the federal Resource, Conservation and Recovery Act of 1976 (RCRA) (42 U.S.C. § 6901 *et seq.*); and in any emergency response to incidents involving hazardous substances. Among other things, the rule would require:

- written safety and health programs designed to identify, evaluate, and control site safety and health hazards, including excavations incorporating an organization structure, comprehensive work plan, and a site-specific safety and health plan designed to interface with any existing general plan;

- site control programs to prevent employee contamination, which require a site map, site work zones, use of the "buddy system," communications, a standard operating procedure, and medical assistance;

- employer-provided minimal levels of training for all employees;

- medical surveillance for employees who are or may be exposed or are required to wear a respirator;

- informational programs to inform employees, contractors, and subcontractors working on a hazardous waste site of the hazards and risks expected; and

- emergency response plans to be developed and implemented to handle anticipated site emergencies prior to commencement of hazardous waste operations.

Following OSB's December public hearing, the Board adopted the regulation and subsequently submitted the rulemaking package to OAL for approval. The proposed rule was scheduled to take effect on January 1 and employers are expected to comply with the rule by July 1. This schedule will remain in effect so long as OAL does not disapprove the action. At this writing, OAL has made no determination.

*Proposed Permit and Fee Regulatory Changes.* On December 20, DOSH held a public hearing regarding proposed amendments to sections 341, 341.1, 341.3, Title 8 of the CCR, regarding permits for excavations, trenches, construction, and demolition, and sections 344(a) and 344.1, Title 8, regarding boiler and tank permit inspection fee schedules. The proposed amendment to section 341 would clarify that employers engaged in the underground use of diesel engines in work in mines and tunnels must apply for and obtain a permit from DOSH;

proposed revisions to section 341.1 would set forth additional requirements which must be satisfied before a permit will be issued for the underground use of diesel engines in work in mines and tunnels; and proposed changes to section 341.3 would add a \$50 fee for the issuance of such a permit.

Proposed changes to section 344(a) would increase the fee for boiler and tank permit inspections from \$75 per hour to \$85 per hour, and proposed changes to section 344.1 would increase the hourly fee for field inspections of air tanks, liquified petroleum gas vessels, and boilers from \$75 to \$85.

These proposed changes await OAL submission and approval.

*Update on Other Proposed Regulatory Changes.* At its July 1990 meeting, OSB held a public hearing on a proposed amendment to section 1604.12, Title 8 of the CCR, Construction Safety Orders. (See CRLR Vol. 10, No. 4 (Fall 1990) p. 131 for background information.) The proposed revision adds a new subsection (d) to section 1604.12, requiring employers to keep entryway doors locked for the purpose of controlling or securing the counterweight pit area from unauthorized employee access. This revision, which was adopted by OSB at its November 15 meeting, prevents persons from entering an extremely hazardous location where they could be struck and seriously injured or killed by a descending counterweight. OAL approved this regulatory change on December 17.

On October 25, OSB adopted revisions to its amendments to sections 3000, 3001, and 3009, and its repeal of Appendix 8, Title 8 of the CCR. These changes, which would revise the requirements for elevator inspections and for obtaining a permit to operate an elevator, were disapproved by OAL on July 11. (See CRLR Vol. 10, No. 4 (Fall 1990) p. 132 and Vol. 10, Nos. 2 & 3 (Spring/Summer 1990) p. 156 for background information.) The rulemaking file has been resubmitted to OAL for approval.

On July 25, OAL disapproved OSB's adoption of section 5004, amendment of section 1718, and repeal of section 4999(g), Title 8 of the CCR, which would restrict persons from riding on loads, hooks, or slings of derricks, hoists, or cranes, and regulate personnel platforms for cranes and derricks. (See CRLR Vol. 10, No. 4 (Fall 1990) p. 132 for background information.) OSB staff responded to OAL's concerns and resubmitted the rulemaking file; OAL approved the proposed changes on December 11.

At OSB's October 25 meeting, the Board adopted a modified version of proposed amendments to section 5155, Title 8 of the CCR; OAL had previously disapproved the Board's proposed changes on July 26. The regulatory action sets new limits on certain airborne contaminants in line with federal OSHA standards adopted in March 1989. (See CRLR Vol. 10, No. 4 (Fall 1990) p. 132 and Vol. 10, No. 1 (Winter 1990) pp. 116-17 for background information.) OAL approved the modified amendments on November 21.

On October 25, the Board adopted modifications to its proposed amendments to section 3657, Title 8 of the CCR (General Industry Safety Orders). (See CRLR Vol. 10, No. 4 (Fall 1990) p. 132 and Vol. 10, Nos. 2 & 3 (Spring/Summer 1990) p. 155 for background information.) The proposed amendment would require that all industrial trucks used to hoist employees be equipped with a means to prevent the raised platform from lowering at a rate in excess of 135 feet per minute, in case of hydraulic system failure. At this writing, the rulemaking package has not been submitted to OAL.

At its September 20 meeting, OSB adopted proposed new sections 1698(f), 1717(e), 1721, 1722, and 1722.1, and proposed amendments to sections 1504, 1715, and 1720, Title 8 of the CCR (Concrete and Masonry Construction), which were the subject of a March 15 public hearing. (See CRLR Vol. 10, No. 4 (Fall 1990) p. 132 and Vol. 10, Nos. 2 & 3 (Spring/Summer 1990) p. 155 for background information.) These proposed revisions were approved by OAL on October 22.

At its November 15 meeting, OSB adopted proposed changes to sections 3275, 3276, 3278, and 3279, Title 8, regarding the use of ladders and scaffolding. (See CRLR Vol. 10, Nos. 2 & 3 (Spring/Summer 1990) p. 155 for background information.) At this writing, the proposed changes have not yet been submitted to OAL for approval.

The following regulatory proposals reported in CRLR Vol. 10, No. 4 (Fall 1990) at pages 131-32 have yet to be adopted by OSB and submitted to OAL for approval:

- proposed amendments to Title 8, section 1596 of the Construction Safety Orders, and section 6309(h) of the Logging and Sawmill Safety Orders, regarding the use of seat belts in certain types of equipment outfitted with rollover protective structures;



-proposed amendments to section 3212(d), Title 8 of the CCR, and section 1711(h), Title 24 of the CCR, which would require that guardrail protection be provided for employees working within six feet of the edge of a roof and when employees are required to approach within six feet of the edge of the roof; and

-proposed new section 5191, Title 8 of the CCR, which would incorporate the provisions of a new federal regulation (29 C.F.R. Part 1910.1450) relating to control of occupational exposures to hazardous chemicals in laboratories.

## LEGISLATION:

**AB 42 (Hayden)**, as introduced in the Assembly on December 3, provides that whenever any local public fire agency has knowledge or reasonable suspicion that a place of employment where garment manufacturing operations take place contains fire or safety hazards for which fire or injury prevention measures have not been taken in accordance with local fire and life safety ordinances, it may notify DOSH. The bill further provides that when DOSH has knowledge of such conditions, it shall notify the appropriate local public fire agency. The bill also provides that when DOSH receives such a referral from a local fire agency, DOSH shall investigate; when a local fire agency receives such a referral from DOSH, the agency may investigate at its discretion. This bill, an urgency measure was signed by the Governor on December 13 (Chapter 7, Statutes of 1991).

**Anticipated Legislation.** Assemblymember Hayden may reintroduce AB 955, which would require that on or after July 1, 1992, every computer video display terminal and peripheral equipment used in any place of employment be in conformance with standards adopted by the American National Standards Institute. AB 955 was vetoed by the Governor last session (see CRLR Vol. 10, No. 4 (Fall 1990) p. 133 for background information).

## LITIGATION:

On October 18, the California Supreme Court denied Cal-OSHA's petition for review of the First District Court of Appeal's ruling in *California Labor Federation, et al. v. Cal-OSHA*, No. A048574 (July 12, 1990). In that decision, the First District held that the Safe Drinking Water and Toxics Enforcement Act of 1986 (Proposition 65) is a state law governing occupational safety and health pursuant to the State Occupational Safety and Health Plan

Initiative (Proposition 97, passed in 1988). This holding requires OSB to incorporate into Cal-OSHA's State Plan for Occupational Safety and Health standards which provide for the protections of Proposition 65. (See CRLR Vol. 10, No. 4 (Fall 1990) p. 133; Vol. 10, Nos. 2 & 3 (Spring/Summer 1990) p. 154; and

Vol. 10, No. 1 (Winter 1990) p. 115 for extensive background information on this issue.)

## FUTURE MEETINGS:

April 18 in Sacramento.  
May 16 in Los Angeles.  
June 20 in San Francisco.  
July 25 in San Diego.



## DEPARTMENT OF FOOD AND AGRICULTURE

### DEPARTMENT OF FOOD AND AGRICULTURE

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The California Department of Food and Agriculture (CDFA) promotes and protects California's agriculture and executes the provisions of Food and Agricultural Code section 101 *et seq.*, which provides for CDFA's organization, authorizes it to expend available monies, and prescribes various powers and duties. The legislature initially created the Department in 1880 to study "diseases of the vine." Today the Department's functions are numerous and complex. Among other things, CDFA is authorized to adopt regulations to implement its enabling legislation; these regulations are codified in Chapters 1-7, Title 3, Chapters 8-9, Title 4, and Division 2, Title 26 of the California Code of Regulations (CCR).

The Department works to improve the quality of the environment and farm community through regulation and control of pesticides and through the exclusion, control, and eradication of pests harmful to the state's farms, forests, parks, and gardens. The Department also works to prevent fraud and deception in the marketing of agricultural products and commodities by assuring that everyone receives the true weight and measure of goods and services.

CDFA collects information regarding agriculture and issues, broadcasts, and exhibits that information. This includes the conducting of surveys and investigations, and the maintenance of laboratories for the testing, examining, and diagnosing of livestock and poultry diseases.

The executive office of the Department consists of the director and chief deputy director, who are appointed by the Governor. The director, the executive officer in control of the Department, appoints two deputy directors. In addi-

tion to the director's general prescribed duties, he/she may also appoint committees to study and advise on special problems affecting the agricultural interests of the state and the work of the Department.

The executive office oversees the activities of seven operating divisions:

1. Division of Animal Industry—provides inspections to assure that meat and dairy products are safe, wholesome, and properly labeled, and helps protect cattle producers from losses from theft and straying;

2. Division of Plant Industry—protects home gardens, farms, forests, parks, and other outdoor areas from the introduction and spread of harmful plant, weed, and vertebrate pests;

3. Division of Inspection Services—provides consumer protection and industry grading services on a wide range of agricultural commodities;

4. Division of Marketing Services—produces crop and livestock reports, forecasts of production and market news information, and other marketing services for agricultural producers, handlers, and consumers; oversees the operation of marketing orders and administers the state's milk marketing program;

5. Division of Pest Management—regulates the registration, sale, and use of pesticides and works with growers, the University of California, county agricultural commissioners, state, federal and local departments of health, the U.S. Environmental Protection Agency (EPA) and the pesticide industry;

6. Division of Measurement Standards—oversees and coordinates the accuracy of weighing and measuring goods and services; and

7. Division of Fairs and Expositions—assists the state's 80 district, county, and citrus fairs in upgrading services and exhibits in response to the changing conditions of the state.