



SAFETYTIMES

A Bi-monthly Publication distributed by the Workers' Comp & Safety Committee
P.O. Box 8070, Santa Rosa, CA 95407 • (707) 542-9502 • www.ncbesafety.com

ROUTING SLIP

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North Coast Builders Exchange

November – December 2010

Cal/OSHA Appeals – Do I Need A Lawyer?

People tend to see the solution to a problem from the vantage point of their experience: Safety professionals think of safety surveys and training. HR directors consider adjusting personnel policies. Risk managers contemplate future potential outcomes. The old joke is pretty true: To a hammer, every problem looks like a nail.

The downturn in the economy is leading many employers to represent themselves at the Cal/OSHA Appeals Board. At the same time, new legislation promises to make it harder to defend Cal/OSHA citations. The answer: It depends.



The truth is that anyone can present an appeal to the Cal/OSHA Appeals Board. The Board even provides a guidebook for non-lawyers. Cal/OSHA appeals guides are on the internet, and the OSHA Institute teaches appeal preparation.

But the days are gone - if they ever existed - when employers can expect a good result from just showing up and explaining how they see things. As with every other legal forum (think WCAB),

decisions have piled up over the decades. Statutes and regulations continue to be enacted. The fact is that it is difficult for non-lawyers to succeed without access to legal research tools and much work.

Before you decide whether to hire counsel or go it alone, consider this checklist:

1. Are the issues clear-cut? Are your defenses complicated or technical? Are there any procedural issues you want to raise?
2. Is the dispute only about facts? If it is just a matter of which side the judge will believe, you may not need counsel.
3. Do you need to research past Appeals Board decisions? A few are available on the Appeals Board's website, but they are sorted by name, not subject or regulation. Most are available on legal research sites, but those sites are expensive.
4. Do you understand the legal concept of "standard of care?" AB 2774, now before the Governor for signature, will change the standard of proof of a serious violation from "substantial probability" to "reasonable possibility." Are you ready to argue what that means?
5. Will you need expert testimony to prove your case? Do you know how to enter expert testimony? AB 2774 was signed by Governor Schwarzenegger, so Cal/OSHA's inspectors will be "deemed" qualified to opine, and thus everyone's an expert. Can you cross-examine an expert and effectively object to his or her expertise?
6. Has the appeal been assigned to one of Cal/OSHA's attorneys? If so, that tells

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COMP CORNER

Hallie Fraser
Workers' Comp
& Safety Director



We're back! We apologize for the break in publishing and distribution of the *SafetyTimes*. We decided to bring the publication in-house in order to economize and to offer you the *SafetyTimes* both in print and as a pdf download (available at www.ncbesafety.com). You'll notice a few design changes, but otherwise we are committed to providing a quality newsletter to our group workers' comp participants and members of NCBE.

Remember, if you have ideas for tailgate topics, articles, want to write an article, etc. please contact me at hallie@ncbeonline.com or (707) 542-9502. I'm happy to research and write articles on specific topics of interest.

Do you know why you receive the *SafetyTimes* publication? You are either a participant in NCBE's group workers' comp program (as a NCBE member) or you are in the Golden State Builders Exchanges (GSBE) group workers' comp program and "assigned" to NCBE due to the area where your business is (Sonoma, Lake, or Mendocino

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NCBE Workers' Comp & Safety

Winter Seminars

for

NCBE's Construction Training Center

1030 Apollo Way, Santa Rosa

(707) 542-9502

December

12/1 CPR/First Aid Class

12/2 EPA Lead Certification

12/13 Intro to Cal/OSHA

For more upcoming seminars, visit

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COMP CORNER

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County). All builders exchanges in California are members of GSBE, it is through GSBE that we are able to provide a discounted group workers' comp program to our membership.

As a group workers' compensation participant you are qualified to receive the following services through the NCBE Workers' Comp & Safety Program: Assistance with creation and maintenance of written safety programs, on-site inspections (by me, not OSHA), tailgate safety topics, Safety Clips, training assistance, Cal/OSHA regulatory assistance, reduced rate for safety-related workshops and seminars, etc ... Please go to www.ncbesafety.com for all the services available. Contact me at hallie@ncbeonline.com or at (707) 542-9502 if you are interested in learning more about these valuable services.

Need Safety Materials?

Email: hallie@ncbeonline.com or call (707) 542-9502

Ladder Safety Tips



- Never stand on the top rung
- Use a ladder that is appropriate height for the job.
- Don't use other materials (such as a bucket) to make the ladder "taller".
- Prior to use, inspect the footing, rungs & rails to make sure they aren't cracked or damaged. Ensure all connections are solid.
- Always maintain a three point contact with the ladder when ascending or descending.
- Do not "walk" the ladder, get down, move it, then get back up on it.
- Do not lean too far past the rails to "reach" something.
- Throw away ladders that are no longer usable.

Cal/OSHA Appeals – Do I Need A Lawyer?

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you Cal/OSHA believes the legal issues are complex or that this is one citation they don't want to lose.

7. Is Bureau of Investigations (BOI) investigating (DOSH's in-house criminal investigative arm)? If so, the stakes are too high to not retain counsel.

8. Has the injured employee or his or her attorney sought party status? If so, that is a strong indication that you face additional legal claims, such as *"serious and willful misconduct"* at the WCAB. Do you know how a decision at the Cal/OSHA Appeals Board can affect an Serious & Willful claim at the Workers' Comp Appeals Board (WCAB)?

9. Do you need to protect your investigation? Only the attorney-client communication and work product privileges will help you there.

10. Will losing the appeal affect your public *"face?"* Your employees' attitude?

11. Which is more important to you: The cost of defense or keeping your record as clean as possible? If you are a construction company or work with public entities, a negative Cal/OSHA history can stop you at the door.

12. How likely are future violations? Citations for sections 3203 and 1509 (Illness and Injury Prevention Programs) are easy to write after an incident. A history of violations affecting your core operations (e.g., fall protection for wood framers, point of operation guarding for sheet metal shops, HazMat training for laboratories) are dangerous to your corporate health. The penalty for a first repeat citation is double the normal amount; a second repeat is four times. A *"willful,"* can run as much as \$70,000.00.

13. How will Cal/OSHA's abatement requirements affect you? If you believe there was no violation in the first place, does it make sense to accept a citation which requires abatement changes which you believe are unnecessary and expensive?

14. How much time can you devote to preparing arguments and witnesses? To researching Board decisions? How well do you understand Cal/OSHA's motivations and *"hot buttons"* when it comes to discussing settlement?

15. Finally: How angry are you? Can you look at the issues dispassionately? When you hear Cal/OSHA speak, does your blood pressure remain normal? Would you benefit from having someone else speak for you in negotiations with the Division and at the Board?

So, no, you do not have to have an attorney. But if you decide you do, we modestly suggest that you choose a firm with a combined 36 years' experience defending Cal/OSHA citations (and a member of NCBE). After all, you wouldn't ask your dermatologist to take out your appendix.

Regardless, we wish you the very best results possible.

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Bits & Pieces



Heat Illness Regulations change

(Effective 11/4/10)

Yes, the hazards of high heat has probably passed for the year, but you need to know that there have been changes to the heat illness prevention regulation (§ 3395). In summary, the rulemaking includes *"shade up"* provisions when the temperatures reach 85°F, *"high-heat"* procedures at 95°F, clarifies what constitutes a *"shade break"* and creates exemptions from the shade-up requirement for employers for whom it is not feasible, providing the alternative is just as

effective as shade. Go to: <http://www.dir.ca.gov/DOSH/HeatIllnessInfo.html> for training resources and the full regulation.

New Comprehensive Index

A Comprehensive Index to Cal/OSHA Regulations has been created and is now on the DIR website. You can go to *"fall protection"* and actually see all regulations related to fall protection in one place! Time saving is an understatement! You can even download the index via PDF. Check it out at <http://www.dir.ca.gov/title8/index/T8Index.html>

EPA's Renovation, Repair and Painting Rule (RRP) – Lead Certification

You must be certified to work in pre-1978 target housing or you could be fined up to \$37,500. The rule applies to any work that involves the disturbance of lead-based paint in pre-1978 buildings. It is crucial for all contractors and firms that perform renovation work to be familiar with the provisions of the regulation and to ensure compliance with the EPA Rule. NCBE has the **Lead Certification workshop** coming up on December 2nd. Don't miss this opportunity to get this training locally! Check out our website at www.ncbeonline.com for more information or to register.

NCBE Safety Hotline

Have a safety question? Need a copy of a regulation? Want to set up a site inspection? Is OSHA coming to visit and you need urgent assistance with getting into compliance? Call NCBE's Safety Hotline. It's a direct line to someone who can help. **(707) 542-SFTY (7389)**.

Contact Us

Workers' Comp & Safety Committee

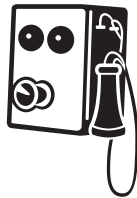
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For more articles and safety information visit
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