BILL ANALYSIS

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Date of Hearing: May 8, 2013

ASSEMBLY COMMITTEE ON LABOR AND EMPLOYMENT
Roger Hernández, Chair
AB 1165 (Skinner) - As Amended: May 1, 2013

SUBJECT : Occupational safety and health: violations: abatement.

SUMMARY : Enacts various provisions of law related to an employer's obligation to abate an alleged hazard pending appeal of a citation. Specifically, this bill :

1)Provides that an appeal of a citation or notice or special order that is classified and cited as a serious violation, a willful violation, a repeated violation, or a failure to abate a serious violation shall not stay the abatement dates and requirements except as follows:

a) An employer may request a stay of abatement in a notice of appeal.

b) The Division of Occupational Safety and Health (DOSH) shall stay the abatement if it determines that there is a substantial likelihood of success by the employer on the contested matters and that a stay will not adversely affect the health and safety of employees. The decision to stay an abatement will be final unless the employer renews the request for a stay of abatement in a direct appeal of the redetermination to the board.

2)Provides that DOSH may stay the abatement requirement while a motion to stay abatement is pending.

FISCAL EFFECT : Unknown

COMMENTS : This bill deals with an employer's obligation to abate a violation pending an employer's appeal to the Occupational Safety and Health Appeals Board (OSHAB). Under current law, DOSH may issue a citation or notice of proposed penalty to an employer if it determines that the employer has violated existing law. The citation is required to be in writing and describe with particularity the nature of the violation. The citation is also required to fix a reasonable time for the abatement of the alleged violation. An employer

may appeal the citation by filing an appeal with the Board within 15 days of the receipt of the citation. However, there is generally no obligation for an employer to abate the alleged violation while the appeal is pending.

In recent years, worker advocates and other stakeholders have raise concern that, since an employer appeal of a citation may not be heard and ruled upon for months (or even years), this can lead to workplaces remaining dangerous months after an inspector has ruled that it is unsafe.

AB 1988 (Swanson) from 2008

The debate around the abatement issue in recent years began with AB 1988 (Swanson) from 2008. Among other things, AB 1988 would have required an employer to request a stay of abatement to the Board (in its appeal) and to make certain showings. Specifically, AB 1988 provided that an abatement measure required by DOSH would not be stayed pending an employer appeal unless the employer indicated by verified petition that it seeks a stay of abatement and the reasons why abatement is not necessary to protect the health or safety of employees. The OSHAB would then schedule a hearing within 30 days (which may be extended another 30 days in complex cases) and issue a decision within 10 days. This bill authorized the Board to grant the stay of abatement where it found either (1) that no employee will be exposed to the unsafe or unhealthy condition, or (2) or that the condition is unlikely to cause death, serious injury or illness, or serious exposure to the employee.

AB 1988 was held under submission in the Senate Appropriations Committee.

The OSHAB Expedited Appeal Pilot Project

Based on the concerns raised by AB 1988, the OSHAB subsequently enacted an Expedited Appeal Pilot Project which sought to expedite appeals for hearings that involved an appeal to an

abatement order as part of the citation. The goal of this pilot project was to "fast track" certain appeals where abatement was an issue in order to minimize the risk of continued exposure to an alleged violation by workers.

In November 2011 the OSHAB indicated that the pilot project was discontinued due to lack of resources. However, the pilot project was reportedly re-instituted at a subsequent date.

SB 829 (DeSaulnier) from 2011

The abatement issue was revisited in SB 829 (DeSaulnier) from 2011. Among other things, SB 829 provided that if an employer or employee contests the period of time fixed for correction of a violation (also known as abatement) for a serious or similar violation, any hearing on that issue shall be conducted as soon as reasonably possible and shall take precedence over other hearings conducted by the OSHAB. However, these provisions were amended out of SB 829 and the bill was used for another purpose.

AB 1277 (Skinner) from 2012

As introduced, AB 1277 (Skinner) would have provided that the stay of an Administrative Law Judge's order or decision following an employer's request for reconsideration would not apply to requirements for abatement. Therefore, the bill would have ensured that the abatement requirements go into effect upon the issuance of an ALJ decision even if an employer has asked for reconsideration. However, this language was recently deleted from the provisions of AB 1277.

Recent Proposed OSHAB Rulemaking

Recently, the OSHAB has proposed a package of proposed regulations that, among other things, addresses the abatement issue. The proposed rulemaking has been completed and is awaiting final action by the Secretary of State and will be

effective July 1, 2013.

With respect to abatement, the proposed rulemaking amends Section 373 of the regulations (which governs expedited

proceedings) to provide the following additional language:

"(b) Where the Appeals Board is aware or is notified that an alleged violation appealed is classified by the Division of Occupational Safety & Health as a Serious, Repeat Serious, Willful Serious, Willful, Willful Repeat or Failure to Abate, and either abatement is on appeal, or abatement has not occurred, the Appeals Board shall expedite the proceeding.

(c) The Appeals Board shall serve parties written explanation of the expedited process, a notification of docketing, a copy of the docketed appeal forms and citations, a standing ordercompelling discovery, a stipulation form, and a status conference notice.

(1) A telephonic status conference shall be held within 30 days of the docketing of the appeal. At that time, the ALJ will confirm that the expedited process is appropriate, review the requirements of the expedited process with the parties, review pending and impending discovery, and make such orders regarding any matter as needed to meet the timetable of this section.

(2) A telephonic prehearing conference shall be held within 60 days of the status conference. The prehearing conference will proceed under Section 374. The parties will be required to stipulate to undisputed facts, identify issues, and raise issues regarding the admissibility of evidence. The parties shall identify all witnesses and exhibits they intend to call or introduce at the hearing.

(3) A hearing shall be held within 60 days of the prehearing conference and will be scheduled for one day and adjusted, if necessary.

(4) The Appeals Board or a party may bring a motion to shorten the timeframes set forth in subsections (c)(1) - (3) on a showing of good cause."

The Initial Statement of Reasons filed by OSHAB accompanying the proposed rulemaking states the following:

"The purpose of this proposed change is to uniformly expedite certain types of appeals in order to mitigate the

delay in abatement that can occur as a result of Rule 362, which allows for the automatic stay of abatement in every case.

The problem addressed is the small but meaningful number of cases wherein a hazardous condition remains unabated at a cited employer's workplace pending the resolution of the appeal. The Labor Code provides an employer the opportunity to challenge any citation, and the automatic stay rule (Title 8, section 362) exists to protect

employers from the expense of implementing changes to its operations (i.e. abatement of an alleged violation) that ultimately are not required if the citation is successfully appealed. The automatic stay rule is a Board rule that preserves Board resources by not requiring adjudication of the merits of a stay in each case. Such a requirement would necessitate very different procedures and would require more resources than the Board currently has available. Most employers voluntarily abate, as ordered in a citation, because doing so allows for an abatement credit of a 50% reduction in the proposed penalty. This allowance is due to
Director's regulations and is beyond the scope of the Appeals Board's rulemaking authority.

Alternatives to this rule were proposed by stakeholders, namely, repeal of the automatic stay provision. However, such alternative would not be less burdensome and equally effective. Rather, such would result in employers who contest the abatement ordered by the Division having no remedy to obtain a stay other than by seeking one from the superior court. This is costly for employers and the Division, which must respond. Another alternative considered in principle was a shortened procedure for addressing requests by employers for a stay and the repeal of the automatic stay. This was not the least costly, effective alternative, as it would require two hearings in cases where abatement was contested. A compelling argument was also made that the merits of ordering a stay turn on whether the violation occurred, and so any procedure addressing the merits of a stay requires a hearing on the merits of the alleged violation. For purposes of allowing discovery by the parties, reaching the merits consumes approximately 120 days of time.

Reason this alternative was selected: Since the great majority of employers who appeal also voluntarily abate the cited condition, and since non-serious and regulatory violations pose less of a danger to employees, staying abatement in those cases but pushing forward the serious, willful or repeat cases wherein the employer has not voluntarily abated effectively isolates the meaningful contests of the abatement order. This greatly reduces (to 4-5 months maximum) the amount of time employees are potentially exposed to unabated, serious violations after the citation is issued. Also, during the pilot project, abatement occurred in the great majority of appeals that qualified for this expedited abatement project, resulting in only one actual hearing during five months of the pilot project. Thus, the existence of the expedited abatement procedure motivates employers to abate even if they contest the underlying violation. This greatly increases the safety of workers in California but does so with the least impact on the regulated community and at the least cost to the Board?

?The benefits of this regulatory addition are that serious, willful, and repeat violations, wherein abatement has not occurred, will be processed within 120 days of the filing of the appeal, and as proven by the pilot program undertaken by the Appeals Board in 2009, many employers will elect to voluntarily abate the condition during the pendency of the appeal to avoid the rapid processing of the case."

Recent Washington State Legislation

The author of this bill notes that legislation was signed into law in April 2011 in the State of Washington that requires employers to correct serious safety violations during any appeal

of a citation issued by the Washington Department of Labor and Industries.

ARGUMENTS IN SUPPORT :

The author states that this bill will ensure that unsafe conditions get corrected in a timely manner. This bill requires an employer to abate a serious, willful, or repeat violation, as required by DOSH, even during an employer's appeal. Under this

bill, abatement shall be stayed if DOSH determines that there is a substantial likelihood of success by the employer on the contested matters and that a stay will not adversely affect the health and safety of employees.

In addition, supporters of this bill argue that under current law, when an employer appeals a citation, hazard abatement is automatically stayed during the appeal. This means that workers continue to be exposed to hazardous conditions. Supporters argue that this bill properly reverses the presumption and declares that workers exposed to a serious hazard should be protected during the pendency of an appeal. They contend that appropriate due process is provided by this bill - the employer may seek a stay (a review by DOSH and a further review by the OSHAB). Furthermore, this bill establishes appropriate parameters to grant a stay of abatement - preliminary evidence must indicate that the workers are not exposed to a hazard that will adversely affect the health and safety of employees. The current system of staying abatement so that workers continue to be exposed does not assure safe and healthful working conditions.

The California Nurses Association (CNA) points to two recent examples that highlight the need for this bill. First, in December 2009, a hospital was cited for serious and willful violations that led to the hospitalization of two employees who were exposed to bacterial meningitis. The hospital appealed the citation, which was not resolved until May 2010. In another case, nurses were locked out of the hospital when attempting to help a gunshot victim who was dropped off at the hospital driveway. The incident occurred in 2010 and the hospital was later cited by DOSH for serious violations, including failure to develop and implement procedures and protocols to protect exposed employees in a manner that caused unnecessary delay and potential security exposure to employees. The hospital appealed the citation, and the citation was not resolved until just this month, approximately two years after the issuance of the citation, when the hospital agreed to settle the case. CNA contends that these cases exemplify the need for legislation to require employers to immediately abate serious, willful, or repeat violations rather than allowing hazardous conditions to continue pending the outcome of an appeal.

ARGUMENTS IN OPPOSITION :

A coalition of employer groups, including the California Chamber of Commerce, opposes this measure. Opponents contend that the requirements for abatement are already grounds for appealing a citation issued by DOSH. Moreover, DOSH has authority to issue

an Order Prohibiting Use where is concludes a condition, process or piece of machinery poses an imminent hazard to employee safety. Requiring employers to specifically context an abatement where it would otherwise be stayed, will create two appeals where currently there is one. The creation of a new ground for appeal concerning abetment is not needed and will place an unnecessary burden on DOSH, the Appeals Board, employers, and other parties.

Moreover, opponents note that the Appeals Board has already adopted regulations to include an expedited appeals process where abatement is an issue. This new process was adopted based on a successful pilot project and extensive stakeholder input over the course of several years.

Opponents state that the merits of ordering a stay of abatement turn on whether a violation occurred. Therefore, any procedure addressing the merit of a stay requires a hearing on the merits of the alleged violation itself. To enable the parties to exercise their rights to due process, including discovery of evidence, determining an alleged violation's merit takes about 120 days. The Appeals Board adopted an expedited appeal process for cases where abatement is at issue that takes 120 to 150 days, or less, greatly reducing the average of ten months an appeal ordinarily would take.

Furthermore, opponents state that the expedited process not only hastens cases where abatement is truly at issue, but it also tends to encourage employers to abate hazards to avoid the shorter appeals process. In other words, when faced with the alternatives of either abatement or an expedited appeal, some employers choose abatement in order to avoid the shorter appeal process.

REGISTERED SUPPORT / OPPOSITION :

Support

CA Conference Board of the Amalgamated Transit Union
CA Conference of Machinists
California Labor Federation, AFL-CIO

California Nurses Association
California Teamsters Public Affairs Council
Engineers and Scientists of California, Local 20
International Longshore and Warehouse Union
National Lawyers Guild Labor & Employment Committee
Professional and Technical Engineers, Local 21
Southern California Coalition for Occupational Safety & Health
State Building and Construction Trades Council
UNITE HERE
United Food and Commercial Workers Western States Council
Utility Workers Union of America

Opposition

Acclamation Insurance Management Services
Air Conditioning Trade Association
Allied Managed Care
Associated Builders and Contractors of California
Associated General Contractors of California
Associated Roofing Contractors of the Bay Area Counties, Inc.
California Chamber of Commerce
California Chapter of American Fence Association
California Farm Bureau Federation
California Fence Contractors' Association
California Framing Contractors Association
California Grocers Association
California Lodging Industry Association
California Manufacturers and Technology Association
California Professional Association of Specialty Contractors

California Retailers Association
Engineering Contractors' Association
Flasher Barricade Association
Marin Builders Association
National Federation of Independent Business
Plumbing-Heating-Cooling Contractors Association of California
Residential Contractor's Association
Walter & Prince, LLP
Western Electrical Contractors Association
Western Growers Association
Western Steel Council

Analysis Prepared by : Ben Ebbink / L. & E. / (916) 319-2091