

Continuing Problems with Appeals Board Policies
As Identified by DOSH Inspectors, Seniors and District Managers

(August 6, 2009)

The Appeals Board's unfair policies and procedures continue to undermine the Division's ability to defend its citations in appeal hearings. The lack of a level playing field means that DOSH is prevented from correcting hazardous conditions and work practices at worksites throughout the state. The people who pay the real price for these Board policies are California's workers.

Unfair Appeals Board policies that create serious obstacles for DOSH in preparing for hearings:

- Denial of and ignoring continuance requests [page 2]
- Continued hearings months after initial day of testimony [page 3]
- Over-booking of hearings at same day, location and judge [page 5]
- Hearing venues where witnesses cannot appear [page 5]

Unfair Appeals Board policies that create serious obstacles for DOSH representatives at hearings:

- Arbitrary decisions by the Board to dismiss cases [page 6]
- Discounting CSHOs' knowledge and experience (the "20 case minimum" rule)
- Unreasonable threshold for proving Serious classifications (the "20 foot" rule)
- Lengthy delays in issuing DARs leaving contested issues unresolved and unsafe practices for years [page 7]
- Denying family members party/intervenor status [page 7]

Arbitrary and capricious policies creating a world where the Board is a "law unto itself"

- Defying court orders (Overaa and Harris) [page 8]
- Unilaterally altering Legislative mandates (accident reporting fine) [page 9]

Continuance Requests Denied or Simply Ignored

Case Name/ Docket Number	Problem
KFM, A Joint Venture 06-2452	Appeals Board denied a continuance for the June 2006 requested by both ER and DOSH because of an ongoing Alameda County District Attorney criminal investigation; ER and DOSH had to file a joint suit in Superior Court against the Board. The Board agreed at court to continue the hearing until 2009. The ER and DOSH request a second continuance for the April 2009 dates because the DA's investigation was still open. The Board denies the second request for continuance and a second lawsuit against the Board had to be filed.
Joseph Albanese, Inc. 07-2144	Appeals Board denied a request for continuance from a small employer who was scheduled to take the California Bar Exam. The employer requested the continuance weeks in advance of the hearing, yet the Board did not rule on the request until the eve of the hearing, when the request was denied. The employer attempted to settle the case immediately after learning the request for continuance was denied, but the Board rejected the settlement because it was called in "too close to the hearing date." A hearing was held by the Board.
NTK Construction 07-2822	The employer's attorney requested a continuance because his father had died in southern California. Both the employer and DOSH repeatedly contacted the Board to request a ruling so the attorney could be with his family. The Board never ruled on the request and the attorney had to leave southern California to attend the hearing.
Webcor Builders 06-3030	DOSH subpoenaed a willing witness to testify at hearing. The witness was out of town with his family immediately prior to the hearing when his wife had a medical emergency on the day before the hearing. DOSH requested a continuance that morning seeking a quick ruling from the Board so that the witness could make travel arrangements if compelled to appear. The Board waited until the close of business on the day before the hearing date to deny the motion for continuance.

Hearings Started but Continued Many Months Later

Schedule of continued hearings as per the Board's July 15, 2009, Master Calendar

Date (2009)	Location/ Judge	Case Name	Comment
	Oakland/MJF	Kwan Wo Ironworks Inc 08-0015	1 st day = 2/6/09; 2 nd date = 7/10/09 but postponed
4 August	Sacramento/ BF	Sierra Pacific Industry 08-0400	
5 August	Oakland/MJF	Sheedy Drayage 06-3053	1 st day = 3/4/08 2 nd day = 10/28/08 3 rd day set for 8/5/09
11 August	Stockton/BF	American Custom Harvesting 07-1854	
11 August	Stockton/BF	Lolos Farm Labor Mgmt 07-2017	
11 August	West Covina/DR	Manpower Inc. 08-4687	
11 August	Oakland/MJF	Cheine Contracting Corp 08-1931	
13 August	Stockton/BF	AT&T 06-5052	
13 August	Oakland/MJF	Gonsalves & Santucci Inc 08-3340	
18 August	Oakland/MJF	CA Prison Industry Authority 07-2171/2173	1 st day = 2/25/09
19 August	Oakland/MJF	NUMMI 08-0964	
10 September	Sacramento/BF	Kinetic Systems Inc 06-3627	
16 September	Sacramento/BF	Thyssenkrupp/Safeway 08-2301	
23 September	San Diego/DR	Akal Security 08-3440	
6 October	Oakland/MJF	BR Cohn Winery 07-5287	
7 October	Sacramento/BF	Vaca Valley Roofing Inc 07-4623	Double scheduled
7 October	Sacramento/BF	Lifetime Construction Services 08-0684	Double scheduled

8 October	Oakland/MJF	D 7 Roofing Services 08-0124	
13 October	San Diego/DR	Dimensional Technology 08-3204	
20 October	Sacramento/BF	Butte Business Services 08-4684	Double scheduled
20 October	Sacramento/BF	Oak Ridge Builders 09-0253	Double scheduled
21 October	Sacramento/BF	Watson Contractors Inc 08-0805	Double scheduled
21 October	Sacramento/BF	Express Services Inc 08-4741	Double scheduled
22 October	Sacramento/BF	Healthcare Security Serv Grp 07-5155	
27 October	Fresno/BF	Picar FLC 08-0168	
28 October	Fresno/BF	All AG Inc 08-0907	Double scheduled
28 October	Fresno/BF	CA Corrections 08-0975	Double scheduled
29 October	Fresno/BF	Jose Manuel Romero 08-1585	
3 November	Sacramento/BF	Seca Equipment Removal 07-0275	Double scheduled
3 November	Sacramento/BF	Performance Contracting Grp 08-0025	Double scheduled
3 November	Oakland/MJF	PG&E 08-0891	
4 November	Sacramento/BF	Superior Painting 08-0681	Triple scheduled
4 November	Sacramento/BF	Pacific Splicing & Testing 08-0688	Triple scheduled
4 November	Sacramento/BF	Smith Ranch 08-1313	Triple scheduled
19 November	San Diego/DR	Pacific Messenger Records 08-2263	1 st day = 3/11/09 2 nd and 3 rd days = 6/23 and 6/24/09
20 November	San Diego/DR	Pacific Messenger Records 08-2263	1 st day = 3/11/09 2 nd and 3 rd days = 6/23 and 6/24/09

1 December	West Covina/JJ	Accuride International Inc 09-0640	
8 December	Sacramento/BF	R3 Automotive 08-5133	

Over-Booking of Hearings

Multiple hearings scheduled at the same day, location and judge, as per the Board’s July 15, 2009, Master Calendar:

- August 4th: 3 cases in Sacramento (same judge)
- September 3rd: 3 cases in West Covina (same judge)
- September 8th: 2 cases in San Diego with same CSHO, different judges
- September 23rd: 3 cases in Stockton (same judge)
- September 24th: 3 cases in Stockton (same judge)
- October 6th: 4 cases in Sacramento (same judge)
- October 7th: 2 continued cases in Sacramento (same judge)
- October 20th: 2 continued cases in Sacramento (same judge)
- October 21st: 2 continued cases in Sacramento (same judge)
- October 28th: 2 continued cases in Fresno (same judge)
- November 3rd: 2 continued cases in Sacramento (same judge)
- November 4th: 3 continued cases in Sacramento (same judge)

Hearing Venues Where Witnesses Are Unable to Appear

Case Name/ Docket Number	Problem
	Central Valley inspections: The lack of regular hearing sites south of Stockton means that both employers and workers, especially farm workers, are unable to appear at hearings as witnesses. The Division, bearing the burden of proof, is the most adversely party affected by this policy.
Almanor Manufacturing 06-3510/3511	The Board denied a change of venue request from this employer in Chester, CA, forcing five witnesses to travel 154 miles to Sacramento for the hearing.
Jim Burke Ford 07-4362/4364	The Board denied a change of venue request from the employer in Bakersfield, CA, requiring witnesses and attorneys to travel 286 miles to Sacramento. The employer settled the appeal rather than make the trip.

Arbitrary Decisions by the Board to Dismiss Cases

Employer name	Docket Number	Problem
<p>E&H Investment Inc, dba Klassic Carwash & Detail</p> <p>[Board ignores settlement]</p>	<p>08-3994/3995</p>	<p>The cases was scheduled for hearing with one ALJ. The Board changed ALJ assignments so a second judge was assigned to the case. After further discussions a settlement was reached and the second ALJ said the case was off calendar. The Board failed to remove the hearing date from the schedule, and when neither the employer nor DOSH appeared, the first ALJ dismissed all citations and ignored the settlement.</p>
<p>Prestige Kitchens, Inc.</p> <p>[Employer name issue]</p>	<p>05-1005/1007</p>	<p>The employer was cited (1 General and 2 Serious) and fined \$27,250 after a worker amputated part of his index finger and severely injured several other fingers on a table saw. The ALJ dismissed the citations and fine because the employer’s business name, “Prestige Kitchens, Inc.” appeared on the citations instead of the controlling corporation, Arthur J. Brewster Corp.</p>
<p>Shimmick Obayashi</p> <p>[Employer name issue]</p>	<p>03-725/728</p>	<p>The employer was cited after a fatal fall of a carpenter for general, serious and accident-related serious violations. The ALJ dismissed the citations on the basis that the name on the employer’s business cards and safety program (“Shimmick Obayashi”) was not the registered legal name of the employer (“Shimmick Construction Company/Obayashi Corporation, A Joint Venture”).</p>
<p>A. Teichert & Son, Inc.</p> <p>[Employer name issue]</p>	<p>04-2982 and 04-0850/0851</p>	<p>The employer was issued general and serious citations after two investigations. The ALJ hearing the cases upheld the cites, but the Appeals Board “on its own motion” took the case under reconsideration and dismissed the citations because the citations were issued to “Teichert Aggregates” and “Teichert Construction” rather than the registered legal name of “A. Teichert & Son, Inc.”</p>

<p>Bimbo Bakeries</p> <p>[Dismiss cites without merit]</p>	<p>03-5215/5217</p>	<p>The employer was cited after an accident resulting in the amputation of a worker's arm for accident-related violations. The ALJ dismissed the citations because the Cal/OSHA inspector had retired by the time the appeal hearing was held, and the judge would not accept the supervising District Manager's testimony that the employer gave consent for the inspection. During the hearing itself, the employer did not challenge the inspection; the ALJ raised the issue for the first time in her decision dismissing the citations.</p>
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Years Long Delay in Issuing Decisions After Reconsideration

Pending DARs, by year appeal was docketed, as per the Board's July 22, 2009, meeting agenda:

- 2002: 1 case
- 2003: 17 cases
- 2004: 5 cases
- 2005: 14 cases
- 2006: 13 cases
- 2007: 10 cases
- 2008: 10 cases
- 2009: 1 case

Total cases: 71

Denying family members party or intervenor status

<p>Pre-Press International and Brunton Enterprises</p> <p>[Denial of party status to dead workers' families]</p>	<p>Pre-Press International, dba Digital Pre-Press International, Docket 08-3255/3362</p> <p>and</p> <p>Brunton Enterprises Inc.,</p>	<p>In both cases the surviving family members of workers killed at work the Appeals Board denied "party status" to the appeal case file by the employer of the dead family member. The denial of party status to dead workers' families contradicts party status routinely given to injured workers and provides fewer rights to workers' families who were killed than to workers who are injured but alive. This policy undermines Cal/OSHA's credibility and ability to work with dead workers' families who often times have valuable information about conditions at the deceased workers' workplace. The policy also</p>
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	dba Plastal Manufacturing, Co., Docket 08-3445/3448	undermines inspectors' morale as their agency will not even respect the rights of workers killed on the job or the sentiments of their surviving family members.
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Defying Court Orders and Unilaterally Interpreting Legislative Mandates

Overaa and Harris cases

C. Overaa & Company, Docket 01-3560; DAR on April 1, 2004 and Harris, Docket 03-R2D5-3914

The employers were issued citations under DOSH's "multi-employer" policy for safety violation on a construction site. The ALJ in the Overaa case upheld the citations that held Overaa responsible as the general contractor that exercised control over the overall worksite. Overaa took the DOSH citation into civil court, but both the Superior Court and Third District Court of Appeal upheld the citations and DOSH policy. The current Appeals Board, however, reversed course and petitioned the California Supreme Court to "de-publish" the court rulings on Overaa so that the Board would not be bound by the court decisions. The Supreme Court denied the Appeals Board's petition. In the subsequent Harris case, the Appeals Board ignored the rulings of the Superior, Appeals and Supreme Courts in the Overaa case to issue a Decision After Reconsideration in the Harris case to reverse the court rulings on Overaa. The Appeals Board is now back in Superior Court and expending considerable resources to defend its Harris decision in defiance of previous court rulings.

ALJ and Appeals Board Reductions in Penalties for Failure to Report

The Appeals Board and its judges have repeatedly reduced the legislature-mandated unadjustable \$5,000 penalty for employer failure to report serious injuries resulting from accidents. The California Legislative Counsel in May 2009 affirmed the Legislative mandate for this penalty and declared that the Board had exceeded its authority in unilaterally reducing penalties.

The table below includes all employer appeals of Title 8, CCR, Section 342, citations heard in the 15-month period between January 2008 and April 2009 where the Board upheld the violation. In only three cases in 33 decisions was the original \$5,000 penalty maintained by the Administrative Law Judge or Appeals Board.

Employer Name	Docket Number	ALJ or Board Decision -- Date	Final Penalty Amount
Merco Construction Engineers Inc.	04-R4D3-3377/3378	ALJ – 11/7/2007	\$500
E.O. Construction, dba E.J.O. Construction Inc.	05-R3D7-3983/3984	ALJ – 11/9/2007	\$750
The Wildlands Conservancy, dba Wind Wolves Preserve	04-R4D3-1967/1968	ALJ – 11/20/2007	\$500
Brydenscot Metal Products	03-R3D3-3554/3555	ALJ & Board Recon – 11/2/2007	\$1,000
Gamboa & Company, Inc., dba La Components Inc.	06-R6D2-2529/2541	ALJ – 3/28/2008	\$1,000
Borden Manufacturing Inc.	06-R2D3-465	ALJ – 5/8/2008	\$4,500
Argonaut Constructors	06-R1D5-2675	ALJ – 5/27/2008	\$2,500
Carpet Guys Flooring	07-R4D1-2966/2968	ALJ-6/19/2008	\$750
Goodrich	07-R3D2-2207/2208	ALJ – 6/30/2008	\$2,500
PG&H Contracting Inc., dba Royal Roof	06-R4D3-1657/1658	ALJ – 2/28/2008	\$750
Innovative Construction	05-R4D4-1113 & 08-R4D4-0652/0653	ALJ – 3/11/2008	\$750
Command Access Technologies	07-R3D1-0567/0569	ALJ – 3/11/2008	\$3,500
Sun Valley Skylights Inc.	03-R4D1-2613/2614	ALJ – 3/28/2008	\$500
Ezra Construction	06-R1D4-0009/0012	ALJ – 3/25/2008	\$500
Gayle Manufacturing Company Inc.	06-R2D1-3062/3063	ALJ – 12/28/2007	\$1,500
21 st Century Gunitite	05-R4D2-4573	ALJ – 1/7/2008	\$750
Santa Cruz Animal Services	05-R1D2-2606/2607	ALJ – 2/7/2008	\$1,000
General Truss Company, Inc.	06-R2D1-0782/0784	ALJ – 2/14/2008	\$5,000
George E. Masker Inc.	06-R2D4-4356	ALJ – 6/17/2008	\$3,500
Motiamir	07-R2D5-3037	ALJ – 6/17/2008	\$1,000
American Textile Maintenance Company	07-R4D1-1574/1575	ALJ – 7/2/2008	\$2,000
Borden Manufacturing Inc.	06-R2D3-465	Board Recon – 7/16/2008	\$4,500
Armando Chavira, dba Industrial Equipment	07-R3D3-2947/2951	ALJ – 7/17/2008	\$500

Estenson Logistics LLC	07-R1D4-1755/1756	ALJ – 7/28/2008	\$4,000
Imia, LLC	07-R6D2-3278/3279	ALJ – 7/28/2008	\$5,000
Long Beach City College	03-R3D5-2747	Board Recon – 8/8/2008	\$5,000
Northland Control Systems Inc.	06-R1D4-3345	ALJ – 9/19/2008	\$1,000
Green Lofts LLC	07-R4D2-3213/3216	ALJ – 11/13/2008	\$750
Urbach Roofing Inc.	08-R3D2-2074/2075	ALJ – 12/22/2008	\$500
Hill Rebar Inc.	06-R3D3-1428/1430	ALJ – 1/6/2009	\$500
Luu’s Brothers Corp., dba A&A Supermarket	07-R2D1-5156/5157	ALJ & Board DAR – 2/23/2009	\$3,000
Vernon Melvin Antonsen & Colleen K. Antonsen and dba Antonsen Construction	06-R2D3-1272/1273	ALJ – 2/5/2009	\$4,000
Sacramento Bldg Products, dba Masco Construction Services Corp.	07-R2D5-0912/0914	ALJ – 2/27/2009	\$3,500

Information taken from the “Decisions” section of the *Cal/OSHA Reporter*, issues dated January 11, 2008, through April 17, 2009.