

PASMA/PARMA  
Southern California

**AB 2774:  
What You Need to Know to Avoid a Serious  
Citation**

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# What Was So Broken That We Needed AB 2774 to Fix It ??

- ▶ “Let me be clear, there’s a new sheriff in town.” – Sec. Labor Hilda Solis
- ▶ Fed/OSHA Changes the Game
  - Shifts money from Consultation to Enforcement
  - De-emphasizes VPP, other recognition programs
  - More scrutiny of state-plan programs

# What Was So Broken That We Needed AB 2774 to Fix It ??

- ▶ Criticism of California OSHA
  - Inadequate inspections
    - Poor descriptions of hazards
    - Poor witness interviews
  - 50% Abatement Credit Not Consistent with Fed/OSHA

# What Was So Broken That We Needed AB 2774 to Fix It ??

- ▶ Criticism of California OSHA
  - Inadequate legal training leads to lost cases
  - Too few writs challenging Appeals Board decisions
  - And....

# What Was So Broken That We Needed AB 2774 to Fix It ??

## ▶ Criticism of California OSHA

- Too Few Serious Citations
  - Fed/OSHA: > 77%
  - Other States: > 43%
  - California: = 19%
    - And too many of these reduced to General or dismissed

# Cal/OSHA Reacts

- ▶ More inspection training
- ▶ More legal training
- ▶ More Serious citations
- ▶ More Willful citations

# Cal/OSHA Reacts

- ▶ Blame the Appeals Board
  - The ‘**substantial probability**’ standard is “impractical, unrealistic... and almost impossible” to prove
    - Len Welsh, Chief, Cal/OSHA

# The Legislature Acts: AB 2774

- ▶ Guts Labor Code sec. 6432, defining “serious violation” and substitutes:
  - (a) There shall be a **rebuttable presumption** that a ‘serious violation’ exists ... if the division demonstrates that there is a **realistic possibility** that death or **serious physical harm** could result from the **actual hazard** created by the violation.”

# The Legislature Acts: AB 2774

- ▶ What is a **realistic possibility** ?

# The Legislature Acts: AB 2774

- ▶ What is a **realistic possibility** ?
  - A: No one knows

# The Legislature Acts: AB 2774

- ▶ What is an **actual hazard** ?
  - (b) The actual hazard *may* consist of, *among other things...*
    - A serious exposure over an established PEL
    - One or more unsafe/unheathful “...**practices, means, methods, operations, or processes** that have been adopted or are in use.”

# The Legislature Acts: AB 2774

- ▶ What is **serious physical harm** ?
  - Was
    - Loss of a member of the body (amputation)
    - Any serious degree of permanent disfigurement
    - In-patient hospitalization > 24 hours for “other than observation”

# The Legislature Acts: AB 2774

- ▶ What is **serious physical harm** ?
  - Now is:
    - Loss of any Member of the Body
    - *In-patient Hospitalization “for purposes other than medical observation”*
    - And...

# The Legislature Acts: AB 2774

- ▶ What is **serious physical harm** ?
  - Now is:
    - “Impairment sufficient to cause a part of the body or the function of an organ to become **permanently** and **significantly** reduced in efficiency on or off the job...
    - “... including, but not limited to, depending on the severity,...

# The Legislature Acts: AB 2774

- ▶ What is **serious physical harm** ?
  - Now is:
    - “... second-degree or worse burns, ...
    - “... crushing injuries even though skin [sic] surface may be intact, ...
    - “... respiratory illness, or ...
    - “... broken bones.”

# The Legislature Acts: AB 2774

- ▶ The Inter-Active Dialogue
  - (b) Before issuing a serious citation, Cal/OSHA must make a **reasonable attempt** to **determine and consider** the employer's:
    - Training relevant to the hazard or similar hazards
    - Procedures for discovering, controlling and correcting *the hazard or similar hazards*
    - Supervision of employees exposed to *the hazard*
    - Communication about safety and health rules and programs
    - And...

# The Legislature Acts: AB 2774

- ▶ The Inter-Active Dialogue
  - (b) Before issuing a serious citation, Cal/OSHA must make a **reasonable attempt** to **determine and consider** the employer's:
    - The employer's explanation of the circumstances
    - Why the employer believes a serious violation did not exist
    - Why the employer believes its actions were reasonable and responsible so as to rebut the presumption of violation

# The Legislature Acts: AB 2774

## ▶ The Inter-Active Dialogue

- The 1BY Form
  - Two sided
  - No less than 15 days before issuing the citation
  - Person signing affirms that all information is true and correct

# The Legislature Acts: AB 2774

- ▶ The Inter-Active Dialogue
  - If Employer Does Not Engage...
    - “...shall not be barred from presenting that information at the hearing...”
    - “...and no negative inference shall be drawn.”

# The Legislature Acts: AB 2774

- ▶ The Inter-Active Dialogue
  - If Employer Does Engage But Later Modifies the Information in the 1BY the Board:
    - “...may draw a negative inference from the prior inconsistent factual information.”

# The Legislature Acts: AB 2774

- ▶ The Inter-Active Dialogue
  - If Employer Does Engage But Later Modifies the Information in the 1BY the Board:
    - Chief Counsel Amy Martin:
      - Changes to information in the 1BY will be considered admissions against interest

# The Legislature Acts: AB 2774

- ▶ Inspectors Elevated to Expert Status
  - “A division safety engineer or industrial hygienist who can demonstrate, at the time of the hearing, that his or her division-mandated training is current ***shall be deemed competent*** to offer testimony to establish each element of a serious violation...”

# The Legislature Acts: AB 2774

- ▶ Inspectors Elevated to Expert Status
  - And may offer testimony as to “custom and practice” of injury or illness prevention relevant to the issue of whether the violation is serious.
    - See ANSI Z10-2005: Occup. S & H Management Systems

# Comments and Recommendations

- ▶ A “Who Moved My Cheese?” Moment
  - The Process is Front-Loaded Now
  - Pro-Active Employers may be Rewarded
    - Keep written programs up to date
    - Aggressively hunt down hazards
      - Remember the emphasis on “**the** hazard”
      - Train and re-train

# Comments and Recommendations

- ▶ A “Who Moved My Cheese?” Moment
  - Management by Walking Around
    - Quiz your employees. After all, Cal/OSHA will.
  - Consider Consultation
  - Document, Document, Document

# Comments and Recommendations

- ▶ Revisit Criteria for Avoiding A Serious Citation
  - Training relevant to the hazard or similar hazards
  - Procedures for discovering, controlling and correcting the hazard or similar hazards
  - Supervision of employees exposed to the hazard
  - Communication about safety and health rules and programs
  
- Remind you of anything?

# Comments and Recommendations

- ▶ Revisit Criteria for Avoiding A Serious Citation
  - Custom and Practice – what the heck is that?

# Comments and Recommendations

- ▶ The 1BY Dilemma
  - Tell All and Hope for No Serious Citation, or
  - Hold Back and Face the “Realistic Possibility” Standard?

# Comments and Recommendations

- ▶ The 1BY Dilemma
  - Before Completing The Form, Be Sure You Know:
    - Exactly what happened
    - That the context of those events will not change
    - Legal ramifications beyond Cal/OSHA

# Comments and Recommendations

- ▶ The 1BY Dilemma
  - DO NOT agree to sign a 1BY already filled in for you by the inspector

# Predictions for 2011

- ▶ For DOSH
  - More citations
  - More citations classified as “serious”
- ▶ For the Appeals Board
  - More appeals
  - Longer hearings
  - More use of expert witnesses
  - More affirmations of “serious” citations

# Predictions for 2011

- ▶ For All Employers
  - More costly appeals
  - More citations on the record
- ▶ And – Eventually for All of Us ...
  - Fewer qualified contractors
  - Dilution of the meaning of a “serious” violation
  - Increased frequency of “repeat” and “willful” citations
  - Questionable impact on accident rates

# Resources

- ▶ Walter & Prince LLP
  - [www.walterprincelaw.com](http://www.walterprincelaw.com)
    - E-zines, articles and further links
- ▶ Fed/OSHA Establishment Search
  - [www.osha.gov/oshstats/index.html](http://www.osha.gov/oshstats/index.html)
- ▶ Cal/OSHA Regulations
  - [www.dir.ca.gov/samples/search/query.htm](http://www.dir.ca.gov/samples/search/query.htm)
- ▶ Cal/OSHA Enforcement (DOSH)
  - [www.dir.ca.gov/DOSH/dosh1.html](http://www.dir.ca.gov/DOSH/dosh1.html)
- ▶ Cal/OSHA Appeals Board
  - [www.dir.ca.gov/OSHAB/oshab.html](http://www.dir.ca.gov/OSHAB/oshab.html)