

AB2774: The IFs the ANDs and the BUTs



Amy Martin, Esq.

Amy Martin, Esq. - For the Prosecution is chief counsel of DOSH. Ms. Martin is involved in the promulgation of regulations and statutes directly effecting the safety of every worker in California. She was part of the advisory committee that led to AB 2774. As chief counsel, she is responsible for prosecutions. Before joining Cal OSHA, Ms. Martin was a partner in a where she specialized in labor and employment law. For six years she was an adjunct professor at UC Hastings where she taught mediation and negotiations with an emphasis on labor issues.

Department of Occupational Safety & Health | 510.286.6958 | AMartin@dir.a.gov



Kevin Bland, Esq.

Kevin D. Bland, Esq. – for the Defense is founding partner at Hines Smith Carder Dincel Bland and focuses his practice on the construction industry. He holds a Contractor’s “A” License and has both practical and legal expertise in construction safety, construction risk management, construction litigation and construction contract claims as well as OSHA citation appeals and rulemaking. Mr. Bland counsels and defends the construction and other industries.

Hines Smith Carder Dincel Bland | 714.513.1122 | kbland@hinessmith.com



Bruce Wick

Bruce Wick – For Employers is Director of Risk Management at CALPASC. With 25 years of risk management experience, Mr. Wick is an industry leader and educator on issues critical to health and safety. His expertise in the areas of workers’ comp, Cal/OSHA, construction defect, general liability and workplace safety make him a frequently sought after presenter throughout California.

CALPASC | 909.793.9932 | bwick@calpasc.org

Cal-OSHA Reporter
www.Cal-OSHA.com
916.774.4000 tel | 916.780.0600 fax
helpdesk@cal-osha.com

AB2774: The IFS the ANDs and the BUTs

MCLE Assessment Test for State Bar Credit

1. The employer MUST assert at the time of its appeal that it took all steps a reasonable and responsible employer in like circumstances should be expected to take prior to the occurrence of the violation, to anticipate and prevent the citation in order to assert the affirmative at the time of hearing.
 True or False
2. The Division does NOT have the initial burden of proof to establish a serious violation under Labor Code Section 6432 because it contains a rebuttable presumption.
 True or False
3. The affirmative defense set forth in Labor Code Section 6432 can be asserted as a defense to a general violation.
 True or False
4. In order for an enforcement office to provide opinion testimony at a hearing, the Division must establish that the enforcement officer is a recognized expert in the industry in which the citation was issued.
 True or False
5. In order for the employer to rebut the presumption of a serious violation, it must only establish that it has a written IIPP.
 True or False
6. A broken leg that is casted for 12 weeks that heals with no lasting effects would be considered a serious injury.
 True or False
7. If the Division does not make an attempt to determine and consider the employer's facts relating to the employer's Section 6432 affirmative defense, the Appeals Board may have grounds to dismiss the citation.
 True or False
8. In order for the Division to classify a citation as serious, it must establish that there is a realistic possibility of serious harm that could result from the hazard identified in the citation.
 True or False
9. If the employer refuses to provide information to the Division related to the Section 6432 affirmative defense prior to the appeal, it may not assert the defense on appeal and offer evidence to support its defense at the time of the hearing.
 True or False
10. Under Section 6432, when assessing the possibility of serious harm, it is NOT assumed that the violation resulted in an accident.
 True or False
11. The employer may not call a recognized expert to testify if the Division only has the enforcement officer provide opinion testimony.
 True or False
12. The employer may continue to assert the lack of knowledge defense just as it always has prior to the revisions to Section 6432.
 True or False

Name
Company
Address
City
State
Zip
Phone
Email
License Number
2 Hours Credit - \$20 Method of Payment:
<input type="checkbox"/> Check (Payable to: Cal-OSHA Reporter)
<input type="checkbox"/> Credit Card (AMEX, Visa, MC)
Credit Card Number
Exp Date
Cardholder name
Signature
For credit please FAX form to: (916)780-0600
Your certificate will be mailed

AB2774: The IFS the ANDs and the BUTs

CDI CE Assessment Test for CE credit with California Department of Insurance

1. The employer may continue to assert the lack of knowledge defense just as it always has prior to the revisions to Section 6432.
 True or False
2. A canned IIPP is good enough to serve as a defense against a serious cite.
 True or False
3. An accident is not necessary for Cal/OSHA to issue a citation for a serious condition.
 True or False

I certify that I attended the full one hour presentation.

Signature

Date

Name	_____
Company	_____
Address	_____
City	_____
State	_____
Zip	_____
Phone	_____
Email	_____
License Numebr	_____
2 Hours Credit - \$20 Method of Payment:	
<input type="checkbox"/> Check (Payable to: <i>Cal-OSHA Reporter</i>)	
<input type="checkbox"/> Credit Card (AMEX, Visa, MC)	
Credit Card Number	_____
Exp Date	_____
Cardholder name	_____
Signature	_____
For credit please FAX form to: (916)780-0600 Your certificate will be mailed	

AB2774: The IFs the ANDs and the BUTs

Assembly Bill No. 2774

CHAPTER 692

An act to repeal and add Section 6432 of the Labor Code, relating to employment.

[Approved by Governor September 30, 2010. Filed with Secretary of State September 30, 2010.]

LEGISLATIVE COUNSEL'S DIGEST

AB 2774, Swanson. Occupational safety and health.

Existing law requires an employer to provide employees with a safe workplace and authorizes the Division of Occupational Safety and Health within the Department of Industrial Relations to enforce health and safety standards in places of employment and to investigate and to issue a citation and impose civil penalties when an employer commits a serious violation that causes an employee to suffer or potentially suffer, among other things, "serious injury or illness" or "serious physical harm."

This bill would establish a rebuttable presumption as to when an employer commits a serious violation of these provisions and would define serious physical harm, as specified. The bill would also establish new procedures and standards for an investigation and the determination by the division of a serious violation by an employer which causes harm or exposes an employee to the risk of harm.

The people of the State of California do enact as follows:

SECTION 1. Section 6432 of the Labor Code is repealed.

SEC. 2. Section 6432 is added to the Labor Code, to read:

6432. (a) There shall be a rebuttable presumption that a "serious violation" exists in a place of employment 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 demonstration of a violation by the division is not sufficient by itself to establish that the violation is serious. The actual hazard may consist of, among other things:

(1) A serious exposure exceeding an established permissible exposure limit.

(2) The existence in the place of employment of one or more unsafe or unhealthful practices, means, methods, operations, or processes that have been adopted or are in use.

(b) (1) Before issuing a citation alleging that a violation is serious, the division shall make a reasonable attempt to determine and consider, among other things, all of the following:

(A) Training for employees and supervisors relevant to preventing employee exposure to the hazard or to similar hazards.

(B) Procedures for discovering, controlling access to, and correcting the hazard or similar hazards.

(C) Supervision of employees exposed or potentially exposed to the hazard.

(D) Procedures for communicating to employees about the employer's health and safety rules and programs.

(E) Information that the employer wishes to provide, at any time before citations are issued, including, any of the following:

(i) The employer's explanation of the circumstances surrounding the alleged violative events.

(ii) Why the employer believes a serious violation does not exist.

(iii) Why the employer believes its actions related to the alleged violative events were reasonable and responsible so as to rebut, pursuant to subdivision

(c), any presumption established pursuant to subdivision (a).

(iv) Any other information that the employer wishes to provide.

AB2774: The IFs the ANDs and the BUTs

(2) The division shall satisfy its requirement to determine and consider the facts specified in paragraph (1) if, not less than 15 days prior to issuing a citation for a serious violation, the division delivers to the employer a standardized form containing the alleged violation descriptions (“AVD”) it intends to cite as serious and clearly soliciting the information specified in this subdivision. The director shall prescribe the form for the alleged violation descriptions and solicitation of information. Any forms issued pursuant to this section shall be exempt from the rulemaking provisions of the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code).

(c) If the division establishes a presumption pursuant to subdivision (a) that a violation is serious, the employer may rebut the presumption and establish that a violation is not serious by demonstrating that the employer did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation. The employer may accomplish this by demonstrating both of the following:

(1) The employer took all the steps a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation, taking into consideration the severity of the harm that could be expected to occur and the likelihood of that harm occurring in connection with the work activity during which the violation occurred. Factors relevant to this determination include, but are not limited to, those listed in subdivision (b).

(2) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered.

(d) If the employer does not provide information in response to a division inquiry made pursuant to subdivision (b), the employer shall not be barred from presenting that information at the hearing and no negative inference shall be drawn. The employer may offer different information at the hearing than what was provided to the division and may explain any inconsistency, but the trier of fact may draw a negative inference from the prior inconsistent factual information. The trier of fact may also draw a negative inference from factual information offered at the hearing by the division that is inconsistent with factual information provided to the employer pursuant to subdivision (b), or from a failure by the division to provide the form setting forth the descriptions of the alleged violation and soliciting information pursuant to subdivision (b).

(e) “Serious physical harm,” as used in this part, means any injury or illness, specific or cumulative, occurring in the place of employment or in connection with any employment, that results in any of the following:

(1) Inpatient hospitalization for purposes other than medical observation.

(2) The loss of any member of the body.

(3) Any serious degree of permanent disfigurement.

(4) 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, second-degree or worse burns, crushing injuries including internal injuries even though skin surface may be intact, respiratory illnesses, or broken bones.

(f) Serious physical harm may be caused by a single, repetitive practice, means, method, operation, or process.

(g) 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, and may offer evidence on the custom and practice of injury and illness prevention in the workplace that is relevant to the issue of whether the violation is a serious violation.



AB2774: The IFs the ANDs and the BUTs

AWARD WINNING
Cal-OSHA Reporter
 CREDIBLE AUTHORITY TRUSTWORTHY
 January 21, 2011 Vol. 38 No. 2 www.cal-oshareporter.com Since 1973

Cal-OSHA Advisory Committee Report
AB 2774 Takes Form

OSHA AND—The dialogue that the Division of Occupational Safety and Health (DOSH) says it wants to have with employers before it decides whether to issue serious violations is close to being made manifest in a form that both DOSH and employers will complete in advance of any serious action.

DOSH Chief Counsel Amy Martin announced at the Jan. 6 meeting of the Cal-OSHA Advisory Committee that the division is in the final stages of developing the form. Inspectors must consider the employer's training and safety communication programs, procedures for discussing and dealing with hazards, how it supervises exposed employees, the circumstances surrounding the incident and why the employer does not believe a serious violation exists.

If DOSH decides to issue the serious violation in spite of this information, the employer can rebut the allegation by demonstrating that it took all of the steps a "reasonable and responsible" employer in similar circumstances would be expected to take.

"Everything has changed," Martin said. The form that DOSH is creating to comply with AB 2774 will be one page, with the front section filled out by the DOSH inspector describing the regulation allegedly violated and the factual description of what the inspector believes was wrong at the worksite.

"Then it's going to make you to please use the other side of the form or as many pages as you need to tell your side of the story," Martin said. "This is new ground for both the division and employers. I am worried that the employer community is going to see this as a problem, that they're going to give away their case," the DOSH legal chief says.

DOSH continues to press its case for the new law, asserting that it will give employers a fair share in working off potential serious violations, while giving the division a leg up in proving legitimate serious violations before the Cal-OSHA Appeals Board.

"As prosecutors, our goal is to search for the truth," Martin said. "Sometimes the truth is whatever the employer has factually that they're not telling us until the day before the hearing. We have to hear that side as well, as well as the side of the workers. Sometimes we are wrong and it would be better to know that up front so that we

DOSH Chief Counsel Amy Martin: Serious-violation form coming next.

Cal-OSHA Investigations
Two Workers Killed in Falls

California's Division of Occupational Safety and Health (DOSH) is investigating two recent accidents involving fatal falls. In one case, the division is still determining whether it has jurisdiction.

Both incidents occurred Jan. 12. The first fatality was at Bulk Transportation in City of Industry. A worker was climbing down a ladder on the back of a tanker truck when he said...

IN THIS ISSUE

NEWS 10-0939 to 00-9944

- New Bill on State Hospital Violence
- Supreme Assist for Exhausted Docs?
- Conference Session is About to Start

DECISIONS 40-8510 to 40-8520

- Robert Galindo
- Steve Zappetti & Son Inc.

Advisory Committee Continued on page 9942

The definitive source for workplace safety and health information!

Sign up for FREE Daily New Digests
www.Cal-OSHA.com

Premium PDF
 Annual subscription \$427

The Workers' Comp Executive is the journal of record for the workers' comp community in California.

Sign up for FREE Daily New Digests
www.WCEXEC.com

Premium PDF
 Annual subscription \$474

AWARD WINNING
WORKERS' COMP
EXECUTIVE
 CREDIBLE AUTHORITY TRUSTWORTHY
 Vol. 21 No. 2
 January 19, 2011

SCIF Blows Up Group Insurance Programs

State Compensation Insurance Fund (SCIF) is moving to radically reshape its group insurance program by dropping stand-alone safety groups and weeding out trade associations that don't meet new standards drawn up by the carrier. State Fund's group program was at the epicenter of scandals broken by Workers' Comp Executive.

Over the holidays, State Fund sent a letter to all trade associations and safety groups participating in its group insurance program, warning that new standards will be rolled out beginning January 1, 2012. The decision puts tens of thousands of workers' comp policies at risk.

"State Fund has decided to phase out its Safety Group program... This decision was not based on the performance of the Safety Groups as a whole or individually and simply reflects a change in our group insurance business model."

—State Fund letter

standards will be rolled out beginning January 1, 2012. The decision puts tens of thousands of workers' comp policies at risk.

While the groups say they were caught off-guard by the letter and the scope of the planned changes, some already have decided that it will not make economic sense for them to reshuffle their operations to stay in the program. Others won't even have that option under the rules State Fund is adopting. Trade associations will have the year to come into compliance to remain in the program, but safety

AIG Agrees to \$450 Million Deal to Settle Civil Lawsuit

American International Group (NYSE: AIG) took another bold step to end litigation surrounding its misreporting of workers' comp premiums, by agreeing to a proposed \$450 million settlement to a civil lawsuit filed by rival insurers. The settlement follows on the heels of an agreement last month by AIG to pay \$100 million to insurance departments across the nation to settle charges that it underreported premiums.

The settlement proposed by the seven intervenors and AIG is an act of self-interest and is detrimental to the

"AIG" continued on page 6

INSIDE

- SEIU Calls Out SCIF on "Illegal Layoff Plan" — page 3
- Paying for Older Workers' Injuries — page 4
- Lien Study Advances — page 4
- Formal Rules for WCAB Class Actions — page 5
- New Faces at Assembly Insurance — page 5
- Public Sector WC Claims Costs Increase — page 9

Aggressive Claims Program Saves Jobs

A one-off arrangement between the Office of Self-Insurance Plans (OSIP), California Self-Insurers' Security Fund (SSIF) and one large trucking company is credited with saving 5,000 jobs in the state and 33,000 nationwide while allowing the once well-insured employer to meet its financial obligations to injured workers and the state. The heart of the program is an accelerated California workers' comp claims creative initiative that has cut SSF's potential exposure nearly in half while preserving liquidity for YBC. World-

wide to turn around its operations. The trucking company is now fully insured for its workers' comp obligations in California, but that wasn't always the case, and those legacy claims had YBC facing a multimillion-dollar bill from OSIP. YBC had been in the state's alternative security program (ASP) run by SSF that allows credit-worthy companies to keep posting a cash deposit or bond to secure their workers' comp liabilities. But YBC's credit had slipped and it

"Jobs" continued on page 9

DEPARTMENT OF INDUSTRIAL RELATIONS

DIVISION OF OCCUPATIONAL SAFETY AND HEALTH

Cal/OSHA –XXXX District Office

Address

Phone #



Date:

Name

Address

City State Zip

Dear Employer:

An inspection was opened by CSHO Name at a place of employment located at Site Address on Date of Inspection. As a result of this inspection the Division intends to cite as Serious the following alleged violation(s) of Title 8 of the California Code of Regulations T8CCR

Insert AVD (charging language) here

You as the employer are encouraged to submit any information you would like to have considered prior to the issuance of citations alleging a Serious violation. This information could include any or all of the following:

- 1. Training for employees and supervisors relevant to preventing employee exposure to the hazard or to similar hazards.
2. Procedures for discovering, controlling access to and correcting the hazard or similar hazards.
3. Supervision of employees exposed or potentially exposed to the hazard.
4. Procedures for communicating to employees about your health and safety rules and programs.
5. Any additional information that you wish to provide such as:
a. An explanation of the circumstances surrounding the alleged violative events.
b. Why you believe a serious violation does not exist.
c. Why you believe your actions related to the alleged violative events were reasonable and responsible.

Please use "Employers Signed Response to Notice of Intent to Issue Serious Violation" attached to this letter to respond and attach any documentation used to support your claims. Use one form per proposed Serious violation.

Please return this form as soon as possible with any supporting documentation. Information received by [insert date 15 days after the date of mailing] will be considered prior to the issuance of this citation. If no information is received, the proposed citation may be issued."

If this box is checked, the Division is considering issuing this citation as a willful, serious violation.

If you have any questions concerning this matter, please contact me at the phone number or address in the letterhead.

Sincerely,

District Manager or Designee

This form will be considered properly served if personally delivered, mailed first class mail with proof of service, or faxed.

AB2774: The IFs the ANDs and the BUTs

8 Requirements of a good IIPP

The IIPP must be in writing and must include the following eight (8) elements:

- **Responsibility**
- **Compliance**
- **Communication**
- **Hazard Assessment**
- **Accident Investigation**
- **Hazard Correction**
- **Training**
- **Recordkeeping**

DVD Order Form

AB 2774: The IHs the APFs and the BWs

Order your DVD now!

_____ Yes! I attended the AB 2774
Webinar. Please send me a DVD for
\$50.

_____ No! I was unable to attend the
Webinar. Please send me a DVD for
\$189.

*(NOTE: DVD's will be shipped out
approximately 15 days after the webinar)*

Name

Company

Address

City

State

Zip

Phone

Email

Method of Payment:

Check
(Payable to: Cal-OSHA Reporter)

Credit Card
(AMEX, Visa, MC)

Credit Card Number

Exp Date

Cardholder name

Signature

To order, please fax form to:
(916)780-0600

AB2774: The IFs the ANDs and the BUTs Feedback

Please rate your satisfaction with each of the following aspects of the webinar.

1 through 5 with 1 being very satisfied and 5 being dissatisfied

Quality of the information receive	1	2	3	4	5
Quality of sound and image	1	2	3	4	5
Relevance of the information to your work	1	2	3	4	5
Opportunity for questions/comments	1	2	3	4	5
Webinar materials	1	2	3	4	5
Overall satisfaction with the webinar	1	2	3	4	5

Comments: _____

name

company

email

AB2774: The IFs the ANDs and the BUTs

Screen Credits

Producer J Dale Debber

Associate Producer Hunter Warburton

Chief Technical Director Kevin Steinke

Live Production Directed Robbie Lynn

Podcast Production Robbie Lynn

Post Production Hunter Warburton

DVD Design Hunter Warburton

Production Accounting Janet Harrington

Customer Helpdesk Kelly Hambly

Music Quantum Jazz "Hand in Space"

Best Boy Jonathan Beach

Slide Design Kevin Hollingshead