“The Beatings Will Continue
Until Morale Improves”
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“New Sheriff in Town”

Accident rates continue to trend down. Fewer and fewer Americans die on the job. In light of this good news, what are Fed/OSHA and Cal/OSHA doing? They’re tightening the screws on employers.

Secretary of Labor Hilda Solis made good on her brash announcement that “there’s a new sheriff in town” by choosing David Michaels as her Assistant Secretary for OSHA, and Jordan Barab as his Deputy Assistant. Both are mounting a national posse to round up and hang employers. Michaels hit the ground running, calling for – among other things – increased penalties and more aggressive enforcement of safety rules. At the federal level he is moving bodies from Consultation to Enforcement and shifting funds from federal cooperative programs, most notably VPP, to pay for increased inspections.

Cal/OSHA Struggles to Keep Up

At the state level, Michaels ordered reviews of enforcement efforts by all of the state-run OSHAs, including Cal/OSHA. Now, for the first time in its history, Cal/OSHA is scrambling to keep its reputation as tougher than Fed/OSHA. Len Welsh, Chief of Cal/OSHA, has gone Michaels one better by “borrowing” Fed/OSHA’s western states Director of Analysis and Evaluation Alan Traenkner for a two-year stint as his Special Assistant.
The shouting at the federal level has echoes here. Our clients tell us that Cal/OSHA’s people are more aggressive and more confrontational while at the same time less knowledgeable, less professional and, finally, less credible.

With a few laudable exceptions, inspectors terminate their investigations once they find one employee whose account justifies a citation, rather than spend time to see if that story can be corroborated.

Fewer and fewer Cal/OSHA staff recall that when SB 198 was passed in the early ‘90’s, creating the first Illness and Injury Prevention Program in the nation, the purpose was to have employers voice their commitment to workplace safety and to provide a framework for safety programs. John Howard, then Chief of Cal/OSHA and now head of NIOSH, promised California’s employers that section 3203 would not become California’s General Duty Clause. But it is today.

Today we also see 3203 citations tacked onto practically every accident-related citation as a “gotcha” on the theory, often freely stated, that accidents don’t happen without a failure to identify a hazard or to train, or both. We have even had to defend a “willful serious” citation for an employer who made the mistake of adding details to its IIPP which 3203 doesn’t require.

As to “willfuls,” the current trend within seems to be to issue “willful” citations more freely where “serious” citations used to be appropriate.

Part of these changes stems from a decision to merge safety engineers and industrial hygienists into one classification. From an enforcement standpoint, this one-size-fits-all approach does not work. Now we see, for example, a well-trained industrial hygienist stand staring at a large machine trying to understand a guarding problem.
Part of it is probably due to the Governor’s enforced furloughs which shortened inspector’s work weeks without lengthening the deadline to issue citations. Both together can create frustration which is taken out on the regulated community.

Part of it is a loss of institutional memory. Cal/OSHA’s Chief Counsel, with thirty years’ experience, retired this year, as did its senior industrial hygienist. The long-time head of policy development, a guru with a phenomenal memory and – as important – experience in the private sector, retired last year. We don’t know for certain, but our sense is that Cal/OSHA is managed today by people who have spent little or no time on the other side of the fence, who have only academic and little “real world” experience in either safety or health.

In the face of uncertain knowledge and unstable jobs, Cal/OSHA’s people retreat more and more into what they know: Title 8’s mandates. As one disillusioned safety professional puts it, Cal/OSHA is all about enforcing safety regulations, not promoting workplace safety.

This shift in attitude is also seen at a higher level. Cal/OSHA is frustrated with the “unfair” impediment of actually having to prove their cases. A major effort is underway to shift burdens of proof from Cal/OSHA to employers. An example: When the Appeals Board required that Cal/OSHA prove more than mere presence on a job site to characterize a general contractor as a “controlling employer,” the union was the first to file a writ challenging the decision, But Cal/OSHA was right behind, arguing that it, not the Appeals Board, should have last say as to what a safety and health statute means.

And in keeping with that “last say” approach, we frequently face Cal/OSHA lawyers who attempt to prove their cases by arguing what the regulation ought to prohibit, not its actual language.
No Good Deed Goes Unpunished

At the Cal/OSHA Appeals Board, this has been a rough decade. When Candice Traeger was appointed Chair in 2005 the Board had a backlog of over 4,000 cases. It took two years to get from filing to hearing. That led to a mandate from Fed/OSHA that the backlog be chopped or else. In 2009, at her re-confirmation hearing before the Senate Labor and Industrial Relations Committee, Traeger was able to report that the current backlog was 87 cases and the time from filing to hearing averaged nine months.

How did the Board do it? By actually enforcing the Board’s late appeal rules. By pushing judges to promote settlements. And, recognizing that most appeals settle when the heat’s on, by setting more than one case for hearing at a time, a tactic used by California’s Superior Courts since they faced a similar backlog in the ‘80’s.

What did the Board get? An open letter of protest from 46 inspectors and one staff attorney decrying her tactics as jeopardizing the safety of California’s workers.

When the Board opened its doors to the first advisory meetings in its history, did it get applause? No. It received heavy criticism for, among other things, following the law instead of doing “justice” for California’s workers.

What’s An Employer To Do?

Keep your head down, and keep working. It may seem counter-intuitive, but think safety, not just compliance. Emphasize training. Walk those jobs.

Follow Davey Crockett’s advice: Be sure you’re right and then go ahead. True, Davey died by following that wisdom but, whatever happens, you’ll sleep better knowing that you did your best to keep your workers safe.