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THE DIVISION OF INDUSTRIAL SAFETY — Regulation of Business Without Litigation

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DETAILED government regulation of business is generally considered a new development. This is in large part true, but one of the most ubiquitous governmental actions is now almost half a century old in California. In 1913, the California Legislature decreed that every employer must maintain a safe place of employment.[1] Though the duty of employer was in part a reflection of the common law, two aspects of the law were new: it was backed by a generalized system of workmen's compensation, and a procedure was established whereby the government through regulation could establish the minimum requirements of maintaining a safe place to work.

Lack of Litigation

Most lawyers are probably unaware of these latter regulations.[2] There have been very few appellate cases which have considered them at all, and those few only in connection with their application as a standard for establishing due care.[3] There are no reported cases involving the reasonableness of these regulations, the propriety of the administrative procedure leading to their promulgation, or otherwise concerned with the regulations themselves. This phenomenon of no litigation is the subject of this article. Why has this type of regulation escaped legal controversy?

Several hypotheses are possible. One is that the regulations are so unimportant that they are not worthy of legal concern. This is plainly not true. The general safety orders which have been issued cover to some degree virtually every employment in California,[4] and many of the requirements are costly to the employer. In terms of dollars and cents many instances could be cited where the possibility of escaping the force of the regulations, even temporarily, would be well worth the cost of litigation. Another possibility is that the regulations and the statutes controlling their promulgation are so clear and have been so scrupulously followed that any litigation would be patently frivolous. Obviously this could not be true—no statute

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[1] Cal. Stat. 1913, ch. 176, § 52, p. 306.

[2] This is certainly not due to any lack of volume of these regulations. They occupy several thousand pages of Title 8, California Administrative Code.

[3] Armenta v. Churchill, 42 Cal. 2d 448, 267 P.2d 303 (1954); Mula v. Meyer, 132 Cal. App. 2d 279, 282 P.2d 107 (1955); Campbell v. Fong Wan, 60 Cal. App. 2d 553, 141 P.2d 43 (1943). As to their application as safeguards to the public generally, Pierson v. Holly Sugar Corp., 107 Cal. App. 2d 298, 237 P.2d 28 (1951).

[4] 8 CAL. ADM. CODE § 3203.

is that free of ambiguity. But, in any event, this statute is in many important respects singularly unclear. A few instances are necessary to document this assertion.

Unclarity of the Regulatory Statute

The statute, which has remained essentially unchanged since 1913,[5] speaks of two types of "orders": general and special.[6] General safety orders are promulgated by the Industrial Safety Board, composed of four gubernatorial appointees and chaired by the Director of the Department of Industrial Relations.[7] The general orders are published in the California Administrative Code. The procedures used in promulgation follow the California Administrative Procedure Act: that is, there is notice of hearings,[8] hearings,[9] and publication of the orders in the Register.[10] While some of the general orders have virtually universal application, *e.g.*, those relating to handrails,[11] illumination,[12] others relate to specific industries, *e.g.*, logging,[13] mining,[14] and others to special types of equipment such as elevators,[15] and gold dredges.[16] They range from highly detailed engineering specifications to the most vague and general requirements.[17]

Special safety orders are of a different class. These relate to specific employers and specific hazardous conditions. Generally, a special order results from an investigation by one of the Division of Industrial Safety's inspectors of a particular place of employment. For example, an inspector visits a factory and finds certain specific violations of the general orders and also a condition which, in his opinion, is hazardous but which is not specifically covered by any detailed general order. He then "writes up" the place of employment, giving a copy to the employer. This form describes the conditions which the inspector believes should be corrected. If the employer does not comply, he receives in due course an "Order to Show Cause" which tells him, in substance, that unless he requests a hearing he will be

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[5] Cal. Stat. 1913, ch. 176, §§ 1-92, pp. 279-320.

[6] CAL. LABOR CODE §§ 6307-08.

[7] CAL. LABOR CODE § 140.

[8] CAL. GOV. CODE § 11423.

[9] CAL. GOV. CODE § 11425.

[10] CAL. GOV. CODE § 11409.

[11] 8 CAL. ADM. CODE § 3227.

[12] 8 CAL. ADM. CODE § 3242.

[13] 8 CAL. ADM. CODE §§ 5200-392.

[14] 8 CAL. ADM. CODE §§ 5900-6147.

[15] 8 CAL. ADM. CODE §§ 3000-104.

[16] 8 CAL. ADM. CODE §§ 4300-51.

[17] 8 CAL. ADM. CODE § 3242 (a) exemplifies such general regulations. It reads: "Working areas, stairways, aisles, passageways, work benches and machines shall be provided with either natural or artificial illumination which is adequate and suitable to secure the safety of employees."

served with a special safety order which will require him to comply with the report of the investigator.

Hearing

The statute requires a "hearing" before issuing a special safety order.[18] This requirement of a hearing or, in practice, an opportunity to be heard, is the first glaring ambiguity. What kind of a hearing and before whom? The statute is wholly silent. Fortunately, this question has arisen infrequently, but when it has, the "hearing" is held before either the Chief of the Division or one of his top assistants. No formal record is made, the witnesses, if any, are not sworn and the whole procedure would more accurately be described as a "conference" between the Division and the particular employer rather than a "hearing."

Judicial Review

What of judicial review? Violations of the orders, both special and general, are misdemeanors.[19] Assuming that the employer does not wish to undergo the distress of a criminal charge, how may he review the safety order, either general or special? One possible method is by starting a declaratory judgment proceeding in a superior court. As far as general orders are concerned, jurisdiction of the superior court could be based on the Administrative Procedure Act which states that a declaratory judgment action may be brought in the superior court to test the validity of "any regulation."[20] It is doubtful, however, whether this provision is applicable.

Section 6600 of the Labor Code provides that judicial review of all orders of the Division may be had in the district courts of appeal and the supreme court, impliedly excluding the superior courts, and this implication is reinforced by another section,[21] incorporated by reference, which specifically so states.

Putting aside declaratory relief as doubtful jurisdictionally, the disgruntled employer can try and have his case reviewed in a district court of appeal. However, in order to do so, the employer must petition for a rehearing within twenty days of the "service" of any final order as a jurisdictional prerequisite.[22] With regard to general orders this makes a modest amount of sense—presumably the petition would

[18] CAL. LABOR CODE § 6500.

[19] CAL. LABOR CODE § 6414.

[20] CAL. GOV. CODE § 11440.

[21] CAL. LABOR CODE § 6601 makes reference to the applicability of § 5955 thereof which reads: "No court of this State, except the Supreme Court and the district courts of appeal to the extent herein specified, has jurisdiction to review, reverse, correct, or annul any order, rule, decision, or award of the commission, or to suspend or delay the operation or execution thereof, or to restrain, enjoin, or interfere with the commission in the performance of its duties but a writ of mandate shall lie from the Supreme Court or the district courts of appeal in all proper cases."

[22] CAL. LABOR CODE §§ 5901, 6602.

be addressed to the Industrial Safety Board and it is reasonable to require that the interested party make prompt application to avoid undue delay in promulgating the general orders. Of course when such an order would be "served" is a little more difficult to understand. Perhaps publication in the register could be treated as constructive service.

As a practical matter, the twenty day limitation with regard to general orders is somewhat unrealistic. Few employers, if any, follow the promulgation proceedings so closely as to know all of the possible implications of a new series of regulations. It is, therefore, unreasonable to expect employers to be in a position to file a petition for rehearing within the twenty day limitation. But even assuming that an employer did file a petition within the time limit, what would be the record which would be the basis of his appeal? Presumably the petition and the denial thereof and perhaps the recorded testimony at the public hearings, but none of these would, in all probability, bear to any considerable degree on the precise regulation or the reasons behind its issuance. This meager and probably largely irrelevant matter, is all that the district court of appeal is permitted to consider as the statute prohibits the taking of any additional evidence.[23]

With regard to "special" orders, the problem of service is relatively simple; since the special order is delivered to the employer in a manner not dissimilar from "service" in the ordinary sense. The twenty day limitation is also practicable, but the record problem remains. Perhaps the results of the informal conference, if there was one, with whatever record was made at that time, could be used. The real difficulty, however, is that the special order is typically in large part no more than a recitation of the provisions of a general order which the particular employer is violating. Is the respondent of a special order to be permitted to attack the general order although the time for so doing has long since past? If so, what is the record which the court will consider as to the validity of the general order?

Historical Source of Difficulties

As an historical matter it is simple to trace down the source of these difficulties. In the original act, the duty of promulgating safety orders was vested in the Industrial Accident Commission.[24] Enforcement was also through an arm of the Commission and the review procedures paralleled the review procedures of workmen's compensation awards.[25] While these review procedures make excellent sense when applied to adjudicative functions of the Commission, they made very little if any sense when applied to the quasi-legislative functions

[23] CAL. LABOR CODE § 5951.

[24] Cal. Stat. 1913, ch. 176, § 57, p. 307.

[25] Cal. Stat. 1913, ch. 176, §§ 56, 63, 84-5, pp. 307-08, 318-19.

of the Commission. In 1945, when the Commission was reorganized,[26] the functions of the Commission, with respect to safety orders, were shifted to the Division of Industrial Safety and the Industrial Safety Board, but no change was made with respect to the review procedures; indeed, they were substantially incorporated by reference.[27] Though this bit of history explains the problem, it does not help solve it.

Legal Sanctions

Our disgruntled employer, frustrated by this morass of confusion, decides that it is not worth the trouble resolving these problems by taking the initiative, so he then determines to violate the orders and see what happens.

The Division has a rather substantial reserve of legal sanctions available to enforce compliance.

Criminal Sanctions

Violations of the safety orders, both special and general, are misdemeanors.[28] This criminal sanction is the most common enforcement technique. It has its problems, mostly revolving around the relationship between the district attorney and the Division. The office of the district attorney is a busy one and violations of the orders are not, at least on their face, either colorful or very important compared to a great deal of the work handled by the district attorney. On the whole, the relationship between Division inspectors and the local prosecuting authorities has been good, but the district attorneys are understandably somewhat hesitant to brand as criminal some of the leading business men in their community. This is particularly true, of course, where the violation of the safety order appears, to the layman at least, as technical and not likely to result in any serious injury.

"Tag" Orders

Frequently the Division will have recourse to the district attorney only after it has "tagged" the particular condition which is hazardous. A "tag" order is a kind of administrative injunction. The inspector simply attaches to the machine a large yellow or orange tag which announces in no uncertain terms that use of the machine is prohibited by order of the Division.[29] If the tag is placed on a machine, it is frequently so attached that it is impossible to use the machine without removing the tag. To remove the tag is itself a misdemeanor

[26] Cal. Stat. 1945, ch. 1431, § 28, pp. 2688-89.

[27] Cal. Stat. 1945, ch. 1431, §§ 8, 28, 78-110, pp. 2685, 2688-89, 2698-705.

[28] CAL. LABOR CODE § 6414.

[29] The language used in such tags is as follows: "WARNING. This ——— has been inspected and is considered unsafe. Further use of this ———, until it has been made safe, may constitute a misdemeanor rendering the employer liable to fine and imprisonment, or both. John Doe, Safety Engineer, Division of Industrial Safety." The reverse side of the tag cites applicable provisions of the California Labor Code.

under a separate section of the statute.[30]

These tag orders present an interesting legal problem. If the analogy to the injunction is valid, it could well be argued that the fact that the tag was unlawfully placed on the machine was not a defense to the charge of removing the tag.[31] This makes good sense from the standpoint of effective administration of the act. The employer, at least in theory, has other methods of reviewing the legitimacy of the Division's action in declaring the machine unsafe. The Division's action is certainly entitled to the presumption of validity, and pending review of the agency's action the employer should not be permitted to use the machine at the risk of his employee's health and safety. Thus, it is perfectly reasonable to make it a separate offense to remove the tag without permission of the Division and to cut off the defense of the impropriety of tagging the machine at all.

Injunctions

To some degree the analogy of the injunction is weakened by the fact that the Division can apply to the courts for an injunction to correct a "serious menace to lives or safety."[32] The application must be accompanied by an affidavit of the inspector sufficient to establish a *prima facie* case.[33] The injunction process has much to commend it. It avoids, for one thing, the taint of the criminal charge, and, unlike the criminal charge, a temporary restraining order corrects the condition. Unfortunately no one knows what a "serious menace" is. Some cases are obvious, but they are relatively rare since few employers will compel men to work in truly dangerous conditions once the hazard has been pointed out. With the more refined or sophisticated violations of the orders, it is difficult to categorize the violations as presenting a "serious menace."

Why No Litigation?

The above should suffice to show that there are enough legal problems involved in the safety regulations as such to warrant some litigation in the almost half-century of their existence. The question remains as to why these problems have not been litigated.

Possible Liability

There are undoubtedly a number of reasons. Probably of relatively slight significance is the fact that knowing violations of safety orders, if they cause an accident, will subject the employer to workmen's compensation liability for "serious and wilful misconduct."[34] This liability cannot be insured against and thus comes directly from

[30] CAL. LABOR CODE § 6511.

[31] United States v. United Mine Workers, 330 U.S. 258 (1947).

[32] CAL. LABOR CODE § 6508.

[33] CAL. LABOR CODE § 6509.

[34] CAL. LABOR CODE § 4553(a).

the pocket of the employer.[35] This collateral enforcement technique was apparently not intended. The act originally did not specifically refer to violations of the safety orders as *per se* "serious and wilful misconduct," and the courts never quite did it either. But the courts did consider violations of the safety orders as in a somewhat diffierent class and recently the legislature limited and codified the violation of a safety order situation.[36] Though this liability exists and it is of some consequence, it seems doubtful that most employers are either aware of it or would be responsive to it.

Safety Is Good Business

A far more important reason is simply that safety is now generally regarded as good business. As a simple matter of economics it saves money for the employer to be safety conscious and to comply with regulations which further safety. The premiums on compensation insurance are tied to the particular employer's experience, and a good safety record saves money. The larger companies have learned this and sometimes go to great lengths to promote safe working conditions. It is fairly common for such employers to have safety engineers on their staff. All this simply means that a very substantial segment of the regulated community is responsive to the regulation and more than willing to comply with reasonable rules. Of course it is this same group of large employers who have the most at stake. They are the ones who under other circumstances would test the regulations, as they have the most to lose or gain by compliance or resistance. Because they are, in general, the most cooperative, much of the litigation simply never gets started.

Influence of Unions and Labor

Unions and labor generally also contribute to some degree to the ease of enforcement. Safety is part of the gospel of the labor movement—no one denies it, and many union officials are genuinely concerned and usefully active in the field. Many of the violations of the safety orders are brought to the attention of the Division through unions and workers. To the extent that they are, the union people will support the Division in any dispute with the employer. Here again, there is a built in compliance factor within the regulated community.

Division of Safety Professionalism

Probably the most important single factor favoring compliance, however, is the professionalism of the Division. This comes to the fore in two places—in the way the regulations are drafted and in the way they are enforced. The regulations are initially drafted by staff personnel in the Division. In doing so, the Division has available

[35] CAL. INS. CODE § 11661.

[36] See, Comment, 42 CALIF. L. REV. 852 (1954).

and uses the various codes prepared by nationally recognized safety groups. The draft is then reviewed in detail by a committee which includes professionals in the field who represent the various groups who will be regulated. A great effort is made, generally successful, to achieve agreement as to the terms of the regulations. The end result are thus regulations which represent a professional consensus of views as to what are sound rules.

The second aspect of professionalism is within the Division itself. Traditionally the Division has emphasized its role as educator over its function as policeman. Although not exclusively staffed by trained engineers, most of the Division's agents are engineers, and all of the supervisors are engineers. The rules are thus enforced with knowledge of the reasons behind them. The agents are trained to spot hazardous conditions and it is a tenet of the Division that there is no job that cannot be done in comparative safety. The agents in the field are expected to explain what the hazard is and are also expected to develop a method of avoiding it. Enforcement is thus treated as principally a job of education: how to persuade the employer to comply with the regulations, not because they are regulations, but rather because there is a safer way of doing the job. The whole tone of enforcement is thus shifted from strict enforcement of the "book" to education. At least one result of this system has been very substantial cooperation and compliance.

These are probably the main reasons for the lack of litigation. It is an enviable record and raises one final question: can any useful generalizations be made from the experience of the Division? Probably not. Safety regulation is a uniquely saleable type of regulation. Nonetheless, the professionalism of the Division does seem to be of some significance. Safety engineering, though far from a mathematically absolute science, is capable of a considerable degree of precision. On many matters engineers can pretty well agree as to what is and is not safe. There is thus a professional yardstick apart from the law. The regulations are carefully drafted to conform to this agreed upon yardstick, and they are enforced by professionals who appreciate the importance of the yardstick. The end result has been an absence of litigation.