

SENATE COMMITTEE ON LABOR , April 05,1991

Hearing Room 50 03:00

p.m. Tapes 53 - 54 MEMBERS PRESENT: SEN. GRATTAN KERANS, CHAIR
SEN. LARRY HILL, VICE-CHAIR SEN. PETER BROCKMAN SEN. BOB KINTIGH SEN.
BOB SHOEMAKER

STAFF PRESENT: ANNETTE TALBOTT, COMMITTEE COUNSEL ROBERTA WHITE,
COMMITTEE ASSISTANT MEASURES CONSIDERED:SB 1037 - PROVIDES SYSTEM
FOR NOTIFICATION OF LAW ENFORCEMENT AGENCIES OF DEATHS OR SERIOUS
INJURIES IN WORKPLACE - PUBLIC HEARING SB 829 - REPEALS SAFETY COMMITTEE
REQUIREMENT FOR CERTAIN SMALL BUSINESSES - PUBLIC HEARING - These
minutes contain materials which paraphrase and/or summarize statements
made during this session. Only text enclosed in quotation marks report a
speaker's exact words. For complete contents of the proceedings, please
refer to the tapes.

TAPE 53, SIDE A

001 CHAIR KERANS calls the meeting to order at 3:07 p.m.

WITNESSES: JAN CHATTEN-BROWN, SPECIAL ASSISTANT TO THE DISTRICT
ATTORNEY, OCCUPATIONAL AND ENVIRONMENTAL PROTECTION, LOS ANGELES, CA
DAVID HITTLE, OREGON WORKERS' COMPENSATION ATTORNEYS/OREGON TRIAL
LAWYERS ASSOCIATION JACK LANDAU, DEPUTY ATTORNEY GENERAL JACK POMPEI,
ADMINISTRATOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, DEPARTMENT
OF INSURANCE AND FINANCE ERIC WASSMAN, ASSISTANT ATTORNEY GENERAL,
CRIMINAL JUSTICE DIVISION: LINDA WISSHER, OREGON COUNCIL OF
COMMUNICATIONS WORKERS OF AMERICA FRANK BIEHL, ASSOCIATION OF WESTERN
PULP AND PAPER WORKERS DIANE ROSENBAUM, OREGON STATE INDUSTRIAL UNION
COUNCIL Senate Committee on Labor April 5, 1991- Page 2

SB 1037 - PROVIDES SYSTEM FOR NOTIFICATION OF LAW ENFORCEMENT AGENCIES
OF DEATHS OR SERIOUS INJURIES IN WORKPLACE - PUBLIC HEARING 025 CHAIR
KERANS: Why would we prosecute someone criminally for industrial
accident, or when is an accident not an accident, and a crime?
029 JAN CHATTEN-BROWN, SPECIAL ASSISTANT TO THE DISTRICT ATTORNEY,
OCCUPATIONAL AND ENVIRONMENTAL PROTECTION, LOS ANGELES, CA -
TELECONFERENCE > There is a Law Review article which defines when it is
not an accident and but a crime. Under California law, and under the
legislation you are considering, serious violations of Occupational
Safety and Health standards that result in death or serious injury would
constitute crimes. > The OSHA prosecution program established in 1985.
We have found these laws to have a real deterrent effect on unsafe
working conditions in Los Angeles County. Both anecdotal and statistical
evidence show that there has been an impact. > The district attorney
likes to say that there is a moral distinction between someone who
through negligence which causes death and someone who takes a gun and
kills someone. However, dead is dead, and there should be consequences
when an employer violates occupational safety and health standards that
have been set specifically for the purpose of protecting employees and
those employees are killed or injured. CHAIR KERANS: How can you really
tell when a crime has been committed? 066 CHATTEN-BROWN > There are a
district attorney investigator and deputy district attorney who are
on-call 24 hours a day every day. They respond to the scene of every
traumatic occupational fatality in Los Angeles. They investigate all
accidents as potential homicides. After the death, they begin the
process of determining whether or not anyone in the chain of command has
prior knowledge of the hazard. It is very significant. It is not
necessary under California law to show that, but very useful. > They
have sent a total of 6 individuals to jail in all of the cases they have
prosecuted. > Their objective is not to be punitive but to deter unsafe

working conditions and to raise the standard of care for employers, but they feel very strongly that civil penalties are treated as part of the cost of doing business. 221 CHAIR KERANS: Is there a separate penalty scheme for these violations - are you working with the California code, or what? CHATTEN-BROWN: > There are two key labor sections. · One makes it a misdemeanor to knowingly or negligently violate an OSHA regulation, if that violation is serious. They have actually prosecuted one case where no one was injured. · There is another code which makes it a misdemeanor to wilfully violate a regulation when that results in death or permanent or prolonged impairment. > Additionally, four cases have been prosecuted for involuntary manslaughter, which is where they can show gross negligence. > There is a new law on the books which has not been tested yet, but it is district attorney . These minutes contain materials which paraphrase and/or summarize statements made during this session. Only text enclosed in quotation marks report a speaker's exact words. For complete contents of the proceedings, please refer to the tapes. Senate Committee on Labor April 5, 1991 - e 3

sponsored legislation, which makes it a felony for a manager to fail to disclose a serious concealed hazard. They have to report it to Cal-OSHA, who in turn reports to 9 other listed regulatory agencies. The employer also has to disclose the hazard to any exposed employees.

258 CHAIR KERANS: What is your relationship with Cal-OSHA as far as investigation?

CHATTEN-BROWN: > With a fatality, under the roll-out program, they receive notification immediately after the coroner receives it. They very often arrive at the scene even before the coroner. Cal-OSHA, under state law, is required to be notified within 24 hours. The district attorney's office feels very strongly that in order to be effective in the investigation, they have to be at the scene very promptly. > In addition, most of the first responders also notify their office. It's a second protection that the coroner's office notifies them. > The district attorney's office notifies Cal-OSHA, even if they have already been notified. They also attempt to meet with the Cal-OSHA personnel at the scene. Cal-OSHA has the expertise about the voluminous set of Cal-OSHA standards, while the district attorney's office has the expertise in terms of conducting a criminal investigation. > It is a cooperative effort, and they feel that the current relationship with Cal-OSHA is very positive. 307 CHAIR KERANS: The difference is not in degree but in kind. One can look to the issue of culpability in a criminal matter in these cases for wilful, repeated, negligent, gross risk created, etc. Is that what separates these cases?

CHATTEN-BROWN: > We do not always require an individual did know - that's an extraordinarily difficult burden, and we urge, as we have urged Congress which is considering similar legislation at this time, not to fall in the trap of requiring actual knowledge. It's very rare to get documentation or be able to prove that a person had knowledge about a hazard on a specific piece of equipment. But we have often shown that managers have been warned of similar hazards, or have been in a position where they should have known. > Second degree murder is what we would go for if we had that type of fact information. 352 SENATOR HILL: I'm interested to know if the other district attorneys around the state have the same interest as your office, or is your office unique in its interest in enforcing this set of statutes.

CHATTEN-BROWN: > We are probably the most specialized in terms of having a separate section to handle these prosecutions, but in fact our program

has been emulated by a number of prosecuting offices around the country. Within California there are several prosecution offices that are increasingly bringing these cases, and we do attempt to assist them. SENATOR HILL: Have you seen an increase in safety or a decrease in unsafe conditions as a result of enforcement activities? Also, what is the current feeling of the employer community about your activities currently in Los Angeles?

These minutes contain materials which paraphrase and/or summarize statements made during this session. Only text enclosed in quotation marks report a speaker's exact words. For complete contents of the proceedings, please refer to the tapes. - Senate Committee on Labor April 5, 1991 Page 4

396 CHATTEN-BROWN: > They do not have any hard statistical evidence, but there are three significant things as anecdotal evidence about the success of the program: · She gives a lot of presentations to businesses, and she usually gets response from risk managers that she has made their jobs easier. There is a heightened awareness of the need to comply, and a greater commitment of resources to make the work place safe. · In terms of going criminal versus civil, over and over again, there are defense attorneys who come in to plead the case who express a willingness to have their clients spend in civil penalties amounts far in excess of those we could get legally in a criminal disposition of the case simply to avoid the stigma of criminal prosecution. They do not agree to that because their purpose is not to raise revenue, but to deter unsafe working conditions. It is anecdotal evidence of the success of the program.

TAPE 54, SIDE A

001 CHATTEN-BROWN, CONTINUED > Continues to testify and answer the questions of Senator Hill: · The only statistical evidence she has seen was with relationship to construction fatalities, and although there may be other considerations, the program is a substantial contributing factor that in Los Angeles County, as opposed to other large urban areas - New York, Chicago, etc. - for every \$1 billion of construction, they experience one worker death. In the other jurisdictions, they have approximately 4 worker deaths for every \$1 billion of construction. Although there may be some other reasons for the fact that the Los Angeles area has a 4 times better rate than other jurisdictions, they believe part of the reason is because of the workplace prosecution program. · Employers have not endorsed the program, nor do they ever expect them to endorse the program, but their energies are focused now on the new corporate criminal liability act. Generally the employer community is now much more accepting of the program. > The business community is opposing the federal legislation to increase the penalties, but that too, she feels, will eventually be enacted. 066 SENATOR SHOEMAKER: How serious must the injury be before you become involved, and how involved do you get? CHATTEN-BROWN: > The injury does not have to be serious. They want to look at what might have occurred or what might occur. They have prosecuted for a number of very serious injuries, but they have also prosecuted for a release of chlorine which sent about 80 people to the hospital. Over half of those were children and teachers from a neighborhood school. No one received any in-hospital treatment, but there may be some long-term damage. The type of hazard, however, was a very serious one, and the violations were serious. That's what we consider when determining whether or not to file. It is more difficult to investigate these types of accidents because they don't have the trigger of the call. They rely upon referrals from Cal-OSHA and reading

papers, hearing the news and inquiring from Cal-OSHA where they read or hear about an incident that looks like it may have involved serious safety hazards. 110 SENATOR SHOEMAKER: About how many injuries do you investigate for every death that you investigate?

These minute. contain materials which paraphrase ant/or summarize datements de during this session Only text enclosed in quotation mark. report a speaker's exact words. Por complete contents of the proceedings, plea& refer to the tapes. Senate Commiltee oo Labor April 5, 1991Page S

CHATTEN-BROWN: > Not very many because of the referral process. Also, it's an issue of resources. Because of the immediate notification it's easy for them to develop a solid case in the situation of a death. They would prefer to have a more preventive approach, but they have to be sure that they have the necessary evidence to prove the case beyond a reasonable doubt, and she estimates that they have half the number of investigations involving injuries or serious exposures to hazardous substances as they do to the work place death. There are over 100 occupational fatalities in Los Angeles County every year. She would guess that about 30% of those are from chronic exposure - aSB estosis, silicosis, etc., and they do not investigate those because of latency period. SENATOR SHOEMAKER: How many of the cases which you do investigate result in a conviction?

CHATTEN-BROWN: > They prosecute within their office about 8 per year. The District Attorney there only handles felonies and misdemeanors in the unincorporated areas. So in addition to the 46 cases which they have filed, over three dozen more have been filed by local city attorneys, based upon prosecutions that Los Angeles County conducted.

155 SENATOR KINTIGH: I was wondering what percentage of convictions you had from the 300 prosecutions. CHATTEN-BROWN: > Those are statewide, and she does not have an absolute figure on that. Many of them were prosecutions that were undertaken prior to the program or in the early years of the program by other jurisdictions. > The Los Angeles County District Attorneys office strongly supports passage of a statewide measure such as SB 1037. The District Attorney will send a letter confirming their endorsement of the bill and specifying the reasons for the endorsement. > Teleconference ended at 3:50 p.m. 219DIANE ROSENBAUM, OSIUC (EXHIBIT A) > Details Exhibit A. > Testifies in support of SB 1037 290 DAVID HITTLE, OREGON WORKERS' COMPENSATION ATTORNEYS/OREGON TRIAL LAWYERS ASSOCIATION > Testifies in support of SB 1037. > The bill will not cost the system any additional money, but will come out to the fee which the employee already pays. > This will send a message to employers that they have to take safety seriously or there will be consequences. 350 JACK LANDAU, DEPUTY ATTORNEY GENERAL (EXHIBIT B) > Testifies in support of SB 1037. > Introduces an amendment (Exhibit B). . These minutes contain materials which paraphrase and/or summarize ststernenb mate during this session. Only text enclosed in quotation marks report a speaker's exact worse. For complete contents of the proceetings, please refer to the tapes. . Senate Committee on Labor April 5, 1991- Page 6

411 CHAIR KERANS: Would you send a letter to me expressing what you have just verbally stated to the committee as to the nature of the bill given the fiscal support? LANDAU: I would be happy to do so. . .

418 ANNETTE TALBOTT, COMMITTEE COUNSEL > I have a question about sentencing guidelines. Would you describe what you think the impact of designating them as A B and C felonies would result in terms of

sentencing, assuming they did not have any prior convictions? '

430 ERIC WASSMAN, ASSISTANT ATTORNEY GENERAL, CRIMINAL JUSTICE
DIVISION: > My guess is that the criminal justice counsel would assign
an offense category for these offenses probably in the range of 4-8, and
we're probably talking about employers who have absolutely no criminal
history, so some of these offenses would fall into probation categories,
depending upon where they were pegged. If they fell into an
incarceration category, we would probably be talking about a relatively
short prison term - probably about a year to a year and a half. CHAIR
KERANS: Would you direct a communication to the committee with the
assessment of that? WASSMAN: Sure. 464 SENATOR KINTIGH: I can think
of non-supervisory personnel who might be responsible for an accident,
so would that person be exonerated and the supervisor blamed?
479 CHAIR KERANS: That question will be answered by Jack Pompei on
behalf of OR- OSHA.

TAPE 53, SIDE B

083 TALBOTT: Is there a statutory definition for "serious physical
injury" that used in the assault statute. WASSMAN: Yes, in Chapter 161,
the term serious physical injury is defined. It is somewhat different
from the term "serious disabling injury" that appears in this bill. It
is more narrow.

095 JACK POMPEI, ADMINISTRATOR, OCCUPATIONAL SAFETY AND HEALTH
ADMINISTRATION, DEPARTMENT OF INSURANCE AND FINANCE > There are no
citations for employees because management is responsible under the
current statutes. > If the company can bring in documentation showing
cooperation with OSHA standards, they are more likely to negotiate a
settlement as far as fines and citations are concerned. Too often they
have no verifiable documentation available. 205 BROCKMAN: Have you
ever investigated a case that could be criminally prosecutable?

These minutes contain materials which paraphrase and/or summarize
statements made during this session. Only text enclosed in quotation
marks report a speaker's exact words. For complete contents of the
proceedings, please refer to the tapes. Senate Committee on Labor April
5, 1991 - Page 7

POMPEI: I have not seen any since the beginning of my tenure, December
1, 1987. I have not seen where an individual feared for his/her life
and the company mandated without regard for safety that the person
perform the duty. I'm not certain, however, that has not gone on in our
state.

227 SENATOR HILL: Are there cases in which employers have had multiple
violations?

POMPEI: That is correct, many times.

SENATOR HILL: Are they violations where they could have resulted in
injury or death.

POMPEI: In many cases they have. 323 CHAIR KERANS: Introduces EXHIBIT
C, statistical information from OR-OSHA concerning industrial deaths
over the past 5 years. POMPEI: > He does not agree with Chatten-Brown
concerning OSHA and the cost of doing business. 123 CHAIR KERANS:
Requests that Mr. Pompei write a letter to the Committee in support of
SB 1037. 142 SENATOR HILL: The classification of other violations in

the Administrative Rules - wilful violations are one type which seem to be the most serious, but a serious violation, which is less than wilful - a violation in which there is a substantial probability that death or serious physical harm could result, unless the employer did not or could not with the exercise of reasonable diligence know of the violation. So the serious violation assumes by definition that the employer knew of the danger. Then there is a general violation, and I would say that a death which results from a serious violation also might fall within the range of the provisions of this bill. I'd like to know if there are six deaths that are linked to wilful violations, how many deaths in the same period were linked to serious violations. POMPEI: At this time I don't know.

TAPE 54, SIDE B

SB 829 - REPEALS SAFETY COMMITTEE REQUIREMENT FOR CERTAIN SMALL BUSINESSES - PUBLIC HEARING WITNESSES: LINDA WISHER, OREGON COUNCIL OF COMMUNICATIONS WORKERS OF AMERICA FRANK BIEHL, ASSOCIATION OF WESTERN PULP AND PAPER WORKERS DIANE ROSENBAUM, OREGON STATE INDUSTRIAL UNION COUNCIL JACK POMPEI, ADMINISTRATOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, DEPARTMENT OF INSURANCE AND FINANCE - These minutes contain materials which paraphrase and/or summarize statements made during this session. Only text enclosed in quotation marks report a speaker's exact words. For complete contents of the proceedings, please refer to the tapes. Senate Committee on Labor April 5, 1991 - Page 8

180 SENATOR HILL: GREG TEEPLE, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, telephone his office and wanted to go on record as supporting SB 829. 186 LINDA WISHER, OREGON COUNCIL OF COMMUNICATIONS WORKERS OF AMERICA (EXHIBIT D) > Details Exhibit D. > Testifies in support of SB 829. 239 FRANK BIEHL, ASSOCIATION OF WESTERN PULP AND PAPER WORKERS (EXHIBIT E) > Details Exhibit E. > Testifies in favor of SB 829. 264 DIANE ROSENBAUM, OREGON STATE INDUSTRIAL UNION COUNCIL > Testifies in support of SB 829. 333 JACK POMPEI, ADMINISTRATOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, DEPARTMENT OF INSURANCE AND FINANCE > Testifies in support of SB 829. SENATOR HILL: Do OR-OSHA rules require every employer to have a safety committee? POMPEI: The new law says every employer with eleven or more employees must have a mandated health and safety committee to follow our rules, and we have very stringent rules written. Employers in the state which have ten or fewer, if you are a high risk industry, in the top 25% SIC, you have to have them, where if you are in the top 10% of the low risk, you have to have them. SENATOR HILL: But there is the exception for the collective bargaining. POMPEI: That caveat was put in our health and safety rules many years ago, and it said that if you have a collective bargaining agreement with health and safety omitted from the health and safety rules, and I caught that and told Representative Shiprack that was illegal because a collective bargaining agreement doesn't supersede occupational health and safety rules. My language was that a collective bargaining agreement is valid only if it's effective as, or more stringent than, my rules.

TAPE 54, SIDE B

SB 829 - REPEALS SAFETY COMMITTEE REQUIREMENT FOR CERTAIN SMALL BUSINESSES - WORK SESSION

MOTION: SENATOR HILL to the floor with a "do pass" recommendation.

VOTE: Hearing no objection, the motion carries./ Senators Kintigh and

Brockman were absent.

These minutes contain materials which paraphrase and/or summarize statements made during this session. Only text enclosed in quotation marks report a speaker's exact words. For complete contents of the proceedings, please refer to the tapes. - Senate Committee on Labor April 5, 1991- Page 9

458 The meeting was adjourned at 4:54 p.m.

Submitted by: Reviewed by: Roberta White Annette Talbott
Assistant Committee Counsel

EXHIBIT LOG:

A - Testimony on SB 1037 - Diane Rosenbaum - 1 page B - Amendments to SB 1037 - Department of Justice - 1 page C - Statistical Information on SB 1037 - Staff- 7 pages D - Testimony on SB 829 - Linda Wisher - 4 pages E - Testimony on SB 829 - Frank Biehl - 1 page F - Comparison of Penalties, SB 1037 - Staff - 2 pages G - Newspaper Articles Concerning Death and Injury in the Workplace, SB 1037 - Staff - 11 pages H - Preliminary Staff Measure Summaries on SB 1037 and SB 829 - Staff - 2 pages I - ORS Information on SB 829 - Staff- 1 page

These minutes contain materials which paraphrase and/or summarize statements made during this session. Only text enclosed in quotation marks report a speaker's exact words. For complete contents of the proceedings, please refer to the tapes.