§ 372.6. Proceeding to Compel Discovery.

(a) A party, intervenor, or obligor claiming that its request for discovery pursuant to Sections 372 and 372.1 has not been complied with may serve and file with the Administrative Law Judge or the Appeals Board, if the Appeals Board is hearing the case, a motion to compel discovery naming as respondent the party refusing to comply. The motion shall comply with Section 11507.7 of the Government Code and shall state:

(1) Facts showing that respondent refused or failed to comply with Section 372 or Section 372.1;

(2) A description of the matters sought to be discovered;

(3) The reason or reasons why such matter is discoverable under these rules; and

(4) A reasonable and good faith attempt to contact the respondent for an informal resolution of the issue has been made; and

(5) The ground or grounds of respondent's refusal so far as known.

(b) The motion to compel discovery shall be served upon respondent and filed within 15 days after respondent first evidenced a refusal or failure to comply with Sections 372 and 372.1, or within 30 days after the discovery request was made and respondent has failed to reply to the request or within another time stipulated by the parties with the approval of the Administrative Law Judge or the Appeals Board, whichever period is longer. The motion shall comply with Section 371, subsections (a) and (b).

(c) The hearing on the motion to compel discovery shall be held within 15 days after the motion is made, or a later time that the Administrative Law Judge or the Appeals Board may, on its own motion for good cause determine. Respondent shall have the right to serve and file a written answer or other response to the motion before or at the time of hearing. The answer must comply with Section 371, subsections (a) and (b). The hearing may be conducted by telephone or other electronic means as provided in Government Code Section ~~11140.30~~ 11440.30. The parties may stipulate, with the approval of the Administrative Law Judge or the Appeals Board, to waive a hearing on the motion to compel discovery, provided that the stipulation provides a date by which respondent shall file its response and requires that the order on the motion shall issue within 30 days of the date the motion was filed.

(d) Where the matter sought to be discovered is under the custody or control of respondent and respondent asserts that the matter is not a discoverable matter under the provisions of Section 372.1, subsections (a) through (d), or is privileged against disclosure under subsection (f), the Administrative Law Judge or the Appeals Board may order that the matter be lodged with it and examined in accordance with the provisions of subdivision (b) of Section 915 of the Evidence Code. The Administrative Law Judge or the Appeals Board shall decide the motion based upon the matters examined in camera, the papers filed by the parties, and such oral argument and additional evidence as the Administrative Law Judge or the Appeals Board may allow.

(e) Unless otherwise stipulated by the parties with the approval of the Administrative Law Judge or the Appeals Board, the Administrative Law Judge or the Appeals Board shall, no later than 15 days after the hearing, issue a written order denying or granting the motion. The Administrative Law Judge or the Appeals Board shall promptly serve a copy of the order to each party or representative. Where the order grants the motion, in whole or in part, the order shall set forth the matters the moving party is entitled to discover under Sections 372 and 372.1. The order shall not become effective until 10 days after the date the order is served. Where the order denies the motion in its entirety, the order shall be effective on the date it is served.

Note: Authority cited: Sections 148.7, 149.5 and 6603(a), Labor Code. Reference: ~~Section~~ Sections 11440.30 and 11507.7, Government Code; and Sections 148.7, 149.5 and 6603(a), Labor Code.

§ 372.8. Discovery; Exclusive Provisions.

The provisions of Sections 372, 372.1, 372.2, and 372.3~~, and 372.9~~ provide the exclusive right to and method of discovery as to any proceeding within the jurisdiction of the Appeals Board.

Note: Authority cited: Sections 148.7, 149.5 and 6603(a), Labor Code. Reference: Sections 148.7, 149.5 and 6603(a), Labor Code.

§376. Time and Place of Hearing.

(a) Appeals shall be heard promptly.

(b) Appeals relating to a special order, order to take special action, the reasonableness of the abatement period and an expedited proceeding shall be given priority over other proceedings.

(c) When the Appeals Board is notified that a case is being reviewed by the Bureau of Investigations or any prosecuting authority, the Appeals Board shall delay the hearing until notified that review is concluded or for a period not exceeding three years, whichever occurs earlier. If the Appeals Board is notified that criminal charges have been filed, the Appeals Board shall subsequently extend the delay until completion of the criminal case, which shall be deemed to occur on the date of a verdict of not guilty, a dismissal of the case by a court, or the date of sentencing after a verdict or plea of guilty or no contest. The Appeals Board may also delay the case beyond three years from the date of the incident on the written request of a party or prosecuting authority if necessary to allow the Bureau of Investigations or any prosecuting authority to conclude its review or criminal prosecution of the case.

~~(d) The Appeals Board shall set the place of the hearing at a location as near as practicable to the place of employment where the violation is alleged to have occurred. When making this determination, the Appeals Board's evaluation will include the location of Appeals Board hearing venues, the availability of Administrative Law Judges, the location of the parties and the witnesses.~~

(d) A hearing may be conducted by videoconference as provided in Government Code Section 11440.30 of the Administrative Procedure Act, if each participant in the hearing has an opportunity to participate in and to hear the entire proceeding while it is taking place, to observe the exhibits, and to observe the hearing participants to the extent feasible.

~~(e) When setting hearings, the Appeals Board will consider the following:~~

~~(1) The type and complexity of the case.~~

~~(2) Whether multiple hearings can be set on the same day without necessitating a continuance.~~

~~(3) The parties' projection of the length of time needed for the hearing.~~

~~(4) The Administrative Law Judge's projection of the length of time needed for the hearing.~~

~~(5) Any other fact deemed relevant by the Administrative Law Judge or Presiding Administrative Law Judge.~~

(e) For each hearing, other than expedited proceedings set pursuant to section 373, the Appeals Board shall determine, and include in any notice of hearing, the following information: the date(s), time(s), and length for the hearing; the format for conducting the hearing, whether in-person or by videoconference or a combination thereof; and the physical location of the hearing if the hearing includes an in-person format. If a videoconference hearing is selected, the notice of the hearing shall provide instruction on how to participate in the videoconference, identify the necessary technological equipment, and indicate what to do if technical problems arise.

(1) Factors and criteria relevant to these determinations, which may be addressed or discussed at prehearing or status conferences, include, but are not limited to, the following:

(A) Evidentiary presentation and case management issues;

(B) Whether multiple hearings can be set before an Administrative Law Judge on the same day without necessitating a continuance;

(C) The parties' and Administrative Law Judge's projection of the length of time needed for the hearing;

(D) The place of employment where the violation is alleged to have occurred;

(E) The location and suitability of Appeals Board hearing venues;

(F) The availability of Administrative Law Judges, witnesses, and parties;

(G) The location of the parties and the witnesses;

(H) Transportation barriers or travel distance required for attendance at a hearing, for any party or witness;

(I) Hardship caused by time away from current employment or other responsibilities that would be required of a party or witness in order to attend a hearing;

(J) Inability of a party or witness to secure care for children, other family members, or dependents that would unduly hinder travel to a hearing;

(K) The health and safety of parties, witnesses, representatives, and Appeals Board staff;

(L) Any factors requiring a more expeditious hearing date;

(M) Stipulations of the parties;

(N) Other hardships or impediments raised by a party or witness;

(O) Any other fact deemed relevant by the Administrative Law Judge or Presiding Administrative Law Judge.

(2) For hearings set for the videoconference format under subdivision (e) or (g), in whole or in part, the Appeals Board may issue orders requiring prehearing lodging of proposed exhibits via OASIS. Prehearing lodging of exhibits shall not be required more than three working days prior to the hearing. The Appeals Board will not review or consider any lodged documents for substance until introduced by a party or representative at hearing.

(A) Notwithstanding the existence of an order requiring prehearing lodging of exhibits, the Appeals Board may grant parties the opportunity to utilize additional exhibits during the hearing not previously lodged, upon a showing that good cause exists, that no prejudice would occur, or such other showing deemed sufficient by the Appeals Board in its discretion.

(3) If the Appeals Board orders that the hearing occur by videoconference under subdivision (e) or (g), in whole or in part, and a witness, subpoenaed person, party, or representative contends, in a reasonable amount of time prior to the hearing, that they do not have access to the technological equipment necessary to attend, comply, and/or conduct the hearing by videoconference, the Appeals Board will make facilities available where they can access necessary equipment. The Appeals Board may require evidence regarding such claims before making facilities available.

(f) During any prehearing or status conference, each party and party representative shall be prepared to discuss whether to set the matter for a hearing in person, by videoconference, or combination thereof, and be prepared to discuss any relevant criteria set forth in subdivision (e)(1).

The Appeals Board may require evidence supporting the application of these criteria to the specific case.

(g) The Appeals Board shall set the date(s) for hearings for expedited matters pursuant to section 373. An expedited hearing shall be set for the videoconference format. The Appeals Board may, in its discretion, modify the expedited hearing format after it is initially set. If a party believes that the videoconference format would be inappropriate for the expedited hearing, it may request, either at the status conference or pursuant to the procedures set forth in subdivision (h), that the Appeals Board modify the hearing format to an in-person hearing, with reference, without limitation, to the relevant criteria set forth in subdivision (e). The Appeals Board may require evidence supporting the application of these criteria to the specific case.

(h) Government Code section 11440.30, subdivision (b)(2), permits a party to object to the selection of the videoconference hearing format and requires the Appeals Board to consider the objection. Where a party objects to the Appeals Board's selection of the hearing format, except where otherwise directed by Administrative Law Judge, the objection shall be in the form of a written motion in compliance with section 371, identifying the requested change in the hearing. If the facts supporting the objection first become known after the hearing commences, the objecting party shall file the motion as soon as the facts supporting the motion become known. Factors relevant to the Appeals Board's exercise of discretion on objections include, but are not limited to, whether the objecting party has demonstrated that it will be prejudiced or its due process rights will be compromised if it conducts the hearing in the selected format, with reference to the criteria set forth in subdivision (e), without limitation. The motion must be accompanied by evidence in the form of either declarations (pursuant to section 347, subdivision (i)) or specific references to witness testimony and citation to the record. The Appeals Board may also reconsider the hearing format on its own motion at any time.

(i) For purposes of the Appeals Board's rules set forth in Chapter 3.3, when a hearing is ordered to occur by videoconference, the videoconference format of the hearing will constitute the place of hearing and hearing room. To the extent the rules set forth in Chapter 3.3 provide a right to appear in person or personally, that right is satisfied by the videoconference appearance. Further, subpoenas may be issued pursuant to section 372.2, either subdivision (a) or (c), requiring attendance of a person at the videoconference place of hearing, provided the subpoena includes sufficient instruction and information on how to participate in the videoconference, identifies the technological equipment necessary, and indicates what to do if technical problems arise. The Appeals Board shall furnish optional subpoena forms upon request for attorneys' use.

Note: Authority cited: Section 148.7, Labor Code. Reference: Sections 11410.20, 11415.10, 11410.40 and 11440.30, Government Code; Sections 148.7, 149.5 and 6308(c), Labor Code.

§ 376.8. Administrative Law Judge Preparation of Hearing Record.

The Appeals Board or the assigned Administrative Law Judge shall create a hearing record as defined by Section 347, subsection ~~(r)~~ (s) , and shall:

(a) Mark the face of each documentary exhibit in accordance with the following designations:

(1) Division exhibits shall be consecutively marked with numbers beginning with the number "1."

(2) Employer's exhibits shall be consecutively marked with letters beginning with "A." If every letter of the alphabet is used, then the lettering shall continue with the designation "AA" throughout the remaining alphabet.

(3) Third-party exhibits shall be labeled "Third-party - 1" and consecutively thereafter.

(4) Joint exhibits as agreed to by the parties shall be marked as "Joint-exhibit - 1" and consecutively thereafter.

(5) Physical, mechanical or demonstrative evidence returned to a party for storage during the pendency of the litigation pursuant to Section 376.4 shall be identified in both the recorded and written hearing record pursuant to subsections (1) through (4) above.

(6) Sealed or confidential exhibits shall be identified and labeled in the recorded and written hearing record pursuant to subsections (1) through (4) above, with the Administrative Law Judge selecting identifying labels that do not reveal the confidential nature of the sealed or confidential exhibit(s).

(7) Documents may be redacted by the Administrative Law Judge to conceal confidential information that is not relevant to the issues being heard.

(b) At the conclusion of the hearing and closure of the evidentiary record, transmit the paper exhibits entered into evidence to the scanning technician, who shall, within two working days of receipt, scan the exhibits into the "hearing record" portion of the electronic case file.

(c) Attach to the decision a summary of the entire evidentiary record labeled "Addendum A." Addendum A shall contain a list of all exhibits entered into evidence and the proponent of that evidence, the identity of witnesses testifying at the hearing, any exhibits that were offered as evidence and marked as an exhibit but were excluded from the evidentiary record, whether the hearing was electronically recorded or recorded by a certified court reporter, and the following certification:

I, ____ "ALJ Name" _____, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hear the above-entitled matter, hereby certify the proceedings therein were electronically recorded or recorded by a certified court reporter. If the proceedings were recorded electronically, the recording was periodically monitored during the hearing. Either the electronic recording or the recording made by a certified court reporter, along with the documentary and other evidence presented and received into evidence during or after the hearing, constitutes the official hearing record of the proceedings. To the best of my knowledge the recording equipment, if utilized, was functioning normally and exhibits listed in this Appendix are true and correct, and accurately represent the evidence received during or after the hearing.

Note: Authority cited: Section 148.7, Labor Code. Reference: Sections 6603, 6608, 6620, 6621 and 6629, Labor Code.