

DEPARTMENT OF INDUSTRIAL RELATIONS  
OCCUPATIONAL SAFETY AND HEALTH  
APPEALS BOARD

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Attachment No. 2

**INITIAL STATEMENT OF REASONS**

CALIFORNIA CODE OF REGULATIONS

TITLE 8: Division 1, Chapter 3.3, Articles 1, 3 and 4,  
Sections 350.1, 371, 371.1, 373, 374.2 and 376

Modification of the Occupational Safety and Health Appeals Board's  
Rules of Practice and Procedure

SUMMARY

The Occupational Safety and Health Appeals Board (Board) is charged with adjudicating appeals from citations issued by the Division of Occupational Safety and Health. Labor Code section 148.7 authorizes the Board to adopt rules of practice and procedure to fulfill its mandate. The Board has long had such rules, which it supplements and amends, as needed. Currently, the Board has identified five existing rules, which, as explained further below, will be improved by amendment, and one new rule to be adopted, as explained. These changes implement and make specific the Board's authority to establish rules of practice and procedure.

SPECIFIC PURPOSE AND FACTUAL BASIS OF PROPOSED ACTION

Section 350.1, Authority of Administrative Law Judge

This regulation is amended to include holding a status conference as specifically within the powers of the Administrative Law Judge. Status conferences are currently held by Administrative Law Judges pursuant to their authority under this section to "take other action during the pendency of the proceeding to regulate the course of a prehearing, hearing, or settlement conference, that is deemed appropriate by the Administrative Law Judge to further the purposes of the California Occupational Safety and Health Act." The amendment is necessary to create a procedure for resolving and following up on discovery, pleading, or other pre-hearing issues prior to the commencement of the formal hearing. This interim procedure gives the

Judges more opportunity to resolve issues, and in some cases the entire case, prior to holding an evidentiary hearing. Such ability increases the efficiency of the Board in resolving matters before it.

### Section 371, Prehearing Motions

This section is amended to conform subsection references to section 355, Proper Method of Service & Official Address of Record, to reflect changes made in a 2007 rulemaking to section 355. There is no substantive change to this regulation.

### Section 371.1, Motions Concerning Hearing Dates

This section addresses the Board's rules pertaining to motions filed by the parties to continue hearing dates set by the Board.

Subsection (b) is amended to allow parties to serve each other by fax, email, or personal service if an emergency arises, while specifying that the motion to the Board may not be e-mailed. Also, technical, non-substantive changes are proposed to provide greater clarity and to correct typographical errors. These amendments are necessary to remove needless service requirements among parties and remove potential technical opposition to continuance motions in case of emergency. Also, this rule prohibits filing a continuance motion with the Board by e-mail. This rule is needed because the Board does not monitor e-mail and cannot receive motions and determine timeliness through that manner of service. The Board does communicate with parties via e-mail, which practice remains unaffected by the rule, but this rule is needed to assure proper handling of time-sensitive continuance motions and responses.

Subsection (b)(2) is amended to specify that the facts supporting a motion for continuance must be submitted in a declaration signed under penalty of perjury. This amendment is needed to discourage inflated claims made to support the motion, which furthers the Board's ability to rule on motions based on the facts. This will make the Board's rulings on continuances more accurate.

Subsection (b)(3) is amended to state that the Board will not rule on a motion for continuance unless it is provided the other parties' position on the motion or the time for the other parties to respond has passed. This amendment is necessary to assure that all reasonably necessary information is obtained before the Board rules on the motion. The Board concludes that its continuance deliberations will better address the needs of the parties, and preserve the Board's resources, if the rulings are based on a more complete factual basis. Ruling on a continuance based only on the information provided by one side does not result in the most accurate rulings. By requiring the moving party to discern the position of its opponent and to include that in the continuance request increases the likelihood of getting a complete picture of the case before ruling on the continuance.

Subsection (c) is amended to clarify when any opposition to the motion must be filed with the Board. This amendment is needed to promote timely receipt of any opposition so that prompt and accurate rulings may be made.

Subsection (d) is amended to state the Board's commitment to ruling promptly on continuance motions, and to correct typographical errors. Under this proposal, the content of existing subsection (d) has been incorporated, in large part, into the revised subsection (e). This amendment is needed to organize the regulatory text effectively. The added portion requires the Board to rule promptly. This rule is necessary to better preserve Board resources and prevent cases from undue delay.

Subsection (e) is amended to incorporate language previously included in subsection (d) and to specify that each continuance motion will be considered on its own merits. The section states that continuances will be granted upon an affirmative showing of good cause and specifies factors that will be considered in determining whether good cause exists. Under this proposal, the language currently contained in subsection (e) is moved to revised subsection (f). These amendments are needed to provide better organization of the regulatory text and to define "good cause" for a continuance motion. The factors selected to define "good cause" are the kinds of facts that the Board has determined are sufficiently compelling to merit the resulting delay. Specifically, the current rule lists only death, illness, or other "good cause" as meriting a continuance. The better rubric for evaluating whether delaying a case is appropriate is to consider the requestor's prior use of the continuance motion, prejudice to any party resulting from a continuance, the ability of the parties to select a future date for the hearing, conflicts with other court dates, whether a partial continuance will suffice, whether the Employer has abated the violation, and any other relevant fact. In the Board's assessment, these types of facts help determine whether a continuance is warranted. By including this list in the rule, the parties can provide relevant facts to the Board so that more accurate rulings may result. By allowing the consideration of "any other fact," the Board remains flexible in its ability to respond to novel situations.

Subsection (f) is amended to incorporate the language previously included in subsection (e). The exact language previously stated in subsection (f) is moved to new subsection (g) in this proposal without regulatory change. These amendments are needed to provide better organization of the regulatory text.

Subsection (g) is added to incorporate the language previously stated in subsection (f) and to add that a previously denied motion for continuance may be renewed at hearing, and new information may be provided, if the motion was originally denied without prejudice. This amendment is necessary to provide parties with an ongoing opportunity to present all their evidence, and changing the continuance rule from one of prohibiting renewed continuance motions, to one where continuance motions may be renewed as the facts develop over time is more likely to result in evidentiary records that are more accurate and complete, and thus result in more accurate decisions.

### Section 373, Expedited Proceedings

Subsection (b) is added to specify that the Board will expedite an appeal on its own motion if it is aware that an alleged violation remains unabated, or abatement is at issue, and the violation falls within one of the listed classifications. Subsections (1) through (4) state steps in the process that will occur when an appeal is expedited under this provision. This new section is needed to place the regulated public on notice of circumstances under which the Board will expedite a proceeding and of the primary steps in the process. The expedited procedure is needed to curtail the number of employees exposed to workplace hazards during the otherwise lengthy appeal

process. This regulation is based on a pilot project wherein the Board tested and considered other timelines for setting dates for proceedings. The timelines selected in this regulation balance the need to quickly process serious citations that have not been abated with the rights of parties to prepare evidence for a fair hearing. The regulation implements and makes specific Board practice and procedure.

#### Section 374.2, Status Conference

This regulation is added to articulate the current practice of holding status conferences as needed under the authority of the Administrative Law Judge under Regulation 350.1. This section identifies the issues addressed at a status conference, and provides for the use of sanctions by an Administrative Law Judge for a party's failure to appear at and participate in a status conference. These sanctions are the same as are currently contained in Regulation 374, Prehearing Conferences. The issues addressed at a status conference are not identical to those of a prehearing conference. The matters suitable for a status conference are 1) the issues to be presented, 2) the witnesses to be called, 3) the status of discovery requests, 4) pending and contemplated motions, and 5) any other matters that may aid in expediting the hearing or otherwise disposing of the case. A status conference may be set by an administrative law judge as needed to regulate the course of the proceeding. This regulation is necessary to allow administrative law judges to follow up on determinations made at a pre-hearing conference, and to address discovery or other issues as they arise after the pre-hearing conference and before the hearing. This procedure gives more control of the proceeding to the administrative law judge, which will result in better, earlier participation by the parties, reducing delay and resulting in more efficient use of Board resources. This regulation implements and makes specific board practice and procedure.

#### Section 376, Time and Place of Hearing

Subsection (c) of this provision allows the Board to delay appeal proceedings when the Division of Occupational Safety and Health's Bureau of Investigations, or other prosecuting authority, is reviewing an employer's conduct associated with an alleged violation to determine if a case should be referred to the district attorney for possible criminal charges to be brought against the employer. This proposal amends the provision to state that the Board will delay the appeal proceedings for up to three years as opposed to the two years currently provided for in the regulation. This amendment is needed because the statute of limitations for charging an employer with criminal conduct that can result in imprisonment in the state prison is three years, so the two years specified in the regulation is insufficient to allow a criminal prosecution to be commenced prior to the administrative hearing.

Subsection (d) states that the Board will set a hearing at a location as near as practicable to the place of employment where the violation is alleged to have occurred. This proposal would add factors to be considered when the Board is deciding the best location for the hearing. This amendment is needed to provide guidance regarding the phrase "as near as practicable" without unduly limiting the Board's discretion and ability to determine a hearing's location which is periodically limited by budgetary constraints.

Subsection (e) is new and is added to specify factors the Board will consider when deciding how best to calendar hearings. This amendment is needed to provide guidance regarding the Board's practices when setting hearings without unduly limiting the Board's discretion and ability to

change its calendaring procedures. Previously, there were no guidelines for the Board to follow in determining which factors to consider in setting initial hearings. Attorneys and parties who appear before the Board expressed concern when calendaring procedures were changed to set multiple hearings on a given day. To avoid this, and to curtail the number of continuance motions received in the future, the Board has determined the complexity of the case, the parties' estimate of the length of the case, the Board's estimate of the length of the case, and the ability of an ALJ to administer the case along with other cases set at the same time, will determine when a case may be set for hearing. Thus, facts unrelated to either the Board's limited resources or the needs of the case or the parties do not influence the setting of the initial hearing. This avoids any improper considerations, or bias, to impact the initial setting of hearings. This regulation makes specific the Board practice of setting hearings.

#### DOCUMENTS RELIED UPON

None.

#### REASONABLE ALTERNATIVES THAT WOULD LESSEN ADVERSE ECONOMIC IMPACT ON SMALL BUSINESSES

No reasonable alternatives were identified by the Board and no reasonable alternatives identified by the Board or otherwise brought to its attention would lessen the impact on small businesses.

#### SPECIFIC TECHNOLOGY OR EQUIPMENT

This proposal will not mandate the use of specific technologies or equipment.

#### REASONABLE ALTERNATIVES CONSIDERED

The Board considered variations on the regulatory text included in this proposal in conjunction with an advisory committee comprised of stakeholders. The Board concluded that none of the alternatives proposed would better assist the Board in fulfilling its mandate or be more effective or efficient. Given the multitude of factors the Board must consider in determining when and where hearings should be held, the Board concluded that the other alternatives considered would unduly diminish its discretion, unreasonably restrict needed flexibility to address high volumes of appeals, allow appeals to grow stale due to the extensive passage of time, and/or would require additional funding because they would unreasonably increase costs to the Board.

#### EFFECT ON SMALL BUSINESSES

The proposed amendments will not have an adverse impact on small businesses.

#### ECONOMIC IMPACT ON BUSINESS

The proposed amendments to these regulations will not have a significant adverse economic impact on business because they consist, primarily, of clarifications to the Board's rules of practice and procedure. The only significant change in these rules is the provision pertaining to

expedited proceedings for specified appeals in which abatement is at issue, and this rule only requires the parties to act within a shorter period of time. It imposes no new requirements on businesses that might not otherwise be required of them as part of a standard appeal and these appeals constitute a small proportion of appeals brought before the Board.