Chapter 26

APPEALS AND HEARINGS

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Chapter 26

APPEALS AND HEARINGS

Policy Statement: It is the policy of the Division of Occupational Safety and Health (DOSH), also known as Cal/OSHA or the Division, to ensure that employers are informed of their statutory right to contest the Division's enforcement actions, that all cases scheduled for an appeals hearing are reviewed prior to the hearing, and that Division personnel follow the Appeals Boards' Rules of Practice and Procedure when participating in the appeals process.

Authority: DOSH will administer this policy in compliance with all applicable laws, rules, and guidance:

- California Labor Code, Sections 6319, 6600 and 6602, and Title 8 California Code of Regulations Sections 345 through 397.

PROCEDURES:

A. APPEALS

1. Employer and Employee Appeal Rights

   a. Employer

   An employer may contest any Division enforcement action within fifteen (15) working days of the receipt of an enforcement action.

   NOTE: The term enforcement action refers to a Citation and Notification of Penalty, a Special Order or An Order to Take Special Action.

   b. Employee

   An employee, or an employee's representative, may contest the reasonableness of the time fixed for abatement within 15 working days of the issuance of the enforcement action.

2. District Responsibilities

   a. At the time of the Closing Conference, the District Manager and/or compliance personnel shall inform the employer that he or she has the right to contest the enforcement action by filing an appeal with the Occupational Safety and Health Appeals Board in Sacramento with fifteen (15) working days of the receipt of the enforcement action.

   NOTE: Each District Office shall maintain a supply of the

Appeal Forms (formerly Notice of Contest Forms), including Appeal Forms for employers and for employees, and furnish the Appeal Forms upon request.

b. If an employer inadvertently sends an Appeal Form (formerly Notice of Contest) to a District Office, the District Manager shall ensure that the Notice is:
    1. (1) Immediately date-stamped when it is received; and
    2. Forwarded to the Occupational Safety and Health Appeals Board in Sacramento.

c. In any case where other Division or non-Division personnel participated in an inspection or investigation, the District Manager shall inform these individuals when an Appeal Form (formerly Notice of Contest) is received, and the date of hearing, when available.

d. When requested by the Board, copies of the pertinent documents in the employer's file shall be forwarded to the Appeals Board after ensuring that the docket number is written on all documents forwarded.

B. OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD RULES

All Managers and compliance personnel shall be familiar with the Rules of Practice and Procedure of the Occupational Safety and Health Appeals Board. See 8 CCR Sec. 345 through 397.

C. APPEALS PROCESS

1. Case Review

    a. Upon receiving the docketed appeals notice by the Appeals Board, the District Manager shall review the case to determine if:
        1. The case will be sustainable at a hearing;
        2. Legal Unit representation is required according to the mandatory criteria set forth in Section C.2.c.(1); or
        3. Legal Unit assistance is to be requested according to the discretionary criteria set forth in Section C.2.c.(2).

    b. If, after review of the case, the District Manager believes that any part of the enforcement action contains an error, or is not supported by the evidence, the District Manager shall contact the Legal Unit for assistance in amending or withdrawing the

enforcement action. All requests for amendment or withdrawal shall be made to the Legal Unit in writing, together with copies of appropriate documents. Also, see Section G.

2. Legal Unit Representation

   a. General Policy
   It is the policy of the Division to provide legal representation only in those cases warranting such representation since it is not possible for the Legal Unit to represent the Division in all matters calendared for hearing. The District Manager shall adhere to the following referral criteria in determining which cases must be referred to the Legal Unit for legal representation and which cases may be referred to the Legal Unit for legal representation, if available.

   b. Case Referral Process

      1. District Manager
      If, after review, the District Manager concludes that legal representation is required, or that legal assistance is desirable, the District Manager shall complete a Cal/OSHA Form 23R (Appeal of Citation Referral Form), and send the Form 23R to the Regional Manager for review and approval. See Attachment R. If the District Manager concludes that legal review of a settlement is needed, the District Manager shall complete a Cal/OSHA Form 23S (Settlement Referral Form), and send the Form 23S to the Regional Manager for review and approval. See Attachment
      S. All instructions on the Forms should be followed, including how to submit the form to the legal unit and where to upload the required accompanying documents.

      2. Regional Manager
      If, after review, the Regional Manager concludes that a case referral or settlement review is warranted, the Regional Manager shall sign Form 23R or 23S and forward the Form.

         NOTE: District and Regional Managers should not delay in sending requests for legal representation and/or assistance to the Legal Unit since legal assistance may not be available for late requests because of the time commitments of Legal Unit attorneys.

   c. Referral Criteria

      1. Mandatory Criteria

The following cases must be referred by the District Manager to the Legal Unit for legal representation:

a. Issues concerning the scope of Division jurisdiction. The following employment categories often involve an issue of jurisdiction and the District Manager shall ascertain whether the issue will be raised in an appeal:

   i. Transportation (airlines, trucking companies, railroads);

   ii. Mining;

   iii. Agriculture; and

   iv. Contractors performing work on federal property.

b. Anticipated challenges to inspection procedures.

   NOTE: The District Manager shall assume, unless there is a specific written indication to the contrary, that any appeal in which an inspection warrant was issued to gain entry or in which the employer during the course of the inspection questioned the Division's right to perform the inspection, denied that consent had been given, asserted that walkaround privileges had been denied, or challenged other inspection procedures, involves an anticipated challenge to inspection procedures.

c. Any appeal involving a citation, order or penalty including but not limited to any of the following:

   i. The following Title 8 Safety Orders:

      I. Sec. 4184 (general point of operation);

      II. Sec. 5096, et seq. (noise);

      III. Sec. 5156, et seq. (confined space);

      IV. Sec. 1529 (construction-asbestos); or V. Sec. 5208-5215, 5219 and 5220 (carcinogens).

   ii. Cases which fall within the following classifications:

      I. Accidents actively investigated by the BOI;

      II. Citations alleging willful violations;

III. Health citations requiring implementation of engineering controls; or

IV. Cases requiring the testimony of expert witnesses other than the compliance person who issued the citation(s).

iii. Special Orders or Orders to Take Special Action.

d. Any Permit or License revocation or suspension shall be referred to the Legal Unit for evaluation and preparation of the necessary proceedings.

e. Any case which has generated a high degree of media contact or interest shall be forwarded to the Legal Unit for evaluation in order to facilitate consistent and full coordination between Headquarters and field compliance.

f. Any case in which a citation has been issued in a multi-employer setting to a creating, controlling, or correcting employer, whose own employees are not exposed to the violative condition.

3. Discretionary Criteria

The following cases may be referred by the District Manager to the Legal Unit for legal representation:

a. Factually complex cases;

b. Cases involving numerous citations, numerous witnesses, other witness problems;

c. Cases involving complex safety or health inspections;

d. Cases involving legal issues as to the applicability of cited safety orders, either generally or specifically; or

e. Cases where an attorney is representing the employer.

D. DISCOVERY PROCESS

1. Case Referred to Legal Unit

f the District Manager receives requests for discovery, including letters or subpoenas duces tecum, and the case has been referred to the Legal Unit for representation or for assistance, the District Manager shall refer the request for documents to the Legal Unit.

2. Case Not Referred to Legal Unit

In all other cases, the request is to be honored immediately by the District Manager. Responses must include all material, forms and photographs, except for the employee complaint form, where the employee has requested confidentiality, and any other confidential information.

NOTE: In determining which materials in any file held by the Division are confidential, District Managers and compliance personnel shall seek the assistance of the Legal Unit.

E. PRE-HEARING CONFERENCES

The Appeals Board may usually schedule a pre-hearing conference to simplify the hearing. The District Manager will comply with any pre-hearing order issued by the Appeals Board. See Chapter-25.

F. HEARING

1. Preparation
    a. Investigative Work Product
        1. Since preparation for an appeals hearing begins at the time the inspection or investigation is conducted, the District Manager shall ensure that investigative work product produced by compliance personnel under the District Manager's supervision has the ability to withstand an appeal at a hearing of the Occupational Safety and Health Appeals Board.
        2. District Managers and compliance personnel who participate in an appeals hearing shall be fully prepared with appropriate evidence and witnesses.

            NOTE: Continuances are seldom granted by the Appeals Board and only in cases where good cause can be shown.

    b. Compliance Personnel
        1. At the hearing, compliance personnel who conducted the inspection or investigation will be the key witness for the Division and may have to also present the Division's case. The Division bears the burden of proof of all the elements of the violation(s) and shall be well-prepared and acquainted with all the facts and safety orders related to the unsafe condition.

2. In accident cases, employee witnesses are necessary to explain how the accident occurred, because compliance personnel were not percipient witnesses to the violation.
3. Compliance personnel should anticipate and prepare for the issues that will be contested, especially the following:
    a. Was the inspection conducted in accordance with the requirements of the law? (appropriate credentials, etc.)
    b. Was there, in fact, a violation of the cited safety/health order? Was there documented employee exposure to the safety/health order violation? How does the evidence establish the classification of the violation?
    c. How were the gravity (severity, extent, likelihood), size, history, and good faith factors determined, including the facts that influenced the decision on each of these issues?
    d. How were the calculations on the Proposed Penalty Worksheet and application of credits made?
    e. How was the abatement date selected?
    f. Are the abatement changes required reasonable?

2. Subpoenas
   The Division may issue subpoenas to obtain the testimony of witnesses and/or subpoenas duces tecum to compel the production of records or to issue "courtesy" subpoenas for government officials. See Chapter-10 for guidance on issuing subpoenas and subpoenas duces tecum.
3. Evidentiary Considerations Pertaining to Repeat Violations
    a. A copy of the prior citation(s) must be introduced into evidence.
    b. The validity (or correctness) of the prior citations must be established either by:
        1. Testimony of compliance personnel that he or she has reviewed the Division's official file, and that the copy of the citation(s) being presented is a true and correct copy of the "original" in the file, and that the citation has become a final order of the Appeals Board;
        2. By a declaration of the District custodian of records to the same effect
           (when the citation which is the basis of the repeat charge

is not in the District Office file); or

3. Testimony of the original compliance personnel, where more than one safety engineer or industrial hygienist is involved.

c. The Division must demonstrate that the prior citation(s) have been properly served on the employer by either:

1. Introducing a true and correct copy of the receipt for certified mail returned by the Post Office; or

2. Introducing a true and correct copy of the declaration of personal service by compliance personnel which demonstrates that the citation was served upon a responsible management official.

NOTE: The Appeals Board has held that personal service upon a foreman at a construction site is not adequate. Therefore, if a higher level management official is not available, the citation(s) must also be sent by certified mail, or personally delivered, to the business address of the employer.

d. The Division must demonstrate that prior violation(s) have been abated by either introducing a true and correct copy of the employer's Cal/OSHA Form 160 or Form 161, or testimony by compliance personnel that upon reinspection he/she determined that the violative condition underlying the prior citation had been corrected.

NOTE: This element need not be proved if compliance personnel testifies that the prior citation was in reference to a different construction site or to different equipment or machinery in the employer's establishment.

e. The Division must demonstrate that the prior and subsequent violations of the same safety order were based upon conditions, practices, means, methods, operations or processes which were similar by either:

1. Comparing the facts of the two citations if the documents are drafted in such a manner to show their similarity; or

2. Introducing testimony of compliance personnel who issued the prior citation to establish that the factual circumstances were similar to those underlying the present citation.

f. The Division must also establish that the prior citation has become a final order of the Appeals Board. If the prior citation

has not been appealed, the citation would have become a final order of the Appeals Board by operation of law pursuant to Labor Code Sec. 6601. If the prior citation has been appealed, the final order disposing of the matter, either after hearing or by stipulation, must have been issued prior to the date of the violation referenced in the subsequent citation.

NOTE: If legal assistance in presenting an appeal in which a repeat violation is in issue has not been requested, compliance personnel should, on all occasions, call the Legal Unit to discuss the foregoing elements of proof to assure that the Division is prepared to successfully present its case.

4. Hearing Format

    a. General Procedures

    In general, the hearing will proceed as follows:

    1. The Hearing Officer will open the hearing by calling the case by name.
    2. The Hearing Officer will introduce himself/herself and ask the parties to do the same. Business cards will be exchanged with the employer and a card shall be given to the Administrative Law Judge.
    3. The Division must present its case first.
    4. The Appellant cross-examines the Division and presents his/her case.
    5. The Division cross-examines the Appellant.
    6. The Division may present rebuttal evidence after the Appellant presents his/her case.
    7. Final arguments are made.

    b. Presentation of the Case by Division

    1. Jurisdictional Documents

        a. Compliance personnel should have three (3) copies of the jurisdictional document(s):

            i. One (1) copy for the Hearing Officer;
            ii. One (1) copy for the employer;
            iii. One (1) copy for him/herself; and
            iv. Additional copies may be required for others with party status (e.g., union).

        b. Jurisdictional documents shall include:

a. Appeal Form (formerly Notice of Contest) with any attachment.

b. Notice of Time and Place of Hearing.

c. Notice of Continuance, if applicable.

d. Citation, Special Order, Order to Take Special Action, with proof of service.

e. Notice of Failure to Correct Alleged Violation and of Additional Penalty with proof of service.

f. Amended documents with Appeals Board approval (if the citation or notices were changed after appeal).

2. Law and Motions
   District Managers and compliance personnel shall make any appropriate motions, e.g., amendments to citations, agreements or stipulations with the employer about evidence or issues to be resolved.
   EXCEPTION: District Managers and compliance personnel shall not make any motion pertaining to the professional conduct of an Administrative Law Judge (ALJ) at any time. District Managers and compliance personnel desiring to make a motion pertaining to the conduct of an ALJ shall request, through the Regional Manager and the Deputy Chief for Field Operations, that the Chief Counsel of the Division make such a motion.

3. Compliance Personnel to Qualify as Expert Witness

   a. Generally, compliance personnel will not testify as experts, but rather as percipient witnesses. For definition of expert and percipient witness, see Chapter-14.

   b. In order to qualify as an expert witness to give an opinion, compliance personnel shall lay the proper foundation by indicating:

      i. Educational background, degrees received, institution graduated from, date, and major study and any professional certifications obtained.

      ii. Professional society memberships.

      iii. Work experience in engineering, safety, and/or industrial hygiene.

iv. Training program(s) associated with occupational safety and health.

v. Experience acquired while in the employ of the Division.

NOTE: Experience may be presented as a written resume if appellant will stipulate to it. Emphasis must be placed on the experiences in line with the subject matter of the case (e.g., if the subject matter is a violation involving scaffolds, state experiences and knowledge relating to).

4. Testimony

a. Role of Compliance Personnel

The primary role of compliance personnel on the witness stand is to testify to known facts. If qualified as an expert witness, and with preliminary facts already in the record, compliance personnel can express an opinion.

b. Hearsay

Hearsay evidence is admissible to explain or supplement direct evidence. Under the same circumstances, compliance personnel may introduce any written statement of witnesses not present at the hearing. Unless affidavit/declaration procedure in 8 CCR Sec. 372.4 is followed, such statements are hearsay.

c. Guidance

i. Testimony should be confined to the issues connected with the facts of the case, not to unrelated matters.

ii. Compliance personnel should relate briefly in ordinary language the facts in exact chronology, referring to files and notes to refresh his/her memory if necessary.

iii. Testimony should start with initial contact at the place of employment, the type of employment, introduction, presentation of credentials; where opening conference was held, persons present, their titles; walkaround and what was observed relative to the violations in issue.

iv. Any documents, photographs and physical

evidence, e.g., parts of machinery, should be shown to the employer before being introduced into evidence. Provide the employer with a copy of the evidence where possible. Arrange and display any evidence, e.g., photographs, according to the wishes of the Administrative Law Judge.

NOTE: After you have completely presented your case, make a motion to have your documents/exhibits accepted into evidence.

v. A convenient way of preparing for testimony is to carefully review items on the Cal/OSHA Form 1, Form 1A and Form 1B, Field Documentation Worksheets, Notetaking Sheets, Sampling Forms, the enforcement document(s), and the Penalty Calculation Worksheet. Compliance personnel should be familiar with the date of the inspection, the employer's name and address, the number of affected employees, reason for the inspection, and all facts and determinations relating to the alleged violations or orders.

5. Cross-examination of Compliance Personnel by Opposing Side

   When being cross-examined, compliance personnel should give brief, direct, and concise answers.

6. Examination of Witnesses

   a. Questions directed to the witness by compliance personnel should be simple, brief, direct, and related to the subject matter.

   b. If compliance personnel desire to cross- examine a witness, compliance personnel should do so only if the question serves a purpose and furthers the Division's case. As a general rule, it is better not to cross-examine unless it is clearly necessary and there is something to be gained.

   c. If the witness seems mistaken according to documents on hand, the witness should be asked questions about those documents, photographs or other evidence.

7. Closing Statement

After all evidence has been presented from both sides, compliance personnel should make a brief closing statement. The closing statement should summarize the ways in which the evidence presented by the Division supports the Division' case and point out any weaknesses in the employer's evidence.

8. Order or Decision

   After 30 days, the Administrative Law Judge will make a written decision and mail a copy to the parties.

9. Petition for Reconsideration

   a. Within thirty (30) calendar days of the date of a Decision by the Appeals Board, the employer or the Division may petition the Appeals Board to reconsider the Decision of an Administrative Law Judge. The Appeals Board on its own may also order reconsideration. Answers by the Division to a petition or a submission order must be filed within thirty (30) calendar days

   b. If, upon review of a Decision, compliance personnel, the District Manager or Regional Manager determines that reconsideration is warranted, a memorandum requesting reconsideration of the Decision stating the reasons must be forwarded to the Legal Unit no later than 15 calendar days from the date of the Decision. If approved, the Legal Unit shall prepare a Petition for Reconsideration.

      NOTE: If the District Office receives a petition for reconsideration from the employer or other aggrieved party, the petition must be forwarded to the Legal Unit immediately to permit the necessary answer to be prepared.

G. DISPOSITION

1. Legal Representation Has Been Requested

   If the District Manager has requested legal representation, the District Manager shall refer any proposed disposition of the case to the Legal Unit.

   NOTE: See Section G.4.

2. Legal Representation Has Not Been Requested

   a. If the District Manager has not requested legal representation,

the District Manager shall refer any proposed disposition of the case to the Regional Manager. NOTE: See Section G.4.

b. Any stipulations prepared by the District Manager shall be reviewed by the Legal Unit prior to being forwarded to the California Occupational Safety and Health Appeals Board or to the employer for execution. If the Legal Unit does not approve the stipulation as written, or does not prepare a modified revision, within seven working days, the District Manager may proceed at his or her own discretion.

   NOTE: District Managers shall contact the Legal Unit to obtain preprinted stipulations.

3. Concurrence Between Attorneys and Division Management in Disposition of Contested Cases

   In all cases for which legal representation has been requested, the attorney, before changing any part of a citation or penalty or making a final disposition of the case, shall obtain the concurrence of the District Manager or Regional Manager. If agreement between these parties cannot be reached, the matter is referred to the Chief Counsel of the Legal Unit and the Deputy Chief for Field Operations for resolution.

4. Mandatory Administration Approval

   Whether legal representation has been requested or not, it is mandatory that any disposition by any Division personnel of a case falling into one of the following categories shall receive prior approval from the Deputy Chief for Cal/OSHA Enforcement, or from the Chief, before the case can be resolved:

   a. High profile cases, such as those which have received a high degree of media or public interest; or

   b. Dispositions proposing the reduction in the proposed civil penalty of an amount equal to or more than $25,000.

H. OFFICE PROCEDURES

1. When Docketed Appeal Form is Received

   When a docketed Appeal Form is received at a District Office, District Office Support staff shall:

   a. Submit the Docket Notice to the District Manager for review and file on the left inside front cover of the employer's case file;
   NOTE: At the option of the District Manager, a written District Appeal Log may be maintained.

   b. Enter information from the Appeal Form into IMIS.

c. Make a copy of the Docket Notice for compliance personnel involved with the case and, if requested, one for the District Manager.

d. Place a copy of the letter from the Appeals Board attached to the Docket Notice under an ACCO fastener on the left inside front cover of the District Office employer case file.

e. Note an "A" with a felt pen on the folder next to the employer label in order to easily identify that a report is under appeal.

f. Forward, only upon request by the Appeals Board, photocopies of the pertinent information, marked with the docket number, in the specific employer's file which is referenced on the Appeal Form (i.e., Citation, Notice of Civil Penalty) and Proof of Service to the Occupational Safety and Health Appeals Board, 1006 Fourth Street, Fourth Floor, Sacramento, CA 95814.

> NOTE: Proof of Service may be either a completed form "Declaration of Service by Mail" (see Attachment C, Cal/OSHA Form 23C), or a photocopy of the Certified Mail-- Return Receipt Requested receipt and signed green card.

g. Forward, if legal assistance is required, one copy of the complete file (Citation and Penalty, Notice, Penalty Worksheet, compliance personnel's notes, documents, photos, accident investigation report and attachments, statements, etc.), to the Legal Unit. Insert the Appeals Board docket number(s) on the route slip to the Legal Unit.

h. Obtain copies of the original citation immediately upon receipt of the Docket Notice referencing the appeal of a repeat violation, including proof of service, so that compliance personnel can substantiate the "repeat" designation. Certification by the Custodian of Records must accompany the copy of the original citation. See Attachment B (Certification of a Repeat Violation, Cal/OSHA Form 23B).

2. When Notice of Hearing Is Received

   a. Upon receipt of the Notice of Hearing, photocopies are made for the following:

      1. One (1) copy to District Manager;
      2. One (1) copy to compliance personnel;
      3. Three (3) copies for jurisdictional documents packet;
      4. Retain original in the District Employer File.

   b. A hearing calendar shall be maintained. Post the necessary

information (i.e., date, time, place, employer, compliance personnel, etc.) on the calendar.

c. Post the date of hearing on the hearing calendar maintained in the District. The IMIS contest tracking report may be used for entering hearing dates.

d. The original is filed in the District Employer File, immediately on top of the docketed Appeal Form.

3. When a Decision, or Decision After Reconsideration, Is Received Upon receipt of the Decision, District Office Support staff shall:

   a. Make a photocopy of the Decision or Decision After Reconsideration for the Regional Manager, the District Manager and for compliance personnel who were involved with the inspection;

   b. File the original Decision in the employer case file with the Notice of Hearing and any copies of subpoenas, if applicable;

   c. Run an IMIS Case Audit Report and file the Report in the employer case file;

   d. Enter information about the disposition of the contest in IMIS.