

WORKSAFE
safety, health, and justice for workers

California Labor Federation

October 5, 2009

Ms. Traeger and Messrs. Carter and Pacheco:

The California Labor Federation, Worksafe, and the California Rural Legal Assistance Foundation submit the attached proposed rule changes to the Rules of Practice and Procedure of the Occupational Safety & Health Appeals Board, Title 8, CCR Chapter 3.3 for discussion at its October 21, 2009 public meeting.

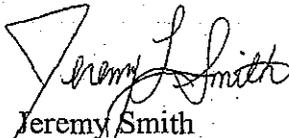
These rule changes are proposed in an effort to address problems that Cal/OSHA inspectors and attorneys and employee representatives have raised at numerous OSHAB Advisory Committee meetings, including the scheduling of multiple hearings before the same Administrative Law Judge on the same day and the rules governing the conduct of administrative hearings which are more onerous than any court of law. The existing rules have led to dismissal of meritorious cases, inability of essential witnesses to attend hearings, exclusion of compelling evidence and numerous other results that undermine Cal/OSHA's ability to enforce California's occupational health and safety laws. The Appeals Board at its August 6, 2009 Advisory Committee meeting welcomed proposed rules to address these concerns. We submit the following proposed rule changes:

- Evidence Rules (changes to Rule §376.2) – Administrative Law Judges (ALJs) have improperly excluded evidence otherwise admissible in courts of law. These proposed changes address the admissibility of hearsay testimony by DOSH inspectors regarding statements of persons who have been subpoenaed but fail to appear or cannot be located; publications offered to prove a generally known fact; and expert and lay opinion testimony of DOSH inspectors.
- Amendments to Conform to Proof (§371.2, proposed new §376.8) – These proposed changes will remedy problems of refusal by ALJs to allow, six months after issuance of citations, amendments to correct the name of a party or citation numbers or to allege a new violation where the factual circumstances that are the basis for the new violation are essentially the same as and relate back to one or more of the original violations.
- Party Status (§354) – These proposed changes give family members of a deceased worker the right to party status. They also give any party the right to participate in settlement discussions and to file objections to and requests for reconsideration of settlement agreements.

- Time and Place of Hearing (§376) – These proposed changes delineate the limited circumstances under which the Board may schedule two or more hearings on the same day before the same ALJ. They also provide for scheduling of hearing locations within 50 miles or an hour of the incident that would enable employees to attend as witnesses.
- Testimony by Video (new §376.3) – This proposed rule permits witnesses to testify by video means upon a showing of good cause, including the fact that the hearing is more than 50 miles or one hour from the witness's home or current place of employment.
- Motions Concerning Hearing Dates (§371.1) – While continuances should be disfavored, this Board has unreasonably denied continuances despite good cause if not made within a very limited period of time. These rule changes provide the grounds for continuances that establish good cause and remove unnecessary time limits.

Given the urgency of adopting rules that will remedy the problems raised above, the signatories of this letter request that the Appeals Board immediately adopt these proposed rule changes without the necessity of the time consuming Advisory Committee process and to commence the rulemaking process pursuant to the Administrative Procedures Act. We will be present at the October 21, 2009 public meeting of the Appeals Board to discuss how you intend to move forward with adoption of these rules.

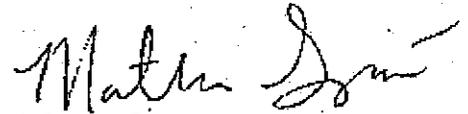
Sincerely,



Jeremy Smith
California Labor Federation



Lora Jo Foo
Worksafe



Martha Guzman
California Rural Legal
Assistance Foundation

Proposed Rule Changes to the Rules of Practice and Procedure of the Occupational Safety & Health Appeals Board, Title 8, CCR Chapter 3.3

Submitted October 5, 2009 to the OSHAB by the California Labor Federation, Worksafe, and California Rural Legal Assistance Foundation)

(Additions to the rules are underlined and in bold font and deletions are indicated by strike through.)

§354. Party Status.

(a) The Division is a party to all proceedings before the Appeals Board, whether or not the Division has appeared or participated in a proceeding.

(b) An affected employee or authorized representative of an affected employee may move to participate as a party to a proceeding by filing a motion in accordance with Section 371. **A representative of an affected employee shall include, but not be limited to an attorney, health or safety professional, or union representative. The rights of an affected employee shall not be lost by reason of that person's death, but survive and pass to the decedent's successor in interest, heir, beneficiary, or other representative.**

(c) Affected employees or authorized representatives of affected employees shall not participate as parties to employers' cost recovery proceedings pursuant to Section 149.5 of the Labor Code.

(d) When an Employee Appeal is filed alleging the unreasonableness of the period allowed by the Division to abate an alleged violation, the employer charged with the responsibility of abating the violation is a party to the proceeding.

(e) An obligor may move to participate as a party to a proceeding by filing a motion in accordance with Section 371.

(f) When an obligor appeal is filed from actions taken by the Division, the employer charged may move to participate as a party at any time prior to the beginning of a hearing.

(g) An obligor shall not participate as a party to employers' cost recovery proceedings pursuant to Section 149.5 of the Labor Code.

(h) A person whose motion for party status has been granted by the Appeals Board becomes a party to the proceeding and is entitled to service of all documents and notices. Each party shall serve within 10 working days of the order granting party status, copies of all documents previously filed with the Appeals Board and not served on the new party. Service shall be in a manner as prescribed in Section 355(c) and proof of such service meeting the requirements of Section 355(e) shall be filed with the Appeals Board.

(i) Any party is entitled to participate fully, to receive notice, to subpoena witnesses, offer evidence, argue and submit briefs. A party shall also have the right to participate fully in the settlement of a matter at the prehearing conference, hearing, or in any other proceedings where settlement may be reached.

(j) An affected employee or authorized employee representative, who is a party, may file an objection to a settlement agreement within fifteen working days of the order's issuance if the settlement agreement affects any issue related to abatement, including but not limited to the amount of time for abatement and the nature of the changes required by the Division to abate the violation.

(k) In addition to any rights set forth in Section 389 et. seq. regarding Reconsideration, an affected employee or authorized employee representative who is a party, may file a petition for reconsideration with respect to a settlement agreement within 30 days of service of an order or decision or settlement agreement affecting any issue related to abatement, including but not limited to the amount of time for abatement and the nature of the changes required by the Division to abate the violation.

§371.1. Motions Concerning Hearing Dates.

(a) Continuances are disfavored.

(b) A motion for a continuance shall be made in writing and shall be made promptly once the reason necessitating a continuance is ascertained. The motion shall be directed to the Appeals Board. Service shall be in a manner as prescribed in Section 355(ed) and proof of such service meeting the requirements of Section 355(ef) shall be filed with the Appeals Board. When the time for the hearing does not permit service as set forth above, upon a written stipulation by the parties, service shall be made by an email or fax which contains the signed stipulation. The motion shall contain:

(1) The date(s) presently assigned for hearing and the date(s) to which continuance is sought;

(2) Facts in support of the motion; and

(3) An indication of whether the other parties to the appeal were contacted, and if not, the circumstances excusing such attempt, and if so, their position on the motion.

(c) Any opposition to a motion for continuance shall be filed with the Appeals Board at any time prior to a ruling on the motion. Service shall be in a manner as prescribed in Section 355(ed) and proof of such service meeting the requirements of Section 355(ef) shall be filed with the Appeals Board. Upon a written stipulation by the parties, when the time for the hearing does not permit service as set forth above, service shall be made by an email or fax which contains the signed stipulation. Depending on the proximity to the hearing date, the opposing party may be allowed to respond orally, a telephonic discussion held, and a telephonic ruling may be issued by the Board.

(d) The motion shall be ruled on promptly but in no event later than 10 days after the motion is filed. in the following circumstances: Although continuances of hearings are disfavored, each request for a continuance must be considered on its own merits. The Appeals Board shall grant a continuance on an affirmative showing of good cause requiring the continuance. The party submitting a motion for a continuance must submit an accompanying declaration setting forth the circumstances that that are the basis for the motion.

(1) ~~An emergency arises, including, but not limited to, death or illness of a party, witness, or representative; or~~ Grounds for Continuance:

Circumstances that indicate good cause include, but are not limited to:

(A) The unavailability of an essential witness, party or counsel because of death, illness, or other emergencies or excusable circumstances;

(B) The addition of a new party who has not had a reasonable opportunity to prepare for hearing;

(C) A party's excused inability to obtain essential testimony, documents, or other material evidence despite diligent efforts; or

(D) A significant, unanticipated change in the status of the case as a result of which the case is not ready for hearing.

(2) Any other reason constituting good cause, if the motion is made no later than 15 days after service of the hearing notice. Other factors to be considered:

In ruling on a motion or application for continuance, the Appeals Board must consider all the facts and circumstances that are relevant to the determination. These may include but are not limited to:

(A) Whether there was any previous continuance, extension of time, or delay of hearing due to any party;

(B) The length of the continuance requested;

(C) The availability of alternative means to address the problem that gave rise to the motion or application for a continuance;

(D) The prejudice that parties or witnesses will suffer as a result of the continuance;

(E) Whether a party's counsel is engaged in another hearing;

(F) Whether all parties have stipulated to a continuance;

(G) Whether the interests of justice are best served by a continuance, by the hearing of the matter, or by imposing conditions on the continuance;

(H) Whether the employer has abated the alleged unsafe condition or conditions; and

(I) Any other fact or circumstance relevant to the fair determination of the motion or application.

(3) Notwithstanding other provisions of this section, the Appeals Board shall grant a continuance upon the agreement of the parties when a case has been referred by the

Bureau of Investigations for prosecution and the prosecutor has joined in the request as evidenced by the prosecutor's declaration indicating his or her desire for a continuance.

(e) The following circumstances shall not constitute good cause:

(1) Failure to obtain representation, unless a substitution is required through no fault of the party.

(2) Failure of another party to comply with a request for discovery, unless the Appeals Board orders a continuance of the hearing after a motion to compel discovery has been filed pursuant to Section 372.6. A continuance of the hearing may be ordered only if:

(A) a motion to compel discovery was filed at a time which would not have foreseeably delayed the hearing, or good cause for such later filing is shown, and

(B) the matters sought to be discovered are of sufficient importance to warrant a continuance of the hearing.

Note: At-hearing sanctions for discovery abuses are specified in Section 372.7 of these regulations.

(f) Once a motion for continuance has been ruled on by the Appeals Board, a motion for continuance based on the same grounds shall not be entertained at the hearing without changed circumstances.

§ 371.2. Amendments Prior to Hearing.

(a) Once the parties are notified that an appeal is docketed by the Appeals Board, any proposed amendment of the citation or appeal shall be made in accordance with the procedures set forth in Section 371. Where the parties are notified by mail, the notification date is deemed to be five days after the date on the notification letter. An amendment by the Division that alleges a new violation shall may be permitted by the Appeals Board, but not after six months have elapsed since occurrence of the alleged violation. after six months have elapsed since the occurrence of an alleged violation if in order to further the purposes of the California Occupational Safety and Health Act and in furtherance of justice, on any terms as may be proper, under the circumstances in subparagraphs (1) or (2):

(1) if the factual circumstances that are the basis for a new violation are closely related to one or more original violations

(2) for the Division to amend any citation or order, or for any party to amend any pleading, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect

(3) Notwithstanding subparagraphs (1) and (2), an amendment as described in this section shall not be allowed if the mistake to be corrected would cause the adverse party, in reliance thereon, to maintain his or her action or defense upon the merits in a manner unduly prejudicial to that party, or would otherwise be unduly prejudicial to any party.

(b) Each party shall be given notice as provided in Section 371 of the intended amendment and an opportunity to prepare a response to an amendment which presents a new charge or defense. Any new charges or defenses shall be deemed controverted.

§ 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) In cases being reviewed by the Bureau of Investigations, unless the employer and the Division submits a written request agreeing that its the appeal go forward in the normal course, the Appeals Board shall delay the hearing until the conclusion of a review of the case by the Bureau of Investigations for a period not exceeding 2 years, whichever occurs earlier. Where a District Attorney has initiated an investigation or criminal proceedings, the Appeals Board shall delay the hearing until resolution of the criminal matter by the District Attorney for a period not exceeding 2 years, whichever occurs earlier. If either party establishes that necessary witnesses cannot testify because of a pending criminal investigation or proceeding, the appeal will be stayed until the criminal matter is resolved. The period may be extended beyond 2 years at a party's request if necessary to allow the Bureau of Investigations to conclude its review of the case or the District Attorney to conclude its criminal proceedings.

(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.

(e) In cases where a fatality or serious injury or illness has occurred, the hearing location shall be located within 50 miles or an hour of the incident, whichever is shorter. Hearings shall be held at Division district offices or the nearest suitable state facility.

(f) (1) No administrative law judge shall be scheduled to hear two or more hearings on the same day unless the cases involve the same parties and witnesses, except under the following circumstances:

(A) The Board may schedule a hearing in the morning and another hearing in the afternoon if it is anticipated that the hearings will be able to be completed in four hours or less.

(B) The Board may schedule an additional hearing before an administrative law judge on a given day so long as each hearing arises from a different District of the Division of Occupational Safety and Health.

(C) If two or more cases are scheduled to be heard before the same administrative law judge on the same day, all parties shall be notified in writing as soon as possible after the hearing is set, and at least one week before the hearing date, of the time each hearing is to commence.

(2) If a party believes that a hearing scheduled to be heard during a morning or afternoon or on a full day will not be completed in the time allotted, the party shall promptly so notify the administrative law judge assigned to the case. The judge shall schedule a conference call for the parties to determine whether additional time on consecutive days shall be set aside for the conduct of the hearing. If after the hearing begins, it becomes apparent that additional time is required to complete the hearing, the administrative law judge will confer with the parties to schedule a further hearing date as soon as possible and consistent with the schedules of the parties and the judge.

§376.2. Evidence Rules.

The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions.

(a) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection to hearsay evidence is timely if made before submission of the case or raised in a petition for reconsideration so long as the party offering the hearsay has an opportunity to argue why the hearsay is admissible as an exception to the hearsay rule and/or if the hearsay was necessary to support a finding, so long as the party offering it has an opportunity to submit additional evidence in support of a finding.

(b) It shall be an exception to the hearsay rule and the Board shall take judicial notice of a publication written by a person with no interest in the litigation which is offered to prove a generally known fact, if all of the following conditions are met:

(1) The party offering the publication at any time 10 or more days prior to a hearing or a continued hearing, provides notice, with copies served on the Board and other parties by fax or email, that the publication is to be introduced accompanied by a copy of the publication and a declaration by the lay or expert witness who will provide opinion testimony at the hearing that she or he referred to, considered, or relied on, in forming his or her opinion, a peer reviewed scientific, technical, or professional text, treatise, journal, or similar publication.

(2) Any party opposing the admission of the publication shall submit a declaration in opposition, with copies served on the Board and other parties by fax or email at least 5 or more days prior to a hearing or a continued hearing, stating why the facts contained in the publication are controversial and providing copies of publications the opposing party wants to submit to controvert the facts in the publication of the moving party.

(3) The administrative law judge shall admit the declarations and publications into evidence and such shall support a finding of fact and may be afforded such weight as the administrative law judge deems appropriate. Parties may at the hearing question declarants offering and opposing the publications, and shall determine what weight to give

to the various peer-reviewed publications.

(4) All other parties may cross-examine regarding any lay or expert witness who relied upon the publication in forming an opinion.

(c) The custodian of records need not be present to submit official government records or business records so long as a custodian declaration accompanies the records stating that the document was created by an employee acting within the scope of duty and that the report was made at or about the time of the event.

(d) The rules of privilege shall be effective to the extent that they are otherwise required by statute to be recognized at the hearing and irrelevant evidence shall be excluded.

(e) The Appeals Board may exclude evidence if its probative value is substantially outweighed by **any prejudice it may cause** the probability that its admission will necessitate undue consumption of time.

(f) Testimony of non-party, current employees against the interest of their current employer shall be given added credibility and weight.

(g) Expert and lay opinion.

(1) Lay opinion shall be allowed where its admission makes the fact-finding easier and more accurate, and where a witness provides an inference that takes the place of describing a series of perceptions that, in common experience, add up to a rather ordinary inference or characterization. A Division inspector or investigator may provide a lay opinion based upon the inspector's or investigator's personal observations of one or more situations. The lay opinion shall constitute evidence in support of a finding, and may be accorded such weight as the administrative law judge determines is reasonable as an inference from the facts.

(2) Expert opinion shall be allowed by persons who have special knowledge, experience, or training, and where such opinion explains the connection between facts and conclusions that the administrative law judge must determine. A Division inspector or investigator may provide an expert opinion regarding the likelihood that death or serious physical harm could result from a violation based upon his or her education and experience generally in the field of occupational safety and health. The expert opinion shall constitute evidence in support of a finding, and may be accorded such weight as the administrative law judge determines is reasonable as an inference from the facts. It shall not be necessary for an inspector or investigator to have specific education or expertise with respect to a particular hazard in order to be qualified as an expert so long as the following conditions are met:

(A) the inspector or investigator testifies that she or he has consulted with Division personnel regarding whether a violation was likely to cause death or serious physical harm,

(B) the Division representative with whom the inspector or investigator consulted has previously been qualified to testify as an expert before the Appeals Board with respect to a particular hazard,

(C) the Division representative with whom the inspector or investigator consulted submits a declaration regarding his or her qualifications and matters where s/he has been qualified as an expert with respect to a particular hazard, and

(D) the Division provides notice that an inspector or investigator will be testifying as an expert based on the experience of another in the Division, which notice shall include a copy of the declaration in (C) above, at any time 10 or more days prior to a hearing or a continued hearing, with copies served on the Board and other parties by fax or email.

§376.3. Testimony by video.

A witness may testify at a hearing by video at the request of and upon a showing of good cause by the party requesting such testimony. The witness presented by video shall be subject to cross-examination by other parties and questioning by the administrative law judge. Good cause shall, among other things, include that the witness is unable to attend the hearing in person because the location of the hearing is more than 50 miles or one hour from the witness's home or current place of employment.

§376.8. Amendments During Hearing

(a) An amendment to the citation offered by the Division during the hearing and more than six months since the occurrence of an alleged violation shall be permitted by the Appeals Board, in order to further the purposes of the California Occupational Safety and Health Act, if the factual circumstances that are the basis for the amendment are closely related to one or more of the original alleged violations.

(b) (1) During the hearing, the Appeals Board or administrative law judge shall, in furtherance of justice, and on any terms as may be proper, allow the Division to amend any citation or order, or any party to amend any pleading, by adding or striking out the name of any party, by correcting a mistake in the name of a party, to correct a mistake in any other respect or to conform to the proof presented at the hearing.

(2) The Appeals Board or administrative law judge shall allow the Division to amend a citation or order, or any party to amend any pleading, pursuant to subdivision (b)(1) at any time prior to the close of the hearing, whether before or after the passage of six months from the issuance of the citation.

(3) Notwithstanding the other provisions of subparagraph (b), an amendment as described in subparagraph (b) shall not be allowed if a mistake to be corrected would cause the adverse party, in reliance thereon, to maintain his or her action or defense upon the merits in a manner unduly prejudicial to that party, or would otherwise be unduly prejudicial to any party. However, if the prejudice claimed to have been caused by the amendment of a citation can be remedied by a continuance of the hearing, a continuance shall be granted in lieu of dismissal of the citation.

(c) Any new allegations permitted under paragraphs (a) or (b) shall be deemed controverted.