

FINAL STATEMENT OF REASONS

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD RULES OF PRACTICE AND PROCEDURE PROPOSED REGULATIONS Z-2015-1229-05

UPDATE OF INITIAL STATEMENT OF REASONS

SECTION 355.4 SUBDIVISION (d). The proposed regulation as originally noticed to the public considered documents received by the Appeals Board the following working day if transmission began later than 5:00 p.m. Pacific Time. However, as the Board's software vendor has made it possible for the Board to continue to receive appeals during off hours, the Board is able to respond to comments made during the preliminary rulemaking process and edit the deadline to midnight, or 11:59 p.m. Pacific time.

Updated Necessity Statements:

SECTION 361.3, SUBDIVISION (g). The Board proposes a change to this subdivision for the purpose of clarity. Pursuant to Labor Code sections 6319 and 6319.5, the Division of Occupational Safety and Health (Division) may, by its own authority, either revoke or grant an abatement credit. The change to the language clarifies that the Division may act under its own statutory authority to make either change. The purpose of subdivision (g) remains unchanged. The subdivision interprets and makes specific the Board's authority under Labor Code section 6600, to allow appeals at the Board of Division citations for 15 days following the receipt of such citation or such notice, of the amendment of the original citation. An appeal of the amendment of a citation does not revive the failure to appeal any other issue from the initial citation.

SECTION 364.2. The Board has amended the length of posting of a settlement order from 15 days to 30 days, in order to clarify the current regulation, and "provide affected employees or representatives of affected employees an opportunity to participate as parties to a hearing under Section 6602" as required by the Labor Code section 6603, subdivision (a). Pursuant to Labor Code section 6614, "any party aggrieved directly or indirectly by any final order or decision" may petition for reconsideration of a Decision of the Appeals Board "at any time within the 30 days after service." The Board proposes this change from 15 to 30 days in order to conform the timelines within these two sections. It fulfills the intent of the OSH Act and the Labor Code for the notice to be posted for 30 days, and ensures that employees may review the posting during the course of the period when reconsideration may be filed.

SUPPLEMENTAL STATEMENT OF REASONS

On June 1, 2016, the Board posted its Notice of 15 Day Comment Period, Supplemental Statement of Reasons, and text of proposed rules of practice and procedure to its website for public access. The Board also sent these three documents to all Board stakeholders via email, as

well as notifying stakeholders that the documents were available online. The Board's email did not expressly mention Government Code section 11347.1, but the Board substantially complied with that section by making its Supplemental Statement of Reasons available at all times to the public, as well as by expressly mentioning it in the email that accompanied the Notice of 15 Day Comment Period, Supplemental Statement of Reasons, and the text of proposed rules of practice and procedure that was shared with Board stakeholders.

SUMMARY OF RESPONSE TO COMMENTS RECEIVED DURING THE INITIAL NOTICE PERIOD OF JANUARY 15, 2016 THROUGH MARCH 3, 2016 AND PROVIDED ORALLY AT THE PUBLIC MEETING ON MARCH 3, 2016.

Oral Comments

Jora Trang, Worksafe, at the public hearing on March 3, 2016.

Comment #1:

Ms. Trang asked how section 372.9 Division Production of Evidence at Filing of Appeal would help the appeals process, and what the Division's position was on the section, if they were in agreement with the new section.

Response:

The Board developed section 372.9 after reviewing rules of practice and procedure in other administrative agencies, including Title 29, Code of Federal Regulations section 2200.206 Disclosure of Information in Federal Occupational Safety and Health Review Commission proceedings. The Board presented a draft to stakeholders during the pre-rulemaking procedure, and received positive feedback from stakeholders. The Division was not concerned with the rule, as they commented in a meeting that they generally did provide their 'file' to the appellant in a timely fashion, in order to expedite the process. The Board's goal with such a rule is to ensure that all parties, both represented and unrepresented, timely receive pertinent information, so that parties are prepared to engage in Board prehearing procedures and the hearing itself.

The Board thanks Ms. Trang and Worksafe for their participation in the rulemaking process, and for commenting on this regulatory package.

COMMENTS RECEIVED DURING THE PERIOD THE MODIFIED TEXT WAS AVAILABLE TO THE PUBLIC.

The modified text was made available to the public for comment from June 1, 2016 to June 17, 2016.

Written Comments

Comment #1:

Jora Trang, Worksafe, via letter received by the Board on June 17, 2016.

Ms. Trang comments regarding section 364.2, Settlement Orders. She states that this section appears to cover settlements that may occur “at any time after the Appeals Board obtains jurisdiction of the appeal. Thus, party status or intervener status may have been granted after the Appeals Board obtains jurisdiction. If settlement occurs after party status or intervener status has been granted, then the Division and the employer are not the only parties that must agree to a resolution. Subsection (a) fails to take these other parties into consideration. Ms. Trang suggests clarifying language, or alternatively, the addition of a general term such as “parties”, as opposed to the current language which assumes two parties in the settlement process.

Response:

Similar concerns regarding this section were raised during the Board’s preliminary rulemaking activity, and at that time the Board noted that it is aware of the rights of interveners pursuant to Labor Code section 6603 to participate in the appeal and settlement process once status has been granted, but that the Board did not interpret the section as providing interveners the right to sign off on settlement agreements reached in the Cal/OSHA process. The right of interveners to participate in the process pursuant to Labor Code section 6603 remains unchanged under the proposed amendments to section 364.2, and the Board does not believe further changes to the proposed regulation are required. The Board thanks Worksafe for its participation in this process.

Comment #2:

Worksafe suggests the addition of the word “the” in its comments to new subsection (e): The employer shall post for 30 working days the Settlement Order.

Response:

The Board thanks Worksafe for its comment and adopts this nonsubstantive change to the proposed regulations.

ALTERNATIVES THAT WOULD LESSEN ADVERSE ECONOMIC IMPACT ON SMALL BUSINESS

No alternatives were proposed to the Board that would lessen any adverse economic impact on small business.

ADDITIONAL DOCUMENTS RELIED UPON

Supplemental Statement of Reasons

ADDITIONAL DOCUMENTS INCORPORATED BY REFERENCE

None

DETERMINATION OF LOCAL MANDATE

These proposed regulations do not impose a mandate on local agencies or school districts as indicated in the Initial Statement of Reasons.

ALTERNATIVES DETERMINATION

The Board has determined that no alternative it considered or that was otherwise identified and brought to its attention would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.