FINAL STATEMENT OF REASONS
OSHAB Rulemaking Package Modifying Regulation
Concerning Time and Place of Hearing
Notice File Number Z2022-0418-03

UPDATE OF INITIAL STATEMENT OF REASONS

Pursuant to Government Code Section 11346.9, subdivision (d), the California Occupational Safety and Health Appeals Board (Appeals Board or Board) incorporates the Initial Statement of Reasons prepared and circulated for comment in this rulemaking.

MODIFICATIONS RESULTING FROM THE 45-DAY PUBLIC COMMENT PERIOD (April 29, 2022, to June 16, 2022)

There are no modifications to the information contained in the Initial Statement of Reasons except for the following substantive and sufficiently related modifications that are the result of public comments.

On June 16, 2022, the Appeals Board held a Public Hearing to consider the proposed revisions to California Code of Regulations, title 8, sections 372.6, 372.8, 376, and 376.8. The Appeals Board received oral and written comments on the initial proposed text. The proposed rulemaking for section 376 underwent several modifications in response to the comments received. The Board circulated all modifications for additional comment. The 15-day notice of modifications was issued, with the comment period from August 25, 2022, to September 9, 2022.

The following revisions were made after the initial public comment period and circulated for additional public comment.

Section 376, subdivision (e):

There are two relevant modifications to this subdivision:

First, the Board's original proposal for section 376, subdivision (e), stated that the Appeals Board will determine the date, time, length, and format for the hearing. During the first set of modifications (noticed between August 25, 2022, and September 9, 2022), the proposal was modified to specify that not only will the Appeals Board determine the date, time, length, and format for the hearing, any such determinations and information shall be included within "any notice of hearing." The modification is necessary to ensure that any notice of hearing provides the parties adequate notice of all relevant decisions made by the Board concerning the time, place, format, and location of the hearing.

Next, during the first set of modifications (noticed between August 25, 2022, and September 9, 2022), this subdivision was modified to specify that, where a hearing is set to occur via videoconference, the notice of hearing will provide instruction on how to access the videoconference. Specifically, the language was modified to state that, "If a videoconference hearing is selected, the notice of the hearing shall provide instruction on how to access and attend

the virtual location of the hearing." The modification is necessary to ensure that, where a hearing is ordered to occur by videoconference, the notice of hearing provides sufficient instruction on how to participate in the videoconference. However, as noted below, this language underwent further refinement in response to stakeholder concerns in the second set of modifications (noticed between October 31, 2022, and November 15, 2022), discussed *infra*. It currently reads, "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."

Section 376, subdivision (e)(1)(B):

The Board's original proposal stated that one of the factors the Appeals Board may consider when determining the date, time, length, and format of the hearing is "[w]hether multiple hearings can be set on the same day without necessitating a continuance." During the first set of modifications (noticed between August 25, 2022, and September 9, 2022), this subdivision was modified to clarify that this factor asks whether multiple hearings can be set "before an Administrative Law Judge" on the same day without necessitating a continuance. The modification addresses a stakeholder concern that the Board may try to set parties or representatives for multiple hearings in one day. This provision clarifies that the Board will not seek to schedule parties or representatives for multiple events in a single day but that the Board may consider whether an administrative law judge (ALJ) may be set for multiple hearings in a single day without necessitating a continuance.

Section 376, subdivision (e)(2):

During the first set of modifications (noticed between August 25, 2022, and September 9, 2022), this subdivision was modified to specify that prehearing lodging of proposed exhibits shall not be required more than three working days prior to the hearing, and to also specify that the Appeals Board will not review or consider any lodged documents for substance until introduced by a party or representative at hearing. The subdivision was also modified to add subdivision cross-references for greater clarity. The modification is necessary to address stakeholder concerns. Stakeholders raised the concern that ALJs may require lodging too far in advance of the hearing, creating a hardship for parties. Stakeholders also raised concerns that ALJs might substantively review and rely upon proposed exhibits that the parties never introduce at hearing, thereby effectively relying on documents outside of the administrative record. These modifications directly address those concerns by clarifying that prehearing lodging of proposed exhibits shall not be required more than three working days prior to the hearing and by specifying that the Appeals Board will not review or consider any lodged documents for substance until introduced by a party or representative at hearing.

Section 376, subdivision (e)(3):

The Board's original proposal stated that if a witness, party, or representative establishes, in a reasonable amount of time prior to the hearing, that they do not have access to the technological equipment necessary to conduct the hearing by videoconference, the Appeals Board will make facilities available where they can access necessary equipment. During the first set of

modifications (noticed between August 25, 2022, and September 9, 2022), this subdivision was modified to also specify that if a person subpoenaed to appear via videoconference does not have access to the technological equipment necessary to comply with the subpoena, the Appeals Board will make facilities available where they can access necessary equipment to appear via videoconference. This modification specifies that the Board will also make such facilities available for a "subpoenaed person" to "attend, comply and/or conduct" the hearing by videoconference. The modification is necessary to ensure full access to Board proceedings, including for persons subpoenaed to appear via videoconference. The subdivision was also modified to add subdivision cross-references for greater clarity.

<u>Section 376, subdivision (h):</u>

During the first set of modifications (noticed between August 25, 2022, and September 9, 2022), this subdivision was modified to specify that the Appeals Board may reconsider the selected format for the hearing on its own motion. The modification is necessary to ensure that the Appeals Board, itself, may reconsider earlier rulings, particularly as new information, facts, or considerations come to light.

<u>Section 376, subdivision (i):</u>

There are two relevant additions in this subdivision:

The Board initially modified this subdivision in response to a stakeholder concern. One stakeholder contended that the Board's rules of practice and procedure provide an express right to an in-person hearing and require a physical hearing room, creating a conflict with the current rulemaking. The Board disagrees both with the stakeholder's interpretation of the relevant regulations, and with the assertion that any conflict is created by the current rulemaking. Notwithstanding the Board's disagreement with the premise asserted, the Board added this subdivision (noticed between August 25, 2022, and September 9, 2022), to specify that, "[f]or purposes of the Appeals Board's rules of practice and procedure, when a hearing is ordered to occur by videoconference, the virtual location of the hearing will constitute the place of hearing and hearing room, and any right to appear in person or personally is satisfied by the videoconference appearance." This modification is intended to affirmatively negate the existence of any alleged conflict. Please note, this language underwent further refinement in the second set of modifications (noticed between October 31, 2022, and November 15, 2022), discussed *infra*. It was modified to read: "For purposes of the Appeals Board's rules of practice and procedure, 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 of practice and procedure provide a right to appear in person or personally, that right is satisfied by the videoconference appearance."

Additionally, during the initial set of modifications (noticed between August 25, 2022, and September 9, 2022), the Board added language in this subdivision to specify that subpoenas may be issued pursuant to section 372.2, either subdivision (a) or (c), provided the subpoena includes sufficient instruction on how to access the videoconference. Specifically, the Board added language stating: "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 access and attend the virtual location." The modification was made to ensure that, where a hearing is ordered to occur by videoconference, the subpoena provides the subpoenaed party sufficient instruction on how to participate in the videoconference. This language has been further refined in the second set of modifications (noticed between October 31, 2022, and November 15, 2022), discussed *infra*. The subdivision currently reads: "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."

MODIFICATIONS RESULTING FROM THE FIRST 15-DAY PUBLIC COMMENT PERIOD (October 31, 2022, to November 15, 2022)

Following the first 15-day public comment period on the proposed modifications to the text of the regulations, the agency issued a Second Notice of Modifications to Text of Proposed Regulations in order to propose changes as a result of the comments received during the 15-day public comment period. A 15-day period for comment was provided pursuant to Government Code section 11347.1. The following sections were revised substantively as set forth below.

Section 376, subdivision (e):

As noted above, during the first set of modifications (noticed between August 25, 2022, and September 9, 2022), the language was modified to state that, "If a videoconference hearing is selected, the notice of the hearing shall provide instruction on how to access and attend the virtual location of the hearing." However, within the second set of modifications (noticed between October 31, 2022, and November 15, 2022), the Board removed the terms "virtual location," "access," and "attend" from the proposed regulation in response to a stakeholder concern that those terms could cause confusion. The subdivision now merely states that the notice of hearing will provide instruction on how "to participate in the videoconference, identify the necessary technological equipment, and indicate what to do if technical problems arise." This further modification is necessary to address the stakeholder concern and merely rewrites the requirements in plain and simple terms, to ensure greater clarity in the Board's rules.

Section 376, subdivision (e)(2)(A):

Within the second set of modifications (noticed between October 31, 2022, and November 15, 2022), this subdivision was added to specify that, where pre-hearing lodging of exhibits is required, 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." This modification is necessary to address stakeholder concerns. Regarding the provision allowing ALJs to require prehearing lodging of proposed exhibits, a stakeholder addressed the concern that parties cannot always predict all evidence they will need at hearing, e.g., for impeachment purposes or to

refresh a witness's recollection. To address this concern, the Board added this subdivision to grant parties the opportunity to utilize additional exhibits during the hearing, which were not previously lodged, upon a showing that good cause exists, that no prejudice would occur, or such other showing deemed relevant by the ALJ.

Section 376, subdivision (e)(3):

Within the second set of modifications (noticed between October 31, 2022, and November 15, 2022), this subdivision was modified to clarify that a party, witness, representative, or subpoenaed person may "contend," rather than "establish," in a reasonable amount of time prior to the hearing, that it lacks access to the technological equipment necessary to attend, comply, and/or conduct a hearing by videoconference. The subdivision is additionally modified to specify that the Board may require evidence of such claims before making facilities available. The modification is necessary to clarify the burden of proof when a claim is made of insufficient access to technology to attend via videoconference. A mere contention of lack of access to technology is all that is required. Thereafter, the Board can do one of two things, either: (i) make facilities available or, (ii) in its discretion, may require further facts to support such claims before making facilities available.

Section 376, subdivision (i):

There are two relevant modifications to this subdivision:

First, as noted above, during the initial set of modifications (noticed between August 25, 2022, and September 9, 2022), this subdivision was added to specify, "[f]or purposes of the Appeals Board's rules of practice and procedure, when a hearing is ordered to occur by videoconference, the virtual location of the hearing will constitute the place of hearing and hearing room, and any right to appear in person or personally is satisfied by the videoconference appearance." However, within the second set of modifications (noticed between October 31, 2022, and November 15, 2022), the Board broke the sentence into two parts to provide greater clarity, and to address stakeholder concern that the original language was too broad. It was modified to read: "For purposes of the Appeals Board's rules of practice and procedure, 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 of practice and procedure provide a right to appear in person or personally, that right is satisfied by the videoconference appearance." This modification is necessary to provide greater clarity, and to address stakeholder concern that the original language was too broad.

Second, during the initial set of modifications (noticed between August 25, 2022, and September 9, 2022), the language was modified to state that, "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 access and attend the virtual location." However, within the second set of modifications (noticed between October 31, 2022, and November 15, 2022), the Board removed the terms "virtual location," "access," and "attend" from the proposed regulation. The Board instead modified this subdivision to state: "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." This further modification is necessary to address stakeholder concerns regarding confusion arising from the terms "virtual location," "access," and "attend." The modification merely rewrites the requirement in plain and simple terms, to ensure greater clarity in the Board's rules of practice and procedure.

FURTHER NON-SUBSTANTIAL CHANGES

The Board made two other non-substantial changes. (Cal. Code Regs., tit. 1, § 40.)

Section 376, subdivision (i):

Where section 376, subdivision (i), referred to the Board's "rules of practice and procedure," the Board modified that to refer to the Board's rules "set forth in Chapter 3.3," which is where the Board's rules of practice and procedure are located.

The Board also excised portions of a non-regulatory sentence that states, the Appeals Board "shall maintain exemplars of the required disclosures on its website,..."

SUMMARY AND RESPONSE TO WRITTEN AND ORAL COMMENTS RESULTING FROM THE 45-DAY COMMENT PERIOD (April 29, 2022, to June 16, 2022)

The Board incorporates into each and every response set forth below the following: the Board believes that the proposal and related rulemaking documents comply with statutory and legal requirements.

I. Oral Comments on June 16, 2022.

Jora Trang, Worksafe

Comment No. 1:

"I found the recent proposed changes… to be excellent. I was really happy with the way our comments were received and then incorporated into the changes. And I am super excited to proceed with videoconferencing in appeals cases. So, thank you so much for the amazing work that you've all done."

Response:

Prior to initiating the formal rulemaking process, the Board interacted with stakeholders on several occasions to help develop the proposed regulatory language. The Board thanks Ms. Trang and Worksafe for their assistance developing the proposed regulatory language.

The Board also thanks Ms. Trang and Worksafe for participating in the rulemaking process and for commenting on the regulatory package.

Danielle Lucido, Chief Counsel, Division of Occupational Safety and Health (Division)

Comment No. 1:

"The big picture comment is from Cal/OSHA that this iteration of the regulation is preferable to all of the prior iterations that were shared by OSHA early on in this process informally.... We think that this was the best possible draft rule that came out of the Board."

Response:

Prior to initiating the formal rulemaking process, the Board interacted with stakeholders on several occasions to help develop the language of the proposed regulatory language. The Board thanks Ms. Lucido and the Division for their assistance in helping to develop the proposed regulatory language.

Comment No. 2:

Ms. Lucido's next comment concerned the proposed revision to section 376, subdivision (e)(2), which allows the Appeals Board to issue orders requiring pre-hearing lodging of proposed exhibits via OASIS for hearings set for the videoconference format. She stated the Division "understands the administrative need for exhibits to be uploaded prior to the hearing and we understand that the reason to be -- to prevent delay and permit the hearing to begin as scheduled." However, she cautioned that the ALJs should not require the documents ten days in advance of the hearing, which she indicated had become a common practice after videoconference hearings were adopted during the COVID-19 pandemic. The Division believes that ten days is excessive and results in staff uploading exhibits that they would not otherwise upload, had they been further along in their preparation. The Division states the ten-day requirement constitutes a potential waste of state resources.

Response:

As a result of this comment, and to address the Division's specific concerns, the identified subdivision was modified to specify that prehearing lodging of proposed exhibits shall not be required more than three working days prior to the hearing. This modification is intended to ensure that parties lodging their own exhibits are not required to do so more than three working days prior to the hearing. The Board declines to make any further revisions as a result of this comment.

Comment No. 3:

Ms. Lucido's next comment also addresses the revisions to section 376, subdivision (e)(2), which allow the Appeals Board to issue orders requiring pre-hearing lodging of proposed exhibits via OASIS. Ms. Lucido expressed the concern, where lodging is required, that an ALJ might substantively review the lodged documents before the parties have a chance to address them. The

Division states, "We do not believe this is appropriate. The parties and their representatives should choose which documents are entered into evidence to be considered by the ALJ. Pre-review, substantive pre-review, of all lodged documents potentially prejudices an ALJ."

Response:

The Board is not aware of any ALJs engaging in the practice of substantive prehearing review of lodged documents. However, the Board agrees that there should not be substantive review of lodged documents that have not been offered or entered into evidence. The Board recently addressed this point in *Webcor Builders*, *Inc.*, Cal/OSHA App. 1416143, Decision After Reconsideration and Remand (May 23, 2022), noting "a hearing exhibit will not be relied upon unless it is introduced, the parties have an opportunity to refute, test, and explain it, and the document is moved and admitted into the record." As a result of this comment, and to address the Division's concerns, the identified subdivision has been modified to specify that Appeals Board will not review or consider any lodged documents for substance until introduced by a party or representative at hearing. The Board declines to make any further revisions as a result of this comment.

Comment No. 4:

The next comment also addresses the aforementioned lodging requirement in section 376, subdivision (e)(2). Ms. Lucido states that the Division expects "that evidence will not be excluded because a party failed to lodge the document timely. To the extent that lodging did not occur as ordered, an ALJ should consider whether that has resulted in prejudice. [¶] Usually there should be no prejudice because in every case, the parties have a right to discovery and there's a ton of regulations about the right to discovery."

Response:

The regulation, as originally proposed, is silent as to the appropriate sanction for the failure to timely lodge documents in compliance with a prehearing lodging order.

The Board recognizes that hearings are dynamic proceedings and that there will be *bona fide* situations where parties cannot always predict what documents they will need at hearing. The Board also recognizes that excusable mistakes and oversights occur. Parties should not be prevented from having their matter decided on the merits in such circumstances. One of the Board's primary goals is to adjudicate matters on the merits. Therefore, for additional clarity, during the second modification to the rulemaking (noticed between October 31, 2022, and November 15, 2022), the Board added section 376, subdivision (e)(2)(A), which specifies that, where prehearing lodging of exhibits is required, the Board may grant parties the opportunity to utilize additional exhibits during the hearing, which were not previously lodged, upon a showing that any one of the following three criteria exist: (1) good cause exists, (2) that no prejudice would occur, or (3) such other showing deemed relevant by the Administrative Law Judge.

However, the Board also notes that prehearing lodging orders are important tools that help achieve effective use of videoconference hearing time, as videoconference hearings would be

unnecessarily delayed if parties attempted to upload exhibits during the hearing. To achieve the overriding intent of the prehearing lodging requirement (i.e., effective use of hearing time and resources), and to ensure that parties adhere to its orders, the Board does retain to itself a tool to address situations where there has been a deliberate or bad faith disregard of the Board's prehearing lodging order. The Board's proposal in subdivision (e)(2)(A) states that the Board "may" grant parties the opportunity to use additional documents during hearing not previously lodged, rather than "shall." Such terminology leaves the ALJ discretion to address situations where there has been a deliberate disregard of its orders. However, absent a deliberate or bad faith failure to comply with the Board's orders, it is the general intent of the Board that hearings be decided on the merits.

Please also see further discussion in response to Comment No. 1 from Ms. Lucido's letter dated November 10, 2022, *infra*.

The Board declines to make any further revisions as a result of this comment.

Comment No. 5:

Ms. Lucido's next comment concerned section 376, subdivision (e)(1)(B), which states that factors and criteria relevant to determining the date, time, and format of the hearing include, "Whether multiple hearings can be set on the same day without necessitating a continuance." Ms. Lucido stated it is unclear whether this provision means that ALJs can have multiple hearings set on the same day or that parties and representatives can have multiple hearings set on the same day. Ms. Lucido states, the Division "does not believe that the Appeals Board should ever consider having Division attorneys or district managers or any representative scheduled for multiple hearings on the same day unless the cases are consolidated." The Division notes that "double or triple booking representatives pressures the party to settle for reasons other than the merits of the case."

Response:

To address the Division's comment, the Board modified the identified subdivision to clarify that this factor asks whether multiple hearings can be set "before an Administrative Law Judge" on the same day without necessitating a continuance.

Again, the Board thanks Ms. Lucido and the Division for participating in the rulemaking process and for commenting on the regulatory package.

Megan Shaked, Attorney with Conn Maciel Carey LLP

Comment No. 1:

Ms. Shaked stated she was "happy to see that there is a robust mechanism for objecting if one party or the other, for whatever reason, did not think the videoconference was the most appropriate choice for a given hearing[.]" However, she stated, "we are a bit surprised and concerned that there is no kind of threshold burden to establish a justification for a videoconference in the first place."

She acknowledged that there are “15 factors for consideration,” but noted that there is no language that there “has to be any sort of threshold showing,” placing the onus on the objecting party.

Response:

The Board does not believe any further modification to the regulation is required in response to this comment. The current proposed rule requires the Appeals Board to determine, among other things, the hearing format, and lists a number of factors relevant to this determination. The Board believes that in the overwhelming majority of cases, the ALJs will engage in reasoned and appropriate discretion when determining the hearing format. However, in those situations where parties believe the ALJ erred in selecting the hearing format, the proposed rule includes a robust mechanism, within subdivision (h), to object to the Appeals Board’s format determination.

The Board thanks Ms. Shaked and Conn Maciel Carey LLP for participating in the rulemaking process and for commenting on the regulatory package.

II. Written Comments.

Mr. Manuel M. Melgoza, Attorney at Donnell, Melgoza & Scates, LLP, by Letter Dated May 23, 2022.

Mr. Melgoza’s letter contains some comments unrelated to the current rulemaking, including a survey of prior Board actions on other subjects. (Melgoza Letter, pp. 1-3.) The Board solely responds to those comments pertaining to the current rulemaking.

Comment No. 1:

Mr. Melgoza asserts that only in-person hearings are effective. With regard to the proposed changes to section 376, which will permit videoconference hearings in some instances, Mr. Melgoza’s letter states that the proposed regulation will have “dramatic negative impacts … on potential appellants, on the rights of litigants to receive fair and impartial hearings that best protects the parties’ rights, and ultimately on workers who depend on the continuity of their employers’ businesses for their livelihoods.” (Melgoza Letter, p. 1.)

Response:

The Board disagrees with Mr. Melgoza’s primary contention, which is that only in-person hearings are effective. During the COVID-19 state of emergency, the Board gained significant experience with videoconference hearings, and found that they represent a practical, effective, and efficient method for conducting hearings in many cases. Indeed, the Board notes that many other state agencies have also made the same determination, and have adopted similar rules allowing remote hearings, some of which have existed for years.

The Board has clear legislative support and statutory authorization to conduct hearings via videoconference. The California Legislature provided state agencies, including the Board, the option to conduct hearings by videoconference, and the current rulemaking explicitly relies, and

is patterned on, that statutory authority. Government Code section 11440.30, contained in Chapter 4.5 of California's Administrative Procedures Act (APA), grants the Board explicit authority to conduct remote hearings via electronic means, including by videoconference. It states:

> (a) The presiding officer may conduct all or part of a hearing by telephone, television, or other electronic means if each participant in the hearing has an opportunity to participate in and to hear the entire proceeding while it is taking place and to observe exhibits.
> (b) (1) Except as provided in paragraph (2), the presiding officer may not conduct all of a hearing by telephone, television, or other electronic means if a party objects.
> (2) If a party objects pursuant to paragraph (1) to a hearing being conducted by electronic means, the presiding officer shall consider the objections and may, in the presiding officer's discretion, structure the hearing to address the party's specific objections and may require the presiding officer, parties, and witnesses, or a subset of parties and witnesses based on the specific objections, to be present in a physical location during all or part of the hearing.

The Board understands this statute applies to the Board because the general adjudication provisions of Chapter 4.5 apply to all state agencies unless "otherwise expressly provided by statute." (Gov. Code § 11410.20.) Further, Government Code section 11414.10 provides that the provisions in Chapter 4.5 provide a "supplemental alternative" to an agency's own governing procedures. (Gov. Code § 11415.10 & Cal. Law Revision Com.)

Here, the proposed modifications to Section 376 ensure the Board's rules are both consistent with, and adoptive of, Government Code section 11440.30. The proposed regulations specify both that Government Code section 11440.30 applies, and how it applies, providing clear guidance to the regulated community. The proposed rulemaking contains guidance on factors that support in-person hearing, factors that support remote hearings, new procedures for handling objections, and the handling of expedited matters, among other considerations.

Ultimately, the Board believes that a videoconference hearing will often constitute the safest, most reasonable, most appropriate, and least burdensome option, as videoconference technology enables parties and witnesses to attend a hearing from any location, avoids the health risk of exposure to and spread of COVID-19, and minimizes or eliminates the time, expense, and logistical issues associated with travel to a physical hearing venue. Indeed, the Board expects that due to the ability to conduct hearings remotely, in-person, or through a combination thereof, the parties, witnesses, and the public will have greater access to Board hearings.

Further, it is well-established that due process does not require an in-person hearing in every case, at least not as a generalized proposition. (*Arnett v. Office of Admin. Hearings* (1996) 49 Cal.App.4th 332, 338-339; see also *Vilchez v. Holder* (9th Cir. 2012) 682 F.3d 1195, 1199.) Due process is a flexible concept, whose application depends on the circumstances and the balancing of various factors. (*Ingrid E. v. Superior Court* (1999) 75 Cal.App.4th 751, 757.)

However, to be clear, the Board does not suggest that all hearings are suitable for the videoconference format, nor does the proposed rulemaking. Rather, the Board recognizes that case-specific circumstances may favor an in-person hearing. To that end, the proposed regulation provides a list of non-exhaustive factors the ALJ may consider in determining the hearing format. These factors, constained in section 376, subdivision (e), include, but are not limited to:

(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.

The Appeals Board intends that these aforementioned factors will be utilized and considered on a case by case basis when making determinations regarding the hearing format.

Further, consistent with Government Code section 11440.30, the proposed rulemaking allows parties to object to selection of the videoconference format. Subdivision (h) of the Board’s proposed changes to section 376 permits a party to object to a videoconference hearing. Factors relevant to the Appeals Board’s exercise of discretion on such 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 Board believes that appropriate consideration of the factors set forth in section 376, subdivision (e), along with the objection mechanism set forth in subdivision (h), will assure that

the rights of parties to a full and fair hearing are preserved, and that hearings will be held in-person when the circumstances so require

For the aforementioned reasons, the Board does not believe that the proposed changes to section 376 will result in a denial of due process, nor deprive appellants of a full and fair hearing. Rather, the Board believes that the contemplated amendment will increase access to Appeals Board hearings, for both participants and the public, and will serve functionally to add another option for hearing location while not eliminating in-person hearings where necessary. Therefore, the Board declines to modify the proposal further in response to this comment.

Comment No. 2:

Mr. Melgoza's letter states that the proposed regulation "erod[es] employers' legal rights, while providing advantages to the opposing party, the Division of Occupational Safety and Health (aka 'Division'), and 'conveniences' to the Board's staff. These 'advantages' are often made *at the expense of* one class of litigants – *employers*." (Melgoza Letter, p. 1.)

Response:

Mr. Melgoza's instant comment fails to meaningfully articulate or demonstrate the proposed disadvantages that it believes employers will suffer, or the advantages that the Division will receive. The Board does not believe that any party is necessarily advantaged or disadvantaged by a videoconference hearing. During a videoconference hearing, the Division is subject to the same process and procedure as employers. All parties will have the same procedural rights in a videoconference hearing to present evidence, examine and cross-examine witnesses, issue subpoenas, and so forth. (See, e.g., Cal. Code Regs., tit. 8, §§ 372.2, 376.1, 378, 389.) However, the Board does note, as already mentioned, that the regulation provides for a process where parties may object to video hearings if they believe the specific facts of the case demonstrate a specific disadvantage presented by a videoconference hearing.

To the extent that this comment also appears to assert that only in-person hearings are effective. The Board disagrees. The Board also incorporates by reference its response to Comment No. 1. Therefore, the Board declines to modify the proposal further in response to this comment.

Comment No. 3:

Mr. Melgoza's letter states, "The video hearings system the Board proposes continues the advancing erosion of appellant rights to present defenses, and to have the defenses thoroughly and fairly adjudicated." (Melgoza Letter, p. 4.)

Response:

This comment provides no specific explanation as to how the presentation of defenses are uniquely disadvantaged by the proposed regulation. The Board does not see how the presentation of defenses will be uniquely disadvantaged, or advantaged, by a videoconference proceeding. However, the Board does note, as already mentioned, that the regulation provides for a process

where parties may object to video hearings if they believe the specific facts of the case demonstrate a specific disadvantage presented by a videoconference hearing.

To the extent that this comment asserts that only videoconference hearings are effective, the Board disagrees. The Board incorporates by reference its responses to Comment Nos. 1 and 2 from Mr. Melgoza. The Board declines to modify the proposal further in response to this comment.

Comment No. 4:

Mr. Melgoza's letter contends that the Board's proposed regulation contradicts existing regulations, including the following:

- Section 372.2, subdivision (a): "Before the hearing has commenced, the Appeals Board shall issue a subpoena and subpoena duces tecum at the request of a party for attendance of a person at a hearing and for production of a document or thing at the hearing or prehearing conference or at any reasonable time and place." [Underline added.]
- Section 378, subdivision (a): "A party may appear in person or through a representative who is not required to be an attorney at law." [Underline added.]
- Section 379: "Upon motion of a party, the Appeals Board may exclude from the hearing room any witnesses not at the time under examination; but a party to the proceeding, the party's representative, and the inspector or investigator for the Division and the Division's representative shall not be excluded." [Underline added.]
- Section 381, subdivision (c): "An order to show cause will be issued stating the date, time, and place of the hearing at which all parties will have an opportunity to be heard as to whether or not reasonable costs should be ordered." [Underline added.]
- Section 383, subdivision (a): "If after service of a notice of hearing, prehearing conference, settlement conference, status conference, or another event scheduled and duly noticed by the Appeals Board, a party fails to appear at the noticed event, either personally or by representative, the Appeals Board may take the proceeding off calendar; may, after notice, dismiss the proceeding; or may receive evidence from any party that appears." [Underline added.]
- Section 394, subdivision (a): "When reconsideration has been granted either by petition or on the Appeals Board's own motion, the Appeals Board may order that additional evidence be taken at a further hearing. Notice of the time and place of further hearing shall be given to all parties and to such other persons as the Appeals Board may direct." [Underline added.]

(Melgoza Letter, pp. 4-5, fns. 5 & 7.)

Response:

Mr. Melgoza's letter essentially asserts that if another Board regulation uses any of the following words or phrases (or reasonable corrollaries) it conflicts with Board's authority to notice a matter

for a videoconference hearing: “attendance,” “appear,” “in person,” “place,” “place of hearing,” “hearing room,” and “personally.” The Board does not agree that any of the identified regulations, or any of the identified words or phrases, when considered in context, conflict with the Board’s proposed regulation permitting videoconference hearings. The videoconference platform used by the Board provides a virtual hearing room or place. Likewise, the terms “in person” and “personally,” when read in context, generally mean that a party may appear as an invidiual (or *in propria persona*), as opposed to appearing through an attorney or other designated representative.

Nonetheless, in response to this comment, and to avoid any potential misinterpretation of the proposed regulation, the Board modified the text of the proposed regulation in the second set of modifications by adding language to subdivision (i), which stated, “For purposes of the Appeals Board’s rules of practice and procedure, 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 of practice and procedure provide a right to appear in person or personally, that right is satisfied by the videoconference appearance.” These additions are designed to negate any alleged conflicts and resolve potential confusion in the Board’s rules of practice and procedure. The Board declines to modify the proposal further in response to these comments.

However, the Board notes that it did make one further non-substantial change to this provision. As noted herein, where section 376, subdivision (i), referred to the Board’s “rules of practice and procedure,” the Board modified that to refer to the Board’s rules “set forth in Chapter 3.3,” which is where the Board’s rules of practice and procedure are located.

<u>Comment No. 5</u>:

Mr. Melgoza’s letter asserts that attorneys must be able to observe a witness in-person to conduct an effective direct examination and cross-examination, and that is necessary to a fair hearing. The letter also asserts that an in-person hearing best safeguards due process (and variations on that overarching theme). Specifically, Mr. Melgoza asserts,

> The Appeals Board customarily allowed parties, and their attorneys, to personally confront adverse witnesses. The ability to effectively confront and cross-examine witnesses requires that the parties, and attorneys, have the opportunity to accurately *observe* the witness – <u>the entire witness</u> (not just a video portrayal of the witness’s face and possibly shoulders) – while they are on *direct and cross-examination*. The Board’s Video Hearing precludes that ability, and that of a Judge. This hampers counsel’s ability to develop a proper record relevant to witness credibility and interferes with the attorneys’ ability to effectively examine opposing witnesses.

(Melgoza Letter, p. 4.)

> […]

> Absent in-person testimony before a judge, meaningful cross-examination of an adverse witness would be virtually impossible, in that counsel and client can neither gauge visual reactions of witnesses nor discern when a witness testifies from memory or is using documents as an aid.

(Melgoza Letter, p. 5.)

> […]
>
> Instead of having a full, three-dimensional view of the witness, and others in the room… counsel and the judge have views that are limited by the lens of a camera, and two-dimensional images in a flat screen. The attorneys cannot approach a witness, cannot see if the witness is referring to notes, pictures, prepared statements, etc., while testifying. Counsel is unable to see nuances in behavior – "non-verbal communication" – which guide the examiner into further questions, including signals regarding whether the witness displays confusion in reaction to a question, hostility, or any other factor that provides demeanor evidence to help render fair and accurate findings.

(Melgoza Letter, p. 5.)

> […]
>
> The Appeals Board gives a Judge's credibility determinations "great weight" <u>because</u> the Judge was present during the taking of testimony and was able to directly observe and gauge the demeanor on the stand. …Such a long-standing procedural rule is reasonable as the credibility of a witness cannot be entirely or thoroughly examined by counsel, and then evaluated through a single camera lens focused on the witness' face.

(Melgoza Letter, pp. 5-6.)

> […]
>
> From their individual computer screens, representatives and judges' abilities <u>to inquire</u> and observe telltale signs of witness credibility or lack thereof - body language, hand-trembling or visible nervousness, nervous ticks, fidgeting extremities, knuckle-cracking, sweaty hands, feet-tapping, or tight-gripping the edge of their desk (among many other signs of credibility) – are diminished. Likewise, the tone of witness' voice, its volume and pitch, and quality, are not equivalent to being present where he/she is testifying. These depend,

> rather, on the quality of microphones used and their placement, the reliability of the computer connections, etc.

(Melgoza Letter, p. 6.)

> […]
>
> In many cases where witness credibility becomes an issue, the ability to conduct effective witness examination requires personal observation of the entire witness (from their head to their feet) by an attorney and their client, not just the front of their face and their shoulders. Experience demonstrates the importance of the examiner's ability to observe the witness' body language, gestures, inflections, and emphases, etc. […] Effective communication between an examiner and a witness similarly require the witness to observe the examiner's body language, gestures, inflections and emphases.

(Melgoza Letter, p. 6.)

> […]
>
> The ability to examine a witness effectively regarding such complex issues before the Appeals Board, whether on direct or cross, requires a full view of the witness to observe non-verbal communication cues.

(Melgoza Letter, p. 7.)

Response:

Mr. Melgoza's comments essentially suggest that a hearing must occur in-person to be effective. The comments suggests that the examiner must be able to view the entire witness in person to conduct an effective examination. The comments also suggest that the Appeals Board must view the entire witness in person to make effective credibility determinations. The Board disagrees with both of these generalized assertions.

Mr. Melgoza's assertion that a hearing must occur in person to be effective is premised on the idea that an effective examination, and effective credibility determinations cannot be made through videoconference technology because the use of such technology prevents a complete view of a witness's non-testimonial cues and body language. However, the Board believes that a videoconference will, in most cases, provide an adequate window allowing observation of non-testimonial cues for both the parties and the ALJ. A videoconference hearing will allow the hearing participants and the ALJ to observe a witness's demeanor and manner. A videoconference hearing allows the hearing participants and ALJ view a witness's face, facial expressions, some body language, and whether a witness's eyes are darting to other sources (i.e., to view notes, prepared

statements, or others in the room). It also allows them to listen to different inflections in the witness's voice. In sum, the videoconference hearing provides a sufficient window to make effective observations of the witness.

Further, the Board notes that credibility determinations are not solely based on facial expressions and body language, but also on other factors such as: the character of the witness's testimony, the extent of their ability to perceive or recall, the existence of bias, inconsistent statements, and any admissions. (E.g., Evid. Code, § 780.) The videoconference format provides adequate windows into these other areas as well.

During the COVID-19 state of emergency, the Board gained significant experience with videoconference hearings, and found that videoconference hearings represent a practical, effective, and efficient method for conducting hearings, and for making credibility determinations when necessary. Further, within Government Code section 11440.30, the California Legislature provided administrative agencies, including the Board, the option to conduct hearings by videoconference. The current rulemaking relies on that statutory authority.

However, the proposed rulemaking does recognize that case-specific circumstances may militate in favor of an in-person hearing. To that end, as already discussed, the proposed rule contains a list of non-exhaustive factors the ALJ may consider in determining the hearing format. A mechanism also exists for parties to challenge an ALJ's decision on the hearing format, and for the Appeals Board to modify the hearing format on its own motion. Again, the Board believes that these factors will assure that the rights of parties to a full and fair hearing are preserved, and that hearings will be held in person when the circumstances so require. Therefore, the Board declines to modify the proposal further in response to these comments.

Comment No. 6:

Mr. Melgoza's letter states,

> It is common practice before the Board for a party, and a party's attorney, to sit next to each other and share notes regarding witness's testimony. … When an attorney is questioning a witness, the party representative may catch key impeachable instances by observing the testifying witness. If the witness is being coached by another person in the room, the client can point that out to their attorney. Removal of this protection by institution of Video Hearings would also hamper the effectiveness of attorney-client communication necessary to a fair hearing.

(Melgoza Letter, p. 5.)

Response:

Irrespective of whether the hearing occurs via videoconference or in person, the proposed regulation does not prohibit a party and its attorney (or representative) from sitting next to one

another in the same physical location. Please also see the Board's responses to Comment Nos. 1, 2, and 5 from Mr. Melgoza. Therefore, the Board declines to modify the proposal further in response to this comment.

Comment No. 7:

Mr. Melgoza also asserts,

> [P]roblems occur from a witness' viewpoint, such as their ability to observe the attorney or judge asking questions, the ability to understand the questions to generate a responsive answer, instead of a guess at what the witness *thought* the question was. The addition of a language interpreter (not to mention sign language) creates additional potential pitfalls.

(Melgoza Letter, p. 6.)

Response:

The Board notes that a videoconference allows the witness to hear and see the other hearing participants, and to contemporaneously raise any questions or concerns they may have, and to request further guidance.

Further, if for any reason, a witness does not have sufficient equipment to participate via videoconference, the Board's proposed rule states the Board will make facilities available where the witness can access the necessary equipment.

The Board also notes that the proposed rulemaking does recognize that case-specific circumstances may militate in favor of an in-person hearing. To that end, as already discussed, the proposed rule contains a list of non-exhaustive factors the ALJ may consider in determining the hearing format. Again, the Board believes that these factors, along with consideration of any other relevant concerns raised by the parties, will assure that the rights of parties to a full and fair hearing are preserved, and that hearings will be held in person when the circumstances so require. Therefore, the Board declines to modify the proposal further in response to these comments.

To the extent that this comment appears to assert that an effective hearing and examination can only occur in-person, the Board disagrees with this assertion. Please see the Board's responses to Comment Nos. 1, 2, 5, and 18 from Mr. Melgoza. The Board declines to modify the proposal further in response to this comment.

Comment No. 8:

Mr. Melgoza's letter states,

> [A] witness who may not be actually credible can easily manipulate positioning to maintain the *appearance* of eye contact with the judge

> by staring into the lens of their camera (one of the few character traits which may be observed by the judge), and thus display a false sense of credibility.

(Melgoza Letter, p. 6)

<u>Response</u>:

Again, this comment appears to assert that an effective hearing and examination can only occur in-person because of issues with credibility determinations. The Board disagrees with this assertion. Please see the Board's responses to Comment Nos. 1, 2, and 5 from Mr. Melgoza. The Board declines to modify the proposal further in response to this comment.

<u>Comment No. 9</u>:

Mr. Melgoza's letter states,

> In an in-person setting, witness credibility and safeguards against witness coaching, etc. is controlled by a judge who is physically present to observe any suspicious or questionable activity by a party and/or witness. The proposed rules erase this procedural protection. Realistically, in a video hearing, there could be no effective protection against witness coaching, referring to notes, or excluded witnesses sitting outside of camera view.

(Melgoza Letter, p. 6.)

> […]
>
> When a witness testified in-person, parties were allowed to confront them with "non-exhibit" documents for purposes of impeachment. This ability is lost in the Video Hearing process because of the physical separation and the limited "lens" through which counsel and the witness must communicate. If a witness refers to personal notes while testifying, the parties' rights to examine them are compromised, further weakening counsel's opportunity to examine the notes and verify whether a witness testifies truthfully.

(Melgoza Letter, p. 7.)

<u>Response</u>:

These comments allege that the use of videoconference hearings will erode the ability of a party or an ALJ to determine whether a party is relying on improper information, or being coached, when responding to questioning. The comments also allege that the use of videoconference

hearings prevent a party from confronting a witness with non-exhibit documents for purposes of impeachment. The Board disagrees with both comments.

First, the Board does not believe that use of a videoconference will prevent the parties and ALJ from determining or observing if a witness is referring to personal notes, utilizing a prepared statement, or being coached. A videoconference allows the hearing participants view a witness's face and whether their eyes are darting to other sources (e.g., to view notes), whereupon the parties or the ALJ may make appropriate inquiry as necessary. Therefore, the Board declines to modify the proposal further in response to this comment.

Next, the regulation does not prohibit the use of non-exhibit documents for purposes of impeachment. The videoconference technology utilized by the Board permits an ALJ to share such documents with the witness electronically, provided the ALJ receives a copy of the document via electronic transmission. The Board does not agree with the position that videoconference hearings weaken the ability for cross examination and, therefore, the Board declines to modify the proposal further in response to this comment.

Comment No. 10:

Mr. Melgoza's letter states,

> In some instances, construction-related appeals involve use of oversized architectural drawings with tiny entries that need to be immediately visible and legible to all hearing participants so that effective questioning and answers can be presented. The proposed video rules obstruct that process.

(Melgoza Letter, p. 7.)

Response:

The use of oversized architectural drawings constitutes an evidentiary presentation and case management issue. Under section 376, subdivision (e)(1)(A), of the Board's proposal, evidentiary presentation and case management issues are among the issues that the Board may consider when deciding the appropriate hearing format under the proposed rulemaking on a case-by-case basis. Under the proposed rule, the Board may, in its discretion, conclude that such oversized exhibits prevail in favor of an in-person hearing, either in whole or in part. It is noted, however, that exhibits relied upon by the Board must ultimately be entered into the OASIS electronic system. As such, to preserve the evidence for the record, such oversized documents will generally need to be scanned regardless of whether the hearing occurs in-person or by videoconference. It is, therefore, unclear what obstruction is posed by a videoconference hearing that is not present with an in-person hearing. Therefore, the Board declines to modify the proposal further in response to this comment.

Comment No. 11:

Mr. Melgoza's letter states,

> [T]he ability to examine a witness is greatly supplanted by the ability to pass notes *during live testimony*. The "breakout room" function of Zoom does not accommodate this necessity guaranteed by existing regulations.

(Melgoza Letter, p. 7.)

<u>Response</u>:

As already noted in the response to Comment No. 6, the proposed regulation does not prohibit a party and their attorney (or representative) from sitting next to one another in the same physical location and passing notes. Such passing of notes is not contemplated, restricted or enabled by the regulation. Therefore, the Board declines to modify the proposal further in response to this comment.

<u>Comment No. 12</u>:

The letter argues that because the findings and conclusions of the Appeals Board on questions of fact, including ultimate facts, are conclusive and not subject to review (Lab. Code § 6630), it is critical that the parties be afforded full rights to confront witness and ask questions in the presence of the witnesses. (Melgoza Letter, p. 7.)

<u>Response</u>:

Again, this comment appears to assert that an effective hearing can only occur in person. The Board disagrees. Please see the Board's responses to Comment Nos. 1, 2, and 5 from Mr. Melgoza. Therefore, the Board declines to modify the proposal further in response to this comment.

<u>Comment No. 13:</u>

Mr. Melgoza's letter states,

> Under published Board regulations, "Each party shall have the right to introduce exhibits and to impeach any witness." Title 8, CCR § 376.1(b). However, under the Appeals Board's forerunner for conducting *video hearings*, the foundation for the proposed regulations, parties are required to submit <u>all exhibits</u> to the Board 10 to 15 days <u>before the hearing commences</u>. This removes previously available methods to present evidence <u>at and during hearings</u>.

(Melgoza Letter, p. 7.)

> […]

> As for the opportunity to use an exhibit that was not uploaded to the Board's system before the hearing, either because it was not then relevant or that it may be needed for impeachment purposes, there is *no* requirement in existing regulations to require "good cause" for the use and admission of such an exhibit. The proposed rules would essentially impose such a requirement where none exists under the in-person system.

(Melgoza Letter, p. 7.)

<u>Response</u>:

The proposed regulation clarifies the Board's intent to allow ALJs to issue orders requiring prehearing lodging of exhibits for videoconference hearings. Mr. Melgoza appears to assert that such a provision is inappropriate, arguing that it "removes previously available methods to present evidence at and during hearings." However, there is nothing unusual or inappropriate about requiring prehearing lodging of proposed exhibits. It commonly occurs for trials in state and federal courts, and, most importantly, other administrative matters. (E.g., Gov. Code, § 11511, subd. (b)(9).) The Board also does not believe any conflict with existing regulations is created. Further, it is important that the Board and its ALJs have the authority to require pre-hearing lodging of exhibits for videoconference hearings because such hearings might be unnecessarily delayed if parties attempt to contemporaneously upload exhibits during the proceeding, rather than prior to its commencement.

However, in response to this and other comments received (please also see the Board's responses to Oral Comments Nos. 2 and 4 of Ms. Lucido, DOSH Chief Counsel, and Comment No. 1 from her Letter dated November 10, 2022), within the two sets of subsequent modifications, the Board modified the prehearing lodging provision to make it more flexibile.

First, the Board has modified section 376, subdivision (e)(2), to state that prehearing lodging of exhibits shall not be required more than three working days prior to the hearing, and to state that lodged documents will not be reviewed by the Board for substance until introduced at hearing.

Second, the Board is mindful that hearings are dynamic proceedings and that parties cannot necessarily anticipate each exhibit that will be needed or necessary in advance of the hearing. The Board recognizes that parties should not be unreasonably denied the opportunity to supplement proposed exhibits during the hearing, particularly where no prejudice would occur, or where potential prejudice may be cured by a continuance. Within the second set of modifications (noticed between October 31, 2022, and November 15, 2022), the Board added section 376, subdivision (e)(2)(A), to state that the Board may grant parties the opportunity to utilize additional exhibits during the hearing, not previously lodged, upon a showing of either: (1) good cause, (2) that no prejudice would occur, or (3) such other showing deemed sufficient by the ALJ. The Board concludes that these changes sufficiently address the concerns raised by Comment No. 13, and declines to make any further revisions in response to Comment No. 13.

Comment No. 14:

Mr. Melgoza's letter states,

> Under the proposed rules, parties essentially lose their rights to issue *subpoenas duces tecum* to have witnesses attend and bring with them documents to a hearing location, testify to authenticate some or all of them, have them marked as exhibits, and move them into evidence during the hearing.

(Melgoza Letter, p. 7.)

Response:

The Board disagrees that parties lose the right to issue an appropriate subpoena when a videoconference hearing occurs, or through the Board's modifications. Indeed, subpoenas are generally governed by another regulation, section 372.2.

However, to address this comment, within both the first and second set of proposed modifications, the Board has modified the language of section 376, subdivision (i), to clarify that subpoenas may be issued requiring attendance at a videoconference hearing. Following the second set of modifications (noticed between October 31, 2022, and November 15, 2022), subdivision (i) now states, "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." Further, the Board modified subdivision (e)(3) to provide that if a subpoenaed person "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 Board concludes that these changes sufficiently address the concerns raised by Comment No. 14 and declines to make any further revisions in response to Comment No. 14.

Comment No. 15:

Mr. Melgoza's letter states,

> Under the Board's prototype video system, parties are required to submit, in advance and by arbitrary deadlines, lists of their witnesses. There are no guidelines or criteria to determine what happens if an appellant discovers, well before the hearing but after the deadline to provide witness lists, that he/she should call a witness not identified on a witness list. The ability of appellants under the *in-person hearing procedures* to call witnesses after the Division rests its case in chief, as part of a defense, is not protected by the proposed regulations, especially where appellants had not

> anticipated calling that witness earlier, until after the Division presented evidence.

(Melgoza Letter, p. 8.)

Response:

Provisions exist for exchange of witness lists under section 372. The proposed rulemaking does not address or modify that provision.

However, to the extent that the comment suggests that ALJs have required parties submit witness lists to them prior to hearing, the current rulemaking does not contemplate any such specific requirement. To the extent an ALJ imposes such a requirement, it does so based on authority outside the current rulemaking, e.g., section 350.1. Therefore, the Board declines to modify the proposal further in response to this comment.

Comment No. 16:

Mr. Melgoza's letter states,

> The video hearings system the Board proposes often requires appellants to disclose work product and strategy by forcing them to submit exhibits and examination strategies before the Division begins to present its case, causing strategic disadvantages that are not existent under traditional in-person hearings.
>
>> The opponent whose case is a denial of the other party's affirmation . . . may legally sit inactive, and expect the proponent to prove his own case. Therefore, until the burden of producing evidence has shifted, the opponent has no call to bring forward any evidence at all . . .. [His] failure to produce evidence cannot at this stage afford any inference as to his lack of it; otherwise the first party would virtually be evading his legitimate burden (2 Wigmore on Evidence § 290, p. 179)." *Vaughn v. Coccimiglio* (1966) 241 Cal.App.2d 676, 678; *People v. Zavala* (1983) 147 Cal.App.3d 429, 440.
>
> The Board's proposed rule changes fail to preserve and protect the above rights.

(Melgoza Letter, p. 8.)

Response:

The Board disagrees with the generalized assertion that prehearing lodging of proposed exhibits requires disclosure of work product and strategy. Parties are only required to lodge those documents that they intend to offer or introduce as exhibits during the hearing.

Further, there is nothing unusual or improper about requiring prehearing lodging of such proposed exhibits, nor does it require disclosure of work product. Such disclosures are commonly required, and occur, for trials in state and federal courts, and, most importantly, other administrative matters. (E.g., Gov. Code, § 11511, subd. (b)(9).) Further, it is important that ALJs have the authority to require prehearing lodging of exhibits for videoconference hearings because such hearings might be unnecessarily delayed if parties attempt to contemporaneously upload exhibits during the proceeding, rather than prior to its commencement.

Please also see the Board's response to Mr. Melgoza's Comment No. 13, and Board's responses to Oral Comments Nos. 2 and 4 of Ms. Lucido, DOSH Chief Counsel, and Comment No. 1 from her Letter dated November 10, 2022.Therefore, the Board declines to modify the proposal further in response to this comment.

Comment No. 17:

Mr. Melgoza's letter states,

> Although published regulations guarantee parties the rights to compel attendance and testimonies of witnesses, these are not guaranteed under the proposed video hearing rules. In the context of video hearings, subpoenas are insufficient legal tools to ensure a witness testifies. Although a subpoena may ensure a witness's presence at a particular location at a particular date and time, a subpoena cannot order an individual to appear with sufficient technology (equipment) and knowledge, and cannot order an individual to "click" on a particular website to join the cyberspace proceeding and to stay electronically "connected."
>
> Many individuals are not technologically equipped and may be reluctant to appear on a computer video display.

(Melgoza Letter, p. 8.)

Response:

Please see the Board's response to Comment No. 14 from Mr. Melgoza. The Board declines to modify the proposal further in response to this comment.

Comment No. 18:

Mr. Melgoza's letter states,

> Witnesses commonly require Appeals Board-provided second language interpreters. Title 8, CCR § 376.5. When interpreters are used during hearings, communication problems often exist even during *in-person* hearings. Additional problems are created when the interpreter is forced to communicate with multiple people, scattered across several two-dimensional computer screens. The Board's proposed video hearings procedures may render language assistance ineffective. It certainly interferes with the ascertainment of facts.

(Melgoza Letter, pp. 8-9.)

<u>Response</u>:

The Board notes that it has conducted videoconference hearings with interpreters and does not believe that the videoconference format operates as an impediment. Whether the hearing occurs in person or via videoconference, it is necessary for only one person to be speaking at a time due to the needs to create a record either by recorder or by a court reporter. Such constraints do not readily appear to be changed by whether a hearing is in-person or by videoconference. Therefore, the Board declines to modify the proposal further in response to this comment.

Next, to the extent that this comment appears to assert that an effective hearing can only occur in person, please see the Board's responses to Comment Nos. 1, 2, and 5 from Mr. Melgoza. The Board declines to modify the proposal further in response to this assertion.

<u>Comment No. 19</u>:

Mr. Melgoza's letter states,

> Title 8, CCR § 379 allows the Appeals Board to exclude from the hearing room any witnesses who are not on the witness stand. Under the proposed video hearings system, the judge has no effective means to enforce exclusion orders. There are no provisions for safeguards to verify that no other witnesses or visitors are present in a room listening to the proceedings out of view of the camera, and attempting to influence the witness.

(Melgoza Letter, p. 9.)

<u>Response</u>:

The Board disagrees with this comment. There are indeed mechanisms an ALJ can employ to ensure no unauthorized persons are in the same room as a witness outside the view of the camera. First, the videoconference technology utilized by the Board allows an ALJ to see each hearing participant and select whether to exclude or include that participant from the virtual hearing room. Second, the ALJ can also employ practical means to determine whether individuals are present

with a testifying witness. ALJs can ask testifying witnesses, under oath or affirmation, questions to determine whether a witness has external influences or has other persons present. The ALJ can require a testifying witness to display the room that he or she is testifying in with his or her video camera. Therefore, the Board declines to modify the proposal further in response to this comment.

Comment No. 20:

Mr. Melgoza states,

> In practical terms, the Board's new video hearings procedure will write "consolidated hearings," with multiple parties, *out of existence*, due to the number of individual hearing representatives, witnesses, and interpreters who must each have separate cameras, be in separate locations, and provide sufficient *bandwidth* to accommodate the video and audio signals properly. (§ 363)

(Melgoza Letter, p. 9.)

Response:

The Board disagrees with this comment. The Board believes that a consolidated videoconference hearings are entirely feasible, and the concerns unfounded. The Board has already conducted hearings and meetings with numerous participants with little to no difficulty. It is further noted that while limited room size and physical accommodations exist for in-person proceedings, such accommodations are made readily available in a videoconference proceeding.

However, that does not necessarily mean that all consolidated hearings will occur by videoconference. Again, the proposed rulemaking does recognize that there is no one-size-fits-all approach to determining the appropriate hearing format. Case-specific circumstances may militate in favor of an in-person hearing. The proposed rulemaking requires a case-specific evaluation in each case. Therefore, the Board declines to modify the proposal further in response to this comment.

Comment No. 21:

Mr. Melgoza states,

> It is questionable that forcing hearing participants to attend hearings from numerous remote geographical locations - each with his/her dedicated cameras, computer equipment, microphones, and internet connections and no uniform environmental controls – would result in any benefits to the environment, compared to holding hearings in single locations, where the venue and the participants are under the Board's exclusive control. The Board's claim of such an advantage appears entirely speculative and even counterintuitive.

(Melgoza Letter, p. 9.)

Response:

This comment refers to a rationale for the proposed rulemaking contained in the Notice of Rulemaking, wherein the Board opined that videoconference hearings may present some environmental benefits. The Board stands by its assertion. The Board believes that when hearings occur by videoconference it will necessarily reduce the need for hearing participants to travel, thereby reducing associated pollutants with travel, such as carbon dioxide created by car or plane travel. Therefore, the Board declines to modify the proposal further in response to this comment.

Comment No. 22:

Mr. Melgoza states, "The Board's statement that the proposed rules are 'an important public health tool' to address emergency circumstances is legally improper. To advance such as a basis for rule-making is arguably wholly inappropriate and outside the Board's delegated authority to engage in quasi-legislative rulemaking procedures which are limited by statute." (Melgoza Letter, p. 9.)

Response:

Again, this comment refers to a rationale for the proposed rulemaking contained in the Board's Notice of Rulemaking and Initial Statement of Reasons. The Board disagrees with the comment and believes it entirely appropriate to consider the health and safety of its staff, and the litigants that come before it. Therefore, the Board declines to modify the proposal further in response to this comment.

Comment No. 23:

Mr. Melgoza's letter proposes the alternative regulatory language. The letter states,

> In lieu of the Board's proposals, we propose a video hearings program under which the 'default' position would be an *in-person* hearing, and which offers parties the opportunity to give the trier of fact (the assigned ALJs) reasons for requesting that some or all of the hearing to be conducted remotely by electronic means. The ALJ would then be required to make findings to support granting the exceptions. The Board may then modify the hearing format after it is initially set in-person at a physical hearing venue, upon demonstrated good cause.

(Melgoza Letter, pp. 9-10.)

The letter proposes the following regulation:

> (a) The Board shall consult the parties to give them an opportunity to state their positions regarding the locations, dates, and duration of

> formal evidentiary hearings as defined in Title 8 CCR § 347(r). Subject to the availability of Board staff, the Board shall determine the time and place of the hearing after the parties have received a reasonable opportunity to comment, and upon good faith consideration of the input received.
> (b) The hearing shall be held at a hearing facility maintained by the Appeals Board at venues in Sacramento, Redding, Oakland, West Covina, Los Angeles, Santa Ana, or San Diego and at the facility that is closest to the location where the alleged violations occurred or where the appellant maintains its business office.
> (c) Notwithstanding subdivision (b), the hearing may be held at any of the following places:
> (1) A place selected by the agency that is closer to the location where the alleged violations occurred or the appellant maintains its business.
> (2) A place within the state selected by agreement of the parties.
> (3) Virtually by telephone, videoconference, or other electronic means.
> (d) The respondent may move for, and the administrative law judge has discretion to grant or deny, a change in the place of the hearing. A motion for a change in the place of the hearing shall be made within 10 days after service of the notice of hearing on the parties.
> (e) Unless good cause is identified in writing by the administrative law judge, hearings shall be held in a facility maintained by the Board.

(Melgza Letter, pp. 9-10.)

Response:

The Board declines to adopt the proposed regulation set forth in the letter as it would vitiate the express purpose of the Board's proposed rulemaking. As noted in the Initial Statement of Reasons, the Board's modifications to section 376 are designed to be consistent with, and adoptive of, Government Code section 11440.30 (as modified by Assembly Bill 1578[1]), wherein the Legislature modified and enhanced the authority of administrative agencies, including the Board, to conduct hearings by videoconference. The Board's proposed modifications to section 376 were designed to not only adopt Government Code section 11440.30 as amended by AB 1578, but to also delineate and specify how that specific legislation will be applied in Board proceedings, providing clear guidance to the regulated community.

However, the regulation proposed by Mr. Melgoza is inconsistent with Government Code section 11440.30 in multiple respects. Most notably, it sets forth a default in-person hearing requirement and requires a showing of "good cause" to depart from the default position. However, no such

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[1] Assem. Bill No. 1578 (2021-2022 Reg. Sess.), approved by Governor, September 30, 2021 (hereinafter "AB 1578").

language or requirements exist in Government Code section 11440.30. The regulation proposed by Mr. Melgoza is also inconsistent with the objection provisions set forth in the statute.

The Board thanks Mr. Melgoza and Donnell, Melgoza & Scates LLP for participating in the rulemaking process and for commenting on the regulatory package.

SUMMARY AND RESPONSE TO WRITTEN COMMENTS RESULTING FROM THE FIRST 15-DAY NOTICE OF PROPOSED MODIFICATION (August 25, 2022, to September 9, 2022)

Mr. Manuel M. Melgoza, Attorney at Donnell, Melgoza, & Scates, LLP, by Letter Dated September 7, 2022

Comment No. 1:

Regarding the Board's proposed changes to section 376, subdivision (d), Mr. Melgoza asserts:

> The proposed rule inadequately sacrifices parties' rights to a statutorily-required [*sic*] hearing, in favor of the Board's conveniences. Also, some rights of parties that are included in the Board's regulations are missing from the recent proposal.

(Melgoza Letter, p. 1.)

Response:

This comment essentially reiterates Comment No. 1 from Mr. Melgoza's May 22, 2022, letter, in which Mr. Melgoza asserts that parties have a right to an in-person hearing, and that a videoconference hearing is an ineffective substitute. It also essentially reiterates the allegation in Comment No. 4 from Mr. Melgoza's May 22, 2022, letter, in which Mr. Melgoza asserts that the proposed rulemaking conflicts with other provisions of the Board's rules of practice and procedure As already noted, the Board disagrees with these comments. The Board incorporates by reference its responses to Comment Nos. 1, 2, 4, and 5 from Mr. Melgoza's May 22, 2022, letter.

By way of further response, the Board also notes that parties do not have a statutory right to an in-person hearing. Rather, the Board's authority to conduct hearings by videoconference derives from Government Code, section 11440.30. Therefore, no right is sacrificed or eliminated by proposed section 376, subdivision (d). Therefore, the Board declines to modify the proposal further in response to this comment.

Comment No. 2:

In Comment No. 2, Mr. Melgoza notes that section 347, subdivision (s), defines "Hearing Record" to include "physical, mechanical or demonstrative evidence." Mr. Melgoza then asserts that the "parties' rights to effectively offer, explain, inquire into, and observe (including by witnesses) such evidence would be compromised under the current proposal." (Melgoza Letter, p. 1.)

Response:

The Board disagrees that section 376, subdivision (d), would compromise parties' rights regarding evidentiary presentation. The Board's proposed revision to section 376, subdivision (e)(1), requires the ALJ to consider issues of evidentiary presentation when deciding the appropriate hearing format. Whether physical, mechanical, or demonstrative evidence is needed, and how that evidence is presented, is an evidentiary presentation issue under section 376, subdivision (e)(1), which an ALJ may consider when addressing case management issues, including the format for the hearing. Accordingly, the Board declines to make any further modifications to the proposed regulation in response to this comment.

Comment No. 3:

To address the concerns raised in Comment Nos. 1 and 2, Mr. Melgoza appears to suggest several revisions to section 376, subdivision (d). Mr. Melgoza asserts that subdivision (d) should be modified to read as follows:

> (d) Unless a party objects, a hearing may be conducted by videoconference [ ] if each participant in the hearing has an opportunity to participate in, [ ] to hear the entire proceeding while it is taking place, to observe the exhibits, to observe hearing participants, including the entire witness while testifying, to offer and explain exhibits and demonstrative evidence. [ ]

(Melgoza Letter, p. 1.)

Response:

The language proposed by Mr. Melgoza would automatically require an in-person hearing if any party objects to the videoconference format. For the reasons discussed in the response to Comment No. 23 from Mr. Melgoza's May 22, 2022, the Board rejects this proposal. Mr. Melgoza's proposed revisions significantly depart from the current contents of Government Code section 11440.30. In short, the current iteration of Government Code section 11440.30, upon which this rulemaking is premised, does not require automatic acceptance of the objection, as Mr. Melgoza would propose. The Board declines to engage in such a departure from the authorizing statutory authority. Therefore, the Board declines to modify the proposal further in response to this comment.

Comment No. 4:

Regarding the proposed changes to section 376, subdivision (e), Mr. Melgoza asks several questions:

> The term virtual location appears repetitive and confusing. Does it mean or include all the remote locations where participants and witnesses appear to testify and/or observe the hearing?
> Does it only include cyberspace, or the telephone and web link addresses?
> Do the terms "access" and "attend" have different meanings?
> […]
> Will the instructions include only the *means* of access? Or, will they include how the witnesses may use the audio, video, microphones, and e-tools required to participate meaningfully?

(Melgoza Letter, p. 2.)

> […]

> What is *sufficient instruction and information* to *access* and *attend*? Does a witness just access? Will the instructions include how a witness navigates via the videoconference format and makes inquiries/clarifications, etc.?

(Melgoza Letter, p. 4.)

<u>Response</u>:

Within the first modifications to the proposed regulation (noticed between August 25, 2022, and September 9, 2022), the Board added the terms "virtual location," "access," and "attend" in two places. First, section 376, subdivision (e) was modified to state, "the notice of the hearing shall provide instruction on how to access and attend the virtual location of the hearing." Second, subdivision (i) was modified to state, "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 access and attend the virtual location."

As noted above, Mr. Melgoza's letter asserts that the terms "virtual location," "access," and "attend" are confusing. To address the concerns raised in the letter, and to avoid confusion, the Board excised those terms from the proposed regulation, in favor of simpler language.

Within the second set of proposed modifications (noticed between October 31, 2022, and November 15, 2022), the Board modified section 376, subdivision (e), to state, "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." Further, the Board modified section 376, subdivision (i), to state, "[S]ubpoenas 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." In sum, the Board rewrote these provisions in simpler terms. The Board declines to make any further revisions in response to this comment. It is unnecessary to incorporate the details of how the Board's instructions address these issues, and the Board declines to incorporate such details into this rulemaking.

Comment No. 5:

Mr. Melgoza questions whether hearing instructions will "be given in the dominant languages of the witnesses." (Melgoza Letter, p. 2.)

[…]

"Does sufficient instruction and information include materials written in witness' dominant language? If a witness is not English-literate, will the instructions include video tutorial information?" (Melgoza Letter, p. 4.)

[…]

Response:

Regarding the language of hearing instructions, the Board has already begun to make hearing documents available in languages other than English to accommodate parties and witnesses whose primary language is not English. The Board will continue to expand upon such efforts, but declines to incorporate such practices into this rulemaking, since laws already exist governing such requirements (including the Dymally-Alatorre Bilingual Services Act). The Board also notes that it has made several video tutorials, available on its website, but does not believe these need to be addressed in the present rulemaking. Therefore, the Board declines to make any further revisions in response to this comment.

Comment No. 6:

Mr. Melgoza questions, "Will the instructions include information on what remote participants should do if they encounter technical problems ….[and] [h]ow do they bring these to the attention of the ALJ or to a hearing participant?" (Melgoza Letter, p. 2.)

Response:

The Board has made two changes in the second set of proposed modifications (noticed between October 31, 2022, and November 15, 2022) that should address the identified concern. First, the Board has modified section 376, subdivision (e), to state, "If a videoconference hearing is selected, the notice of the hearing shall … indicate what to do if technical problems arise." Second, the Board has modified section 376, subdivision (i), to state, "[S]ubpoenas 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 … indicates what to do if technical problems arise." The

Board concludes that these changes address the issues raised by this comment and declines to make any further revisions in response to this comment.

The Board also incorporates by reference its response to Comment No. 4 from Mr. Melgoza's September 7, 2022 letter.

Comment No. 7:

Regarding the proposed addition of section 376, subdivision (e)(1), Mr. Melgoza complains that the terms "evidentiary presentation" and "case management" are "vague and unspecific." In support, Mr. Melgoza questions whether "evidentiary presentation" includes "factual disputes, witness credibility issues, types of evidence to be presented (e.g., physical, mechanical or demonstrative evidence, video evidence, etc.)?" (Melgoza Letter, p. 2.)

Response:

This comment pertains to language in the original proposal, not a revision or modification. Therefore, there is no need to respond to the comment. However, notwithstanding this deficiency, the Board does not believe these terms to be too vague. The Board confirms that consideration of "evidentiary presentation" issues would include, without limitation, consideration of "factual disputes," "witness credibility issues," and "what types of evidence [are] to be presented" at the hearing. Such issues—i.e., what types of evidence are needed and how with that evidence be presented—concern "evidentiary presentation" under section 376, subdivision (e)(1), which the Board may consider when addressing case management issues, including the format for the hearing. The Board declines to make any modifications to the proposed regulation in response this comment.

Comment No. 8:

Within section 376, subdivision (e)(1), the Board's proposed rulemaking listed factors and criteria relevant to determining the time, location, and format for conducting the hearing. These factors included, among other things: the inability of a party or witness to secure care for children, other family members, or dependents that would unduly hinder travel to a hearing; the health and safety of parties, witnesses, representatives, and Appeals Board staff; and other hardships or impediments raised by a party or witness. Mr. Melgoza's letter asserts that, "These criteria are far too vague and out of place here. Even if these are included somewhere in the Board's regulations, the topics should be placed under considerations for *Motions to Continue Hearings*, and not part of the original setting of hearings." (Melgoza Letter, p. 2.)

Response:

This comment pertains to language in the original proposal, not a revision or modification to that proposal. Therefore, there is no need to respond to the comment. However, notwithstanding this deficiency, the Board expressly declines to remove these considerations from the rulemaking. The Board believes that the use of videoconference hearings, in whole or in part, may be especially beneficial for individuals with disabilities that make it difficult to travel or appear in a public

setting, particularly those at increased susceptibility to the risk of COVID-19; for individuals that live in distant or rural areas; and low-income individuals for whom it may be difficult to secure transportation or arrange for childcare. In short, the use of videoconference hearings may help facilitate greater access to, and involvement in, Board proceedings.

Further, the Board also notes that these considerations have been adopted, and are used, by other agencies, when determining whether to set a matter for electronic hearing. For example, the California Unemployment Insurance Appeals Board considers equivalent criteria. (Cal. Code Regs., tit. 22, § 5055.) Accordingly, the Board declines to make any modifications to the proposed regulation in response to this comment.

Comment No. 9:

Section 376, subdivision (e)(2), of the Board's proposed revisions permits the Board to require pre-hearing lodging of proposed exhibits. Regarding section 376, subdivision (e)(2), Mr. Melgoza notes that,

> A party may have, but does not intend to offer, evidence which has been exchanged during the discovery phase (e.g., deposition transcripts). If another party's witness testifies during the hearing about topics covered by such evidence, and the testimony departs from a previous written statement (or previous deposition testimony), the language proposed by the Board would dilute parties' rights to confront adverse witnesses while they are testifying with such writings or things that go to witness credibility if they contradict the witness' hearing testimony. Similar documents may serve to refresh a witness' memory while on the stand. If the parties' rights are not protected in this fashion by allowing such exhibits to be used for the first time during the hearing, they would have no choice but to "lodge" <u>all discovery</u> in OASIS in advance, whether intended to be actually used or not.

(Melgoza Letter, pp. 2-3.)

To address these concerns, Mr. Melgoza suggests that section 376, subdivision (e)(2) should be revised to state:

> (e)(2) …Pre-hearing lodging of exhibits shall not be required more than three working days prior to the hearing, and may be allowed after the commencement of a hearing if good cause is shown. Impeachment evidence regarding veracity of testimony is always deemed relevant and may be allowed any time during the hearing, absent meritorious discovery abuse objections. The Appeals Board may not review or consider any lodged documents for substance until introduced by a party or representative at hearing. A party may

> not review an opposing party's lodged documents until introduced by the party or representative who lodged the exhibit.

(Melgoza Letter, pp. 2-3.)

Response:

The Board is mindful that hearings are dynamic proceedings and that there will be *bona fide* circumstances where parties cannot necessarily anticipate each exhibit or document that will be needed or necessary in advance of the hearing. The Board recognizes that parties should not be unreasonably denied the opportunity to supplement proposed exhibits during the hearing, particularly where no prejudice would occur, or prejudice may be cured by a continuance.

However, the Board notes that the changes proposed in Comment No. 9 by Mr. Melgoza go far beyond their stated purpose. For example, the Board understands that, in some situations, a party may not determine which documents are relevant (for impeachment purposes or otherwise) until after the last date for prehearing lodging of proposed exhibits. However, that concern does not support a rule declaring that "[i]mpeachment evidence regarding veracity of testimony is always deemed relevant and may be allowed any time during the hearing, absent meritorious discovery abuse objections."

Nevertheless, within the second set of proposed modifications (noticed between October 31, 2022, and November 15, 2022), to address the legitimate concerns raised in Comment No. 9, the Board added proposed section 376, subdivision (e)(2)(A), which states, "[T]he Appeals Board may grant parties the opportunity to utilize additional exhibits during the hearing, upon a showing that good cause exists, that no prejudice would occur, or such other showing deemed relevant by the Administrative Law Judge."

Please also see the Board's responses to Oral Comments Nos. 2 and 4 of Ms. Lucido, DOSH Chief Counsel, and Comment No. 1 from her Letter dated November 10, 2022. The Board declines to make any further modifications to the regulation.

Comment No. 10:

The proposed addition of section 376, subdivision (e)(3), provides that the Board will make facilities (with adequate technological equipment) available to any party, witness, subpoenaed person, or representative that "establishes" that it lacks access to technological equipment necessary to attend a videoconference hearing. Regarding this proposal, Mr. Melgoza raises the following concerns:

> What qualifies as "necessary equipment" to attend? Is any smartphone all that is necessary? Is a certain type of internet access/provider and bandwidth required? How would participants know if their device is sufficient?

> How would an appellant know in advance that a Division witness has the "necessary equipment" in order to "establish" that a witness does not have access to necessary equipment?

(Melgoza Letter, p. 3.)

<u>Response</u>:

Within the second set of modifications (noticed between October 31, 2022, and November 15, 2022), the Board made two modifications to help parties, witnesses, and others determine what equipment will be necessary to appear at a videoconference hearing. Specifically, subdivision (e) has been modified to state, "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." Further, subdivision (i) has been modified to state, "[S]ubpoenas 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 Board also modified the text of section 376, subdivision (e)(3), by replacing "establishes" with "contends," which will make it easier for parties, subpoenaed persons, and witnesses, to raise concerns regarding their ability to participate in videoconference hearings. The Board concludes that these changes eliminate the potential uncertainties raised by Comment No. 10 and declines to make any further revisions in response to this comment.

<u>Comment No. 11</u>:

The Board's revision to section 376, subdivision (g), specifies that expedited hearing dates will be initially set as videoconference hearings. However, the regulation specifies that the Board may modify the expedited hearing format after it is initially set, on its own motion or upon request. Regarding this provision, Mr. Melgoza's letter asserts,

> If a hearing is important enough to proceed on an expedited basis, then it should be important enough to be heard in-person. There is no reason for the distinction that preserves the parties' rights. A videoconference is not as protective of all parties' rights as an in-person hearing. Parties' rights to effectively confront and observe opposing parties' witnesses, the ability of witnesses to effectively see and hear other participants and exhibits, are compromised by a videoconference format. The ability of the ALJ to hear a witness and to observe and evaluate witness demeanor are also compromised.

(Melgoza Letter, pp. 3-4.)

In conjunction with those claims, Mr. Melgoza proposes amended language for section 376, subdivision (g). The proposed amendments appear to make an in-person hearing the default format

and permit the Board to schedule an expedited videoconference hearing *only* in response to a party's objection to an in-person hearing. (Melgoza Letter, p. 3.)

Response:

First, the Board rejects several of the underlying premises stated or implied by Comment No. 11, viz., that parties have a right to an in-person hearing; that videoconference hearings are inherently inferior to in-person hearings; and that the format of the hearing is determined by, or indicative of, the "importance" of that hearing. By way of further responses, the Board incorporates by reference its response to Comment Nos. 1, 2, 5, and 23 from Mr. Melgoza's May 22, 2022, letter, which address the same concerns.

Second, the Board reiterates, as noted in its Initial Statement of Reasons, that this provision exists in its current form, for specific reasons. Due to the short timelines set forth in section 373 for setting expedited hearings, and the concurrent need to issue a rapid notice of hearing for such expedited matters, it is necessary for the Board to initially set all expedited hearings for the videoconference format, since the Board will not have sufficient time to entertain discussion on alternative formats prior to issuance of the initial hearing notice. Therefore, the Board declines to make any further revisions in response this comment.

Comment No. 12:

In Comment No. 12, Mr. Melgoza proposes revisions to section 376, subdivision (h), that suggest that all hearings will be set by default in-person. Thereafter, if a party wishes to proceed in another manner, Mr. Melgoza proposes that an objection would have to be made to the in-person format, accompanied by declarations (pursuant to section 347, subdivision (i)) or specific references to witness testimony and citation to the record. (Melgoza Letter, p. 4.) Mr. Melgoza does not provide an explanation for the changes proposed in Comment No. 12.

Response:

The language proposed by Mr. Melgoza would seem to automatically require an in-person hearing unless a party objects. The Board declines to make such a modification. As noted in the Board's Initial Statement of Reasons, the Board's modifications to section 376 are designed to be consistent with, and adoptive of, Government Code section 11440.30 (as modified by AB 1578). Mr. Melgoza's proposed revisions depart from the current contents of Government Code section 11440.30. There is no default in-person hearing requirement within that statute, and there does not appear to be any clear rationale to impose to such a default requirement. By way of further response, the Board incorporates by reference its response to Comment Nos. 1 and 23 from Mr. Melgoza's May 22, 2022, letter, and its response to Comment No. 3 of his September 7, 2022 letter.

Comment No. 13:

In Comment No. 13, Mr. Melgoza proposes section 376, subdivision (i), as a new subdivision, with the following language:

> Unless good cause is identified in writing by the administrative law judge, hearings shall be held in a facility maintained or controlled by the Appeals Board. (Melgoza Letter, p. 4.)

In support of Comment No. 13, Mr. Melgoza refers the Board to Government Code section 11508, subdivision (d), which provides that "Unless good cause is identified in writing by the administrative law judge, hearings shall be held in a facility maintained by the office."

Response:

The language proposed by Mr. Melgoza would automatically require an in-person hearing at a facility maintained by the Board. The Board rejects such a proposal. By way of further response, the Board incorporates by reference its response to Comment Nos. 1 and 23 from Mr. Melgoza's May 22, 2022, letter, and its response to Comment Nos. 3 and 12 of his September 7, 2022 letter.

By way of further response, Government Code section 11508, subdivision (d), is inapplicable to the Board. That provision falls within Chapter 5 of the Administrative Procedures Act. However, the provisions of Chapter 5 do not apply to *all* agency adjudicatory proceedings. Rather, Chapter 5 applies *only* "as determined by the statutes relating to that agency." (Gov. Code, § 11501.) Here, under the applicable statute, only the following provisions of Chapter 5 apply to the Board: Government Code sections 11507, 11507.6, 11507.7, 11513, 11514, 11515, and 11516. (Lab. Code, § 6603.) Therefore, Government Code section 11508, subdivision (d), is inapplicable to the Board's adjudicatory proceedings, and the Board declines to adopt a regulation that incorporates the language of that provision. The Board declines to modify the proposal further in response to this comment.

Comment No. 14:

In Comment No. 14, Mr. Melgoza suggests revisions to the Board's proposed section 376, subdivision (i). (These suggested revisions are not to be confused with Mr. Melgoza's proposed section 376, subdivision (i), which is addressed in the preceding comment.)

First, Mr. Melgoza suggests that that the Board should delete the phrase "any right to appear in person or personally is satisfied by the videoconference appearance" from the Board's proposed regulation because he contends it "would swallow virtually all the other provisions meant to protect parties' hearing rights." He also suggests that subdivision (i) be revised to state the following:

> (i) For purposes of the Appeals Board's rules of practice and procedure, if a hearing is ordered to occur by videoconference, the virtual location of the hearing will constitute the place of hearing and hearing room. Further, subpoenas may be issued…requiring attendance of a person at the *designated* place of *appearance*, provided the subpoena includes *sufficient instruction and*

> *information* on how to *access* and *attend* the virtual location. (Melgoza Letter, p. 4.)

<u>Response</u>:

Following the first and second set of modifications, the Board modified the text of the proposed regulation by adding language to subdivision (i), which states "[t]o the extent the rules of practice and procedure provide a right to appear in person or personally, that right is satisfied by the videoconference appearance." Mr. Melgoza's comment suggests that the Board remove this language. The Board declines such a change. This language was deliberately included to address Comment No. 4 from Mr. Melgoza's May 22, 2022, letter. The Board incorporates by reference its response to Comment No. 4 from Mr. Melgoza's May 22, 2022 letter.

As for the remainder of the comment (to the extent it addresses the subpoena language), the Board agrees with the suggestion. Within the second set of proposed modifications (noticed between October 31, 2022, and November 15, 2022), the Board has modified the remainder of subdivision (i) in a manner relatively close to the suggestion contained in the comment. The subdivision now states, "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 Board declines to modify the proposal further in response to this comment.

<u>Comment No. 15</u>:

In Comment No. 15, Mr. Melgoza suggests the addition of section 376, subdivision (j), which he proposes to state:

> (j) If a hearing is conducted in videoconference format, the Appeals Board shall not give an administrative law judge's credibility determinations "great weight" if the Judge was not in the immediate presence of the witnesses while testifying and did not directly observe and gauge their demeanor on the witness stand other than by video.

In support, Mr. Melgoza suggests that the Board compare *Metro-Young Construction Company*, Cal/OSHA App. 80-315, Decision after Reconsideration (April 23, 1981) (*Metro-Young*), with *Meiner v. Ford Motor Co*. (1971) 17 Cal.App.3d 127; and *Brutoco Engineering & Construction Inc*., Cal/OSHA App. 96-1342 (*Brutoco Engineering*), Decision After Reconsideration (Aug. 30, 2001). However, Comment No. 15 does not explain the purported significance of either decision.

<u>Response</u>:

The Board declines to add section 376, subdivision (j), as proposed in Comment No. 15. The Board disagrees that an ALJ's credibility determinations are entitled to less weight merely because the hearing was held in a videoconference format. An ALJ is capable of observing witnesses, gauging

their demeanor, and making determinations regarding their credibility, even when that witness testifies, in whole or in part, via videoconference.

In declining to add section 376, subdivision (j), as proposed in Comment No. 15, the Board has reviewed and considered the decisions referenced by Comment No. 15. Neither decision counsels a different result. Neither *Metro-Young* nor *Brutoco Engineering* discusses or addresses videoconference hearings. Rather, both decisions merely stand for the proposition that an ALJ's credibility determinations are entitled to great weight because the ALJ was able to observe witnesses, and gauge their demeanor, and weight their statements in light of their manner. (*Ibid.*) As noted above, an ALJ is capable of evaluating the credibility of witnesses in the videoconference format. While there may be situations where an in-person hearing is beneficial to the ALJ in evaluating witness credibility, that determination may be made on a case-by-case basis, upon consideration of the factors set forth in section 376, subdivision (e)(1). Accordingly, the Board will not incorporate section 376, subdivision (j), as proposed in Comment No. 15, into this rulemaking.

The Board thanks Mr. Melgoza and Donnell, Melgoza & Scates LLP for participating in the rulemaking process and for commenting on the regulatory package.

SUMMARY AND RESPONSE TO WRITTEN COMMENTS RESULTING FROM THE SECOND 15-DAY NOTICE OF PROPOSED MODIFICATION (October 31, 2022, to November 15, 2022)

Ms. Danielle Lucido, Chief Counsel, Division Of Occupational Safety & Health, by Letter Dated November 10, 2022

Comment No. 1:

Ms. Lucido's comments pertain to section 376, subdivision (e)(2)(A). Her letter states:

> There is a well-established policy of adjudicating matters on the merits and allowing admissible evidence at OSHAB hearings. Prior to the emergence of video hearings, the parties have always been allowed to present evidence on the day of the hearing without pre-lodging. The Board should not put the parties at greater disadvantage in introducing exhibits than when hearings were in-person. Therefore, the Division recommends the regulation be amended to use "shall" rather than "may" so that the Board is mandated to allow the parties the opportunity to lodge additional exhibits.
>
> The Board has held that hearings are dynamic, the parties cannot necessarily anticipate each exhibit that will be necessary, and when exhibits have been previously disclosed by the parties, lodging those exhibits after the date set in the pre-hearing order is not prejudicial.

> (*Webcor Builders*, *Inc*., Cal/OSHA App. 1416143, Decision After Reconsideration (May 23, 2022).) Based on this interpretation, the Division recommends that the regulation be amended to allow all evidence disclosed or produced during discovery to be lodged with the Board at any time before or during the hearing.

Based upon the aforementioned comments, the Division proposes several modifications to this subdivision. Those proposed changes are reflected below, with additions underlined and deletions marked by a ~~strikethrough~~.

> Notwithstanding the existence of an order requiring pre-hearing lodging of exhibits, the Appeals Board shall~~may~~ grant parties the opportunity to utilize additional exhibits during the hearing not previously lodged, upon a showing ~~that~~ of one of the following: good cause exists, ~~that~~ no prejudice would occur, or such other showing deemed sufficient by the Appeals Board in its discretion. Exhibits previously disclosed or produced by the parties during discovery shall be deemed to constitute good cause and not prejudicial.

Response:

The Board declines to make the revisions suggested by the Division.

Within the original proposed modification to section 376, the Board added subdivision (e)(2) to clarify and confirm that the Appeals Board may issue orders requiring prehearing lodging of proposed exhibits for hearings that occur by videoconference. This subdivision serves an extremely important function. It ensures that hearings held by videoconference are not unnecessarily delayed by parties attempting to contemporaneously upload proposed exhibits during the proceeding, rather than prior to its commencement. In short, it is an important time management tool that enables effective use of the Board's hearing resources. Further, as with any order issued by the Board, parties are expected to comply with such prehearing orders.

To achieve the overriding intent of the prehearing lodging requirement (i.e., effective use of hearing time and resources), and to ensure that parties adhere to its orders, the Board must have tools at its disposal, i.e., discretion, to address situations where there has been a deliberate disregard of the Board's prehearing orders. That is why the Board's proposal in subdivision (e)(2)(A) states that the Board may "may" grant parties the opportunity to use additional documents during hearing not previously lodged, rather than "shall." Such terminology leaves the ALJ discretion to address situations where there has been a deliberate or bad faith disregard of its orders.

Next, the Division's proposal would largely undermine the Board's ability to issue effective orders requiring prehearing lodging of proposed exhibits. Under the Division's proposal, regardless of whether the ALJ issued an order requiring prehearing lodging of proposed exhibits, the parties would be able to essentially ignore the order and have the ability to upload exhibits during the

hearing itself, provided the documents had been exchanged or disclosed during discovery. Because the expectation is that all (or most) exhibits offered into evidence will generally have previously been exchanged during discovery, prehearing lodging orders would essentially become superfluous, inviting gamesmanship and deliberate disregard of Board orders. The Board would be left with no recourse to enforce compliance with the prehearing lodging order for documents disclosed in discovery. To the extent that the Division's proposed amendment would, in essence, enable or endorse noncompliance with lawfully issued orders and undermine the purpose of the prehearing lodging provision, the Board cannot adopt such language.

Further, noncompliance with prehearing lodging orders would invite gamesmanship. Parties could intentionally disobey the lawfully issued order to delay a proceeding to that party's advantage. Again, such changes would render prehearing lodging orders superfluous and ineffective tools for ensuring a reasonably timely hearing. The Board declines to undermine its ability to issue effective orders in such a manner.

The Board's proposed revision to section 376, subdivision (e)(2)(A), is not intended to, and does not, undermine the Board's ability to issue effective prehearing lodging orders. It merely serves to recognize that hearings are dynamic proceedings and that there will be *bona fide* situations where parties cannot always predict what documents they will need at hearing. It also recognizes that parties will engage, on occasion, in excusable unintentional oversights or mistakes. Parties should not be prevented from having their matter decided on the merits in such circumstances. One of the Board's primary goals is to adjudicate matters on the merits. Therefore, requests under section 376, subdivision (e)(2)(A), should generally be resolved in a manner that furthers that overriding goal. The intention of the Board's proposed addition to section 376, subdivision (e)(2)(A), is to ensure that parties are not unreasonably denied the opportunity to supplement proposed exhibits during the hearing, particularly where good cause exists, no prejudice would occur, where potential prejudice may be cured by a continuance, or such other showing deemed sufficient by the ALJ.

However, the Board's intentional use of the word "may," reflects the Board's intent to reserve to itself the ability to discretionally address situations where there has been a deliberate indifference or disregard to a prehearing lodging order.

Comment No. 2:

> Additionally, there is some ambiguity in the current language of section 376(e)(2)(A). It is unclear whether the party wishing to introduce an exhibit not lodged pre-hearing must show: (1) good cause **and** lack of prejudice, or, (2) good cause **or** lack of prejudice. In its November 4, 2022 publication (Vol. 49 No. 41), the CalOSHA Reporter commented on the proposed regulation and stated that "the moving party must show Good Cause and that additional documents would not prejudice the case." (Emphasis added) The Division recommends that the language of the proposed amendment be modified as suggested above to clarify that the showing is in the disjunctive and that only one element must be shown.

Response:

The Board disagrees that any ambiguity reasonably exists. The Board deliberately used the disjunctive “or” when drafting that portion of the subdivision. (*Eddie E. v. Superior Court* (2015) 234 Cal.App.4th 319, 327 [The word “or” indicates an intention to designate separate, disjunctive categories.]; *Smith v. Selma Community Hospital* (2010) 188 Cal.App.4th 1, 30.) Therefore, there is no need for the further modification since the Board’s deliberate use of the word “or” already indicates that the Board may grant parties the opportunity to utilize additional exhibits during the hearing, not previously lodged, upon a showing of any one of the three criteria, either: (1) good cause, (2) that no prejudice would occur, or (3) such other showing deemed sufficient by the ALJ. The Board declines to modify the proposal further in response to this comment.

ADDITIONAL DOCUMENTS RELIED UPON

None.

ADDITIONAL DOCUMENTS INCORPORATED BY REFERENCE

None.

DETERMINATION OF MANDATE

These standards do not impose a mandate on local agencies or school districts as indicated in the Notice of OSHAB Proposed Rulemaking and Initial Statement of Reasons.

ALTERNATIVES THAT WOULD LESSEN ADVERSE ECONOMIC IMPACT ON SMALL BUSINESS

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

ALTERNATIVES DETERMINATION

The Board invited interested persons to present statements or arguments regarding alternatives to the proposed standards. No alternative considered by the Board would be (1) more effective in carrying out the purpose for which the action is proposed; or (2) would be as effective as and less burdensome to affected private persons than the adopted action, or (3) would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law. Board staff were unable to come up with any alternatives or no alternatives were proposed by the public that would have the same desired regulatory effect.