

**OCCUPATIONAL SAFETY
AND HEALTH APPEALS BOARD**

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**FINAL STATEMENT OF REASONS**

CALIFORNIA CODE OF REGULATIONS

TITLE 8: Chapter 3.3, Articles 1, 1.5, 2, 3, 4, and 5
Sections 347, 350.1, 355, 359, 359.1, 371.2, 374, 385, 386, 392.4, and 392.5

Changes to the Occupational Safety and Health Appeals Board's
Rules of Practice and Procedure
Pertaining to Appeals and Reconsideration

MODIFICATIONS AND RESPONSE TO COMMENTS RESULTING FROM
THE 45-DAY PUBLIC COMMENT PERIOD

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

Section 350.1

In response to comments from the public, the Board has decided not to add the phrase "to compel discovery at any time in the proceeding" in subsection (a). Inclusion of this language confused the regulated public, and existing regulations already allow Administrative Law Judges to compel discovery. This change is needed to avoid unnecessary confusion.

Section 355

In response to public comment, the Board made minor revisions to subsections (a) and (b) to improve clarity. Specifically, the Board: removed the terms "agents or attorneys of record" because these individuals are already included in the term "representative"; clarified the circumstances under which an appeal might be dismissed if the Board is not notified of changes in contact information; clarified where this information must be sent and on whom it must be served; and provided an outside parameter for the term "promptly." These changes are needed to further clarify the regulation.

Section 386

In response to public comment, the Board opted not to revise this section and reinstated the previously existing language. This change was needed to avoid unnecessary confusion.

Section 392.4

In response to public comment, the Board clarified where motions must be sent, clarified when motions may be filed, expanded the relevant timeframes to allow the parties greater flexibility, and

made some non-substantive grammatical changes to enhance clarity. These changes are needed to clarify the regulatory expectations and to allow parties to act in a timely manner.

Summary and Response to Oral and Written Comments:

Dialogue between Board Member Marcy Saunders¹ and Mr. Ray Towne, Staff Attorney, Division of Occupational Safety and Health

Ms. Saunders asked for Mr. Towne for his initial impression of the proposal. Mr. Towne believes there are a number of ambiguities. He also asserted that there is the potential for unintended consequences resulting from some people's efforts to game the system and avoid a decision on the merits. Mr. Towne opined that this is a general problem in the practice of law. Mr. Towne believes that the general trend in all legal systems is to make the rules progressively more complicated, which can be overwhelming for lay people trying to navigate the system. Mr. Towne noted that the Division is unrepresented by counsel in approximately two-thirds of the appeals before the Board.

Response:

The Board thanks Mr. Towne for his perspective and his participation in the rulemaking process. While the Board appreciates Mr. Towne's input, the Board continues to believe that this proposal clarifies its procedures and expectations for the parties.

Dialogue between Kevin Bland, Granado & Bland, representing several contracting associations, and the Board Members

Mr. Bland observed that an effort was clearly made to make the regulations more user friendly, but he believes that some regulations would be difficult for a lay person to understand. He would prefer a system in which employers are able to represent themselves in appeal proceedings and understand the Board's expectations. Chair Traeger invited Mr. Bland to address the Board at one of its regularly scheduled meetings regarding employer concerns pertaining to the appeal process. Mr. Bland hopes to share information from the employer community with the Board to help bridge the gap between them and dispel fears in the employer community. Board member Saunders noted that the proposal was intended to provide greater clarity for entities coming before the Board. She requested that Mr. Bland and Mr. Towne provide the Board greater input on how the proposal complicates matters for the parties and/or increases fears. Mr. Bland stated that there might be areas that are not included in the proposal that would merit attention by the Board. He noted that he is looking at the whole process. Board member Pacheco stated his appreciation of Mr. Bland's participation in the review process and requested that he provide more specific, concrete examples of ways in which the Board can make the process more accessible to the employer community.

¹ Marcy Saunders was a board member when this proposal was noticed for public comment and during the public hearings. Her term on the board ended March 16, 2007.

Response:

The Board thanks Mr. Bland for his participation in the rulemaking process and invites his input on employer concerns. The Board continues to believe that this proposal clarifies its procedures and expectations for the parties.

Aggregated Comments Regarding Timeframes Specified in New Section 392.4

Comment by Mr. Bland

Mr. Bland believes the timeframes specified in new section 392.4 (regarding motions made during the reconsideration process) are too short. He opined that the proposal would benefit from public input on these types of practical issues.

Comment by Board Member Robert Pacheco

Board member Pacheco noted that proposed section 392.4 does not specify a timeframe in which motions can be heard. Rather, it states a final date on which motions may be filed and specifies timeframes for any response to the motion. Board member Pacheco commented that a motion may be filed any time after reconsideration is granted. The proposal is an attempt to create a tool to motivate parties to file any motions they may have. Member Pacheco mentioned that, without such a mechanism, matters can languish indefinitely.

Comment by Mr. Bland

Mr. Bland responded that the timeframes that follow once the Board notices the final 60-day period are rather limited, especially for a larger employer that might need to determine who internally should receive the notice. Mr. Bland added that the timeframes could be confusing to a lay person.

Response:

The Board agrees that the timeframes specified in section 392.4 should be extended to afford the parties more time to file and respond to motions. The Board has modified the regulation in response to Mr. Bland's input.

Comment by Mr. Bland

Mr. Bland suggested that a note be added to clarify that section 392.4 does not preclude parties from filing a motion before the Board issues its notice stating the motion deadline. He noted that the concept of implementing a motion practice for the reconsideration process is not a bad idea, but the regulation might benefit from minor adjustments.

Response:

The Board agrees that clarification on this issue would be helpful, so the Board modified the original proposal to address this point. The regulation will explicitly state that a motion may be filed at any time after reconsideration is granted up until the deadline established by the Board.

The Board thanks Mr. Bland for his participation in the rulemaking process.

Oral Comment by Ray Towne, Staff Attorney, Division of Occupational Safety and Health

The Division addressed the difference between accessing information on a computer and accessing information in a pre-printed, written form. The Division stated that the former provides the reader with a reduced sense of security, because the reader is not sure whether he or she has the full compliment of information sought. The Division stated that the regulatory proposal probably adds one more page to the existing regulations, which exacerbates the problem for the computer user.

Response

The Board thanks the Division for its comments.

Written & Oral Comment by the Division

The Division commented that the proposed revisions to sections 347, 359, 359.1, 371.2, 385, and 392.5 appear to further clarify the regulations. For the most part, the proposed revisions are commendable and help clarify the process. The Division only has concerns in a few areas.

Response

The Board thanks the Division for its participation in the rulemaking process.

Written & Oral Comment by the Division

The Division proposes to amend the definition of “representative” contained in newly designated Section 347(y) to add “and includes a party or intervenor’s agent or attorney of record” at the conclusion of the existing language. The Division’s written comments assert that this would simplify its proposed change to the Board’s proposed amendment to Section 355(b), but the Division acknowledged orally that a “definitions” section often is of little value for the computer user. Accordingly, rather than amend the referenced definition, the Division commented that it might be better to repeatedly add the language it recommended in its written comment throughout the regulations as needed.

Response:

The Board notes that the Division’s comment exceeds the scope of the regulatory proposal. Nonetheless, the Board believes that the existing definition of “representative” is quite broad and includes a party or intervenor’s agent or attorney of record. As a result, the Board does not believe that the definition requires clarification or modification. For the same reason, the Board does not believe the other regulations that refer to “representative” require modification.

Aggregated Comments Regarding Settlement Conferences & Potential Conflicts of Interest

Oral & Written Comments by the Division, Marti Fisher, California Chamber of Commerce and Kevin Bland, Granado & Bland

The commenters assert that the proposed new text in section 350.1 that pertains to an administrative law judge’s (ALJ) ability to hold a settlement conference could create a conflict of interest if the same ALJ presides over the settlement conference and the appeal hearing. The commenters propose to change the new language to state “to order a settlement conference, or

upon stipulation of the parties, to preside over a settlement conference even though designated as hearing officer.”

Oral Comment by Mr. Bland & by Ms. Fisher

The commenters support efforts to achieve resolution of an appeal earlier in the process and support better use of the pre-hearing and settlement conferences. Mr. Bland believes this is an area in which the ALJs have improved. He is eager to draft the language in a way that avoids conflicts of interest.

Comment by Board Chair Candice Traeger

Chair Traeger commented that the Board’s regulations currently provide for settlement conferences and observed that section 374.3 precludes the settlement judge from presiding at the hearing. Chair Traeger suggested that the existing regulations address some of the concerns expressed regarding conflicts of interest. Chair Traeger stated the importance of considering the entire body of regulations and explained the Board’s interest in providing notice of its authority and of its practices through the regulations. She noted that, because people do not always consider the entire body of regulations, it is sometimes important to state provisions in more than one place.

Response:

Existing section 374.3 addresses settlement conferences and explicitly states that an ALJ who presides over a settlement conference may not also preside over the hearing, unless otherwise stipulated by the parties. As a result, the Board does not believe that the commenters’ proposed clarification is needed. The Board also believes it is important to state the ALJ’s authority to hold settlement conferences in more than one regulation because the regulated public often does not consider the entire body of regulations. By including the proposed language in section 350.1, the Board hopes to alert entities coming before the board that settlement conferences are within the ALJ’s powers and are an option for the regulated public.

Oral Comment by Ms. Fisher, California Chamber of Commerce

The Chamber supports repeating provisions at different places in the regulations because it makes it easier for a lay person to locate needed information.

Response

The Board thanks Ms. Fisher for her participation in the rulemaking process.

Aggregated Comments Regarding Method and Timing of Settlement Conferences

Comment Elizabeth Treanor, Phylmar Regulatory Roundtable

The Roundtable’s members are concerned that the revision to section 350.1 regarding settlement conferences would allow an ALJ to order a settlement conference in the midst of a hearing. This would be inefficient and result in the unnecessary expenditure of resources. Ms. Treanor noted that, in her experience, settlement conferences typically occur telephonically, prior to the hearing. The Roundtable hopes this practice will continue and it is unclear from the proposal whether that is the intent.

Comment by Chair Traeger

Chair Traeger noted that, to date, the Board has not held settlement conferences despite having a regulation that allows it to do so. Chair Traeger further noted that the existing regulation allows for telephonic conference calls, but she questioned their efficacy. Chair Traeger stated that the Board does not intend to provide for mid-hearing settlement conferences.

Dialogue between Ms. Treanor, Chair Traeger and Board Member Pacheco

Ms. Treanor has found telephonic settlement conferences to be very effective. Chair Traeger indicated that the conferences held to date have been pre-hearing conferences that sometimes also serve as settlement conferences. Chair Traeger commented that they are intended to be separate proceedings and are treated separately in the existing regulations. Board Member Pacheco described a traditional settlement conference and Ms. Treanor responded that, in her experience, Board conferences are more informal than the process Member Pacheco described. Member Pacheco stated that the Board wants the ALJs to respect the distinction between pre-hearing and settlement conferences and to behave consistent with their role in each instance. Chair Traeger emphasized the need for the parties to be prepared for a pre-hearing conference that meets the regulatory requirements and Member Pacheco emphasized the importance of proper preparation for a settlement conference. Member Pacheco stated that the Board is interested in creating an environment that allows for more settlements to occur.

Response

While there may be times when a settlement conference is appropriate mid-hearing, the Board does not intend to hold settlement conferences mid-hearing as a matter of course. The Board notes that section 350.1 lists a number of activities that ALJs may undertake, many of which occur pre-hearing. Settlement conferences most commonly would be held at that stage of the proceedings and are included in the pre-hearing items included in section 350.1's list for that reason. As a result, the Board does not believe clarification of this provision is required. The Board further notes that it did not modify the existing provision in section 374.3 that allows for telephonic settlement conferences.

The Board thanks Ms. Treanor and the Phylmar Roundtable for their participation in the rulemaking process.

Aggregated Comments Regarding ALJ Powers in Section 350.1

Written & Oral Comment by the Division

The Division recommends omitting the proposed new text in section 350.1, which reads "that is deemed appropriate by the Administrative Law Judge." The Division asserts that this language may be perceived to grant latitude to the ALJs that is inconsistent with Labor Code section 6620. Section 6620 contemplates full discretion by the Board to evaluate and control all actions of the ALJ who initially decides the appeal. The Division believes the referenced proposed language: 1) is unnecessary in light of other more detailed amendments proposed; 2) is duplicative of the other

amendments and of existing provisions; 3) lacks authority, consistency, and clarity in light of section 6620; and 4) is unqualified and overbroad.

Oral & Written Comment by Mr. Bland, Granado & Bland, and Ms. Fisher, California Chamber of Commerce

The commenters agree with much of what the Division stated at the December 6, 2006 public hearing, including the perceived expansion of the ALJs' powers in the proposed changes to section 350.1. Mr. Bland is eager to see the language drafted in a way that does not create a perceived expansion of ALJ powers.

Comment by Chair Traeger

Chair Traeger noted that existing section 350.1 states that the ALJ has the full power, jurisdiction and authority to regulate the course of the hearing. The amendment to section 350.1 stating "that is deemed appropriate by the Administrative Law Judge to further the purposes of the Cal OSH Act" was intended to clarify that statement. Chair Traeger suggested that the existing regulations address some of the concerns expressed regarding a perceived expansion of powers. Chair Traeger stated the importance of considering the entire body of regulations and explained the Board's interest in providing notice of its authority and of its practices through the regulations. Chair Traeger acknowledged that the Board's effort to clarify the ALJs' existing authority may have created the impression that the Board is seeking to expand the ALJs' powers.

Response:

The Board does not agree that the language referenced by the Division is inconsistent with Labor Code section 6620. Section 6620 authorizes the Board to reconsider decisions and orders issued by an ALJ and nothing in the proposed language alters that relationship. The fact that an ALJ has the discretion to take action in furtherance of the California Occupational Safety and Health Act does not render those actions immune from Board review. Moreover, the Board is not currently privy to, or in a position to review, each action taken by an ALJ, as the Division suggests. Section 6620 does not indicate that it should or require it to do so. Pre-hearing conferences, for example, are provided for under the existing regulations and occur outside the Board's scope of review, except to the extent that the pre-hearing conference produces an order.

In addition, the Board sees nothing duplicative about the language referenced by the Division and the other proposed amendments. Rather, the language proposed to be added to section 350.1 is intended to clarify existing language in that section, which states that the ALJs "have full power, jurisdiction and authority" to undertake the listed activities. Those activities currently include holding a pre-hearing conference and regulating the course of the hearing. While settlement conferences have been added to the list of activities contained in section 350.1, they are already provided for in section 374.3, so their inclusion in section 350.1 does not constitute an "expansion of ALJ powers." The Board explained its rationale for adding settlement conferences to section 350.1 in a prior response to a separate comment. The Board believes that when the regulation is read as a whole, and in conjunction with the other existing regulations, it is clear that ALJ powers have not been expanded and that the Board has in no way abrogated its authority under section 6620.

The Board thanks the commenters for their participation in the rulemaking process.

Written & Oral Comment by the Division

The Division believes the proposed language for section 355(b) is inconsistent with existing section 378, which is not proposed for amendment. To avoid the perceived inconsistency, the Division recommends that section 355(b) be revised to include the underlined language: “Any change or substitution in the names and address of all parties and intervenors and their representatives, agents or attorneys of record must be communicated promptly in writing to the Sacramento Office of the Appeals Board and to all parties and intervenors and their representatives, agents, or attorneys of record. Failure to communicate changes or substitutions in writing by the employer to the Sacramento Office of the Appeals Board may result in dismissal of the appeal.”

The Division notes that, if the Board makes the Division’s proposed amendment to the definition of “representative,” some of this language could be omitted.

Response:

The Board agrees that the originally proposed language would benefit from most of the Division’s suggestions and it has modified the proposal accordingly. The Board believes, however, that “representative” encompasses “agent or attorney of record,” so declines to include those terms in the regulation.

The Board thanks the Division for its participation in the rulemaking process.

Aggregate Comments Regarding Address and Name Changes

Written & Oral Comment by the Division

The Division states that revising section 355(b) as it proposes would eliminate an administrative burden on the Board and the Division by relieving the former of the responsibility to notify the Division of this information and by providing the Division with more contact information for the employer, which it could use to engage in mutual case evaluation and to move the process along.

Comment by Board Member Saunders

Board member Saunders noted that the Board proposed this amendment because it is often not informed of address changes. Member Saunders also expressed concern about the Division “moving the process along.” Member Saunders commented that the Division sometimes addresses employer concerns and questions that should be posed to the Board. This can create problems for the Board because employers understandably rely on information provided by the Division and the information is sometimes inconsistent with Board rules and practices. The Board must then decide what to do.

Response

Under existing regulation 352(b), address and name changes should be served on all parties, including the Division. The Board agrees, however, that service on the parties often is not properly affected. In an effort to better communicate the parties' obligation to serve each other with this information, the Board has modified the proposal to include this requirement and avoid any confusion or oversight.

The Board thanks the Division for its participation in the rulemaking process.

Written Comment by the Division

The Division notes that section 359.1 was not expressly listed in the face pages of the rulemaking documents.

Response

The Board thanks the Division for bringing this oversight to the Board's attention.

Written Comment by the Division

The Division stated its understanding of the notification letter referred to in section 371.2.

Response

The Board thanks the Division for its participation in the rulemaking process.

Written Comment by the Division

The Division states that the proposed amendment to section 374 is consistent with the ALJs' powers set forth in the proposed amendments to section 350.1.

Response

The Board thanks the Division for its participation in the rulemaking process.

Aggregated Division Comments Pertaining to Section 386

Written & Oral Comment

The Division asserts that the proposed amendment to section 386 changes the existing regulation from a post-submission provision to a pre-submission provision, without the necessary change to the section heading. The heading should be amended to read "Pre- and Post Submission Amendments."

Written Comment

The Division contends that the proposed amendment to section 386 is inconsistent with the authority, clarity and consistency interests of the body of regulations. To resolve these issues, the Division believes section 386 should be revised to: 1) amend the first sentence of subsection (a) to state: "The Appeals Board may amend the issues on appeal or the Division action at any time

before a proceeding is submitted for decision in order to.”; 2) add the following language at the conclusion of subsection (a): “The Appeals Board shall afford the parties and any intervenor a reasonable opportunity to respond to the amended issues on appeal or amended Division action.”; 3) include Government Code section 11507 in the reference note; and 4) replace existing subsection (b) with the following:

“(b) The Appeals Board may amend the Division action after a proceeding is submitted for decision in order to:

- (1) Correct a clerical error;
- (2) Address an issue litigated by the parties;
- (3) Amend the section number cited in the citation if the same set of facts apply to both the cited and proposed sections; or
- (4) Amend any part of the Division action to conform it to a statutory requirement.

The appeals Board shall afford the parties and any intervenor a reasonable opportunity to respond to the amended issues on appeal or amended Division action.”

Written & Oral Comment

The Division believes the proposed revisions to section 386(a) impermissibly restrict the parties’ right to amend the issues on appeal, or the Division action, before an appeal is submitted for decision. The Division states that Labor Code section 6603(a) requires that the Board’s practices and procedures be consistent with specified sections of the Government Code, including Government Code section 11507. The Division states that section 11507 does not restrict the timing of pre-submission amendments, whereas proposed section 386(a) would allow amendments only after both parties have submitted evidence.

Written & Oral Comment

The Division’s proposed revisions to section 386(b) are intended to preserve the parties’ right to make the specified amendments after the matter is submitted for decision. Proposed subsection (a) is vague with respect to the parties’ ability to amend after the matter is submitted. Government Code section 11516, which is also referenced in Labor Code section 6603(a) (see prior written comment), affords parties the right to make amendments after the case is submitted for decision. Orally, the Division contended that the regulations would no longer address post-submission amendments if the proposed change to subsection (a) is implemented.

Written & Oral Comment

The Division’s proposed revisions to section 386(b) would also preserve Board precedent that recognizes the parties’ post-submission right to amend. The Division stated that four Board Decisions after Reconsideration would be left high and dry if the proposed amendments to section 386 are implemented.

Written & Oral Comment

The Division proposes to delete existing subsection 386(b) because it is inconsistent with Government Code sections 11507 and 11516, both of which provide that, when a party claims to

be prejudiced by an amendment, the proper remedy is to allow the party to file an additional response, and not to refuse the requested amendment. The Division believes its proposed revisions to section 386 would render the proposal compliant with Labor Code section 6603 and would allow the parties the flexibility needed to make amendments, in the interest of justice, as the need arises. The Division is not seeking to provide a means to allow “would-be pre-hearing amendments” into the hearing process. The Division believes that the potential for such abuse is tempered by restricting the types of amendments permitted pre- and post-submission to those specified.

Oral Comment

The Division stated that, as proposed, section 386 would address amendments typically made during closing argument. The Division questioned how parties would address amendments they want to raise following presentation, for example, of the opposing party’s case. The Division questioned whether a party would have to hold its amendment until both parties presented evidence.

Comment by Board Chair Traeger

Board Chair Traeger commented that she understands Labor Code section 6603 requires the Board’s rules to be consistent with the Government Code provisions specified therein, to the extent that the Board has rules on those issues. She does not believe it requires the Board to adopt regulations that mirror those provisions.

Oral Comment

The Division conceded that Board Chair Traeger may be correct in her understanding of Labor Code section 6603 and noted that the language is not completely clear. The Division, however, believes the Board should have regulations that capture the content of Government Code sections 11507 and 11516.

Written Comment

The Division’s proposed revisions to section 386(b) would also avoid the result that occurred in *County of Los Angeles Metropolitan Transportation Authority Cal OSHA App. 98-539 Decision After Reconsideration (Dec. 21, 1999)*. There, the Board set aside an ALJ’s post-submission amendment to revise a citation section number. The Division believes the amendment served the interests of justice.

Written Comment

The last sentence in the Division’s proposed revisions to section 386(b) would codify the holding in *J&M, Inc. Cal OSHA App 01-120 Decision after Reconsideration (Aug. 6, 2004)*, which held that the ALJ erred in not notifying the parties of an intended citation amendment made after the case had been submitted for decision.

Response:

The Board concluded that the proposed amendment to section 386 lacked clarity, is unnecessary in light of other existing regulations, and may not have achieved the intended objective. The Board has decided not to amend section 386.

The Board thanks the Division for its participation in the rulemaking process.

Aggregated Comments Regarding Motion Practice and Summary Adjudication

Division Oral Comment

The Division believes the Board only has the power to hear enumerated types of motions and believes it would be helpful if the Board listed the types of motions that are permitted. The Division would like to see summary judgment motions forbidden, because they are oppressive and burdensome.

Written Comment by Arthur Sapper and James Lastowka, McDermott Will & Emery

Messrs. Sapper and Lastowka urge the Board to amend rule 350.1 to include in the list of ALJ powers, the ability: “to rule on motions, including dispositive motions.” Alternatively, they suggest the Board add language akin to that found in the Federal OSHRC procedures, Rule 67(h), which states that ALJs may “dispose of procedural requests or similar matters, including motions to dismiss citations, notices of appeal, or portions thereof.”

Written Comment by Messrs. Sapper and Lastowka

Messrs. Sapper and Lastowka state that experienced Division of Occupational Safety and Health attorneys have told them that the Board’s ALJs doubt their authority to rule on pre-hearing, dispositive motions, including summary judgment motions, because the ALJs are required to hold hearings. The commenters contend that the expense of pursuing an unsupported citation through hearing deters some employers from contesting citations.

Response:

The Board does not agree that it may only entertain enumerated motions. For example, Title 8, section 371 of the Board’s rules of practice and procedure refers to “pre-hearing motions” and sets no limitations on the types of motions that may be heard. Although other Board rules stated in Title 8 address how and when certain motions may be made, they do not restrict the types of motions that may be brought to the Board. The Division provides no support for its position that the Board may only hear enumerated motions, and the Board is unaware of any authority that would restrict its ability to hear motions properly submitted, including dispositive motions, such as summary judgment motions. Because the Board’s ALJs currently have the authority to rule on dispositive motions, the Board does not believe the revision suggested by Messrs. Sapper and Lastowka is needed.

While the Board recognizes that summary judgment motions can be time consuming, the same is true of hearings. There may be times when a dispositive motion will prove more efficient than a hearing.

The Board thanks the commenters for their participation in the rulemaking process.

Written & Oral Comment by the Division

To meet the clarity and consistency interests of the body of regulations, and in light of the proposed amendment to section 355, the Division suggests that subsections (b) and (c)(1) of new section 392.4 (motions filed during reconsideration) be amended to state that a motion may be signed by, and the specified service and notice may be made on, a party “or the party's representative, agent or attorney or record.” The Division noted that this language would be unnecessary if the Board makes its proposed change to the definition of “representative” in section 347(y) discussed above.

Response:

Existing section 355(b), which will become subsection (c) when the proposal is adopted, pertains to service and provides for service upon a representative, where a representative is present. Moreover, the existing definition of “representative” is broad enough to encompass “agent or attorney or record.” In addition, the proposal currently provides for the documents to be signed by a party or its representative. Accordingly, the Board does not believe that the proposed revisions are necessary.

Written Comment by the Division

To provide greater clarity, subsection 392.4(c) should be amended to state:

“(c) Unless otherwise ordered the following dates shall apply to motions or requests and to opposition and reply papers:

- (1) A motion or request can be filed at any time before the Appeals Board cutoff date;
- (2) The Appeals Board will notify the parties, the parties’ representatives, agents or attorneys of record of the cutoff date 60 days before that date.”

Response:

The Board agrees that subsection (c) would benefit from clarification and it has modified the original proposal to address the Division’s concern.

Dialogue between the Division and the Board Members

The Division urged the Board not to be swept up in the type of procedural formality that deprives lay people of their belief in fairness. The Division would prefer a system in which pre-hearing activity is minimized. Board member Pacheco noted that the Board is trying to address issues that arise post-hearing and during reconsideration, as well. He stated that the Board lacks criteria or a method to address such motions and determine whether they are appropriate. Chair Traeger recognized the danger of implementing too many regulations, but asked the Division what it would recommend the Board do to address motions filed while matters are under reconsideration given that the Board does not have a process to deal with such motions. Chair Traeger also questioned how the Board would guard against implementing underground regulations if it opts not to adopt a regulation.

The Division believes section 392.4 is an effective means to ward off claims of underground regulations. The Division does not believe it is a bad idea to establish procedures for these situations, but noted that the Board could also simply address each situation as it arises and curb poor behavior through the imposition of sanctions, where appropriate.

The Board members commented that the Division's approach seemed to lack clear direction and emphasized that the Board needs to have a process to ensure fairness. Board member Saunders supported the regulatory proposal because she wants the Board to provide employers with good guidance. She believes this will result in quicker resolution of appeals because there will be fewer misunderstandings and fewer legitimate causes of delay in the proceedings. If the process is quicker, and Decisions after Reconsideration can be written sooner, it could prevent some employers from getting into trouble in the first place.

The Division responded that it is important to provide strong guidance on substantive matters, but the Division has little faith in procedural rules as guarantees of due process. The Division added that, if the Board decides to add more rules, proposed section 392.4 is salutary. The Division acknowledged that the proposed regulation primarily establishes timeframes and stated that it finds the timeframes helpful. Member Saunders added that the Division has raised some good points that are worthy of consideration.

Response:

The Board thanks the Division for its comments.

Written Comment by the Division

The Division concurs that no costs or savings to state agencies will result from the proposal. The Division adds that the proposal increases the formality and complexity of the appeals process, which might tend to increase the administrative burden of, and cost to, the Division.

Response

The Board does not believe the regulatory proposal will increase costs to the Division or any other state agency. It is unclear from the Division's comment if it is suggesting otherwise. The Board notes that this proposal represents a small, incremental change to its existing rules of practice and procedure. In many instances, the proposal serves to clarify existing requirements and, in others, it specifies expectations for an existing practice that has heretofore lacked a procedure. Because the Division does not state the nature of the perceived increased cost to it, the Board is unable to comment further.

Written Comment by the Division

To the extent that the proposal makes the appeals process more complex, or limits employers and employees' rights to make amendments, the Division believes the proposal may have a significant, statewide adverse economic impact directly affecting businesses, including their ability to compete with businesses in other states because lay people may be unable to navigate the process and may be forced to retain counsel.

Response

Please see prior response. In addition, the Board has removed the proposed change that the Division suggests would make amendments more difficult, i.e., the proposed change to section 386. The Board disagrees with the suggestion that this proposal will cause appellants to hire attorneys where they would not have hired them under the existing regulations. The Board has a number of existing rules that apply to the appeals process. The contents of this proposal are not qualitatively different than the existing rules. If an appellant is comfortable proceeding without counsel under the existing rules, there is nothing in this proposal that should change that perspective.

Written Comment by the Division

The Division believes its proposed amendments to section 386 would reduce the potential adverse cost impacts discussed in the preceding comments.

Response:

As previously noted, the Board has omitted the proposed changes to section 386. The Board thanks the Division for its participation in the rulemaking process.

Aggregated Comments Regarding Convening an Advisory Committee

Comment by Larry Pena, Southern California Edison, Manager of Corporate Safety, Ray Towne, Division of Occupational Safety and Health, Staff Attorney, Kevin Bland, Granado & Bland, representing several contracting associations, Elizabeth Treanor, Phylmar Regulatory Roundtable, Marti Fisher, California Chamber of Commerce, and Bo Bradley, Associated General Contractors of California (AGC)

The commenters requested that the Board consider convening an advisory committee to discuss and explore the potential impact of the proposal on employers in California.

Oral & Written Comment by Mr. Bland, by Marti Fisher, California Chamber of Commerce, and by Bo Bradley, Associated General Contractors of California (AGC)

The commenters hope to have an appeal process in which employers can represent themselves without counsel. Some of AGC's members believe the proposal has the opposite effect. An advisory committee of stakeholders is the best way to ensure that self-representation is an option. The Division of Occupational Safety and Health and the Occupational Safety and Health Standards Board have experienced great success with the advisory committee process.

Comment by Board Member Saunders & Chair Traeger

Board Member Saunders and Chair Traeger expressed interest in the idea of an advisory committee and asked for input on how the advisory body would work. Member Saunders and Chair Traeger expressed concern about the advisory body's function given the Board's quasi-judicial status. Member Saunders and Chair Traeger commented that the Board previously had an advisory body, but it ended due to lack of interest. Chair Traeger stated her belief that the Board had not previously convened an advisory committee in conjunction with a regulatory proposal, but she would consider it.

Oral & Written Comments by Mr. Bland, Ms. Fisher and Ms. Bradley

The commenters envision a committee comprised of stakeholders and chaired by staff to address regulatory development. They would not expect the committee to engage in regulatory interpretation once the regulations are drafted. The committee would review the regulations and evaluate how to ensure that the regulations achieve the goals established by the Board. The appeals process is intended to be accessible to employers for self-representation, so ferreting out unintended consequences and drafting clear regulations is essential. The committee would be only advisory in nature. The Board would determine how to use the information provided by the committee.

Comment by Board Member Pacheco

Board member Pacheco noted that courts use advisory bodies to assist in the development of their rules and procedures, but noted that these bodies are typically comprised of lawyers and judges as opposed to lay people. Member Pacheco requested that Mr. Bland consider what input the proposed advisory body would provide.

Response

While the Board agrees that an advisory committee could be very beneficial for some regulatory proposals, the Board is eager to provide clarification on the matters addressed in this package and does not believe an advisory committee is essential in this case.

The Board thanks the commenters for their participation in the rulemaking process.

Dialogue between Board Member Pacheco and Ms. Fisher

Board member Pacheco appreciates the Chamber's involvement in the Board's process. Member Pacheco believes the Chamber could help ensure that employers are informed of occupational safety and health requirements. The Board sees many situations in which employers are very well informed of their worker's compensation obligations, but are unaware of their responsibilities with respect to Cal OSHA. Ms. Fisher agrees with the need to provide this assistance. Ms. Fisher has a personal background in occupational safety and recently assumed her position with the Chamber.

Response

The Board thanks Ms. Fisher for her participation in the rulemaking process.

Written Comment by Arthur Sapper and James Lastowka, McDermott Will & Emery

Messrs. Sapper and Lastowka suggest that the phrase "or mode of delivery" be added after "No particular format" in section 359, "Filing of Appeal."

Response

Existing section 359(a) states that an appeal is deemed filed when the desire to appeal is hand delivered, mailed or received by the Board. The Board believes "received" is very broad in scope

and clarifies that no particular mode of delivery is required. As a result, the Board declines to make the recommended change.

The Board thanks the commenters for their participation in the rulemaking process.

Additional Written Comments by the California Chamber of Commerce & Kevin Bland, Granado & Bland

Comment

The commenters suggest that a provision be added to section 347(f) to extend the deadline to the next calendar day when the deadline occurs on a holiday.

Response

The Board believes that the proposed revision is unnecessary because this issue is addressed in existing section 348(a).

Comment

The Chamber and Mr. Bland believe the revision to section 350.1 that pertains to compelling discovery is vague and creates the opportunity for abuse. The commenters observe that the law currently provides a mechanism to compel discovery regardless of its timing. For clarity, the commenters suggest the inclusion of guidelines and limits to this provision.

Response

Existing section 372.6 currently allows ALJs to compel discovery. The proposed addition to section 350.1 was simply intended to emphasize that point and make it easier for the regulated public to know that this is within the ALJs' authority. In an effort to avoid confusion, however, the Board will delete the referenced language from the proposal.

Comment

The Chamber and Mr. Bland assert that section 355(a) should provide an allowance for postal service forwarding delays and errors in deliveries, as well as parameters for "may result in dismissal of appeal."

Response

The Board agrees that the regulation would benefit from further clarification regarding when an appeal may be dismissed for failure to inform the board of changes in an employer's representation and contact information. The Board modified the original proposal to state that dismissals may occur if the Board cannot effectively communicate with the employer. And, as explained in response to the following comment, the Board has allowed employers up to 30 days to provide this information. Given both these changes, the Board does not believe an additional time allowance is needed for postal delays.

Comment

“Promptly,” as used in section 355(b), must be defined as within a specific time period and allowable methods of delivery accepted.

Response

The Board notes that “promptly” is an existing term in the regulation that is simply repeated in the regulatory proposal. Nonetheless, in an effort to clarify its intent, the Board modified the original language to set an outside parameter of 30 days. In terms of allowable methods of delivery, this is already addressed in existing subsection (c), which will become subsection (d) once the proposal is adopted.

The Board thanks the commenters for their participation in the rulemaking process.

Aggregated Comments by Steve Johnson, Associated Roofing Contractors

Comment

ARC does not have any comments specifically related to the proposal, but would like to participate in an advisory committee for informational purposes, if one convenes.

Comment

ARC supports making the appeals process accessible to employers for self-representation and believes many employers are capable of representing themselves. The appeals process is confusing to Mr. Johnson and he often serves as the advisor to ARC’s members, who are small to mid-size employers. Mr. Johnson believes a new instructional video from the Board on the appeal process would be helpful to employers.

Comment

The fines associated with citations are significant and are sometimes imposed for what are perceived to be relatively minor infractions. This creates an adversarial relationship between employers and the Division of Occupational Safety and Health.

Dialogue between Board Member Pacheco & Mr. Johnson

Board Member Pacheco questioned why employers seem to understand their responsibilities for reporting workplace injuries to their insurance carriers, but are unaware of their obligation to notify the Division. Member Pacheco commented that there needs to be a better system for educating small employers. Mr. Johnson believes there is confusion regarding what is a recordable injury and what is a reportable injury. There is also an abject fear of Cal OSHA and the penalties that may follow if they report injuries. In addition, employers often have difficulty learning about the status of a hospitalized worker and are often unclear about the term “other than for medical observation.” Mr. Johnson described scenarios in which determining the onset of the reporting obligation can be difficult. Mr. Johnson added that he tries to encourage employers to err on the side of over-reporting rather than under-reporting. Board member Pacheco questioned how information can be better disseminated to employers. He stated that it is frustrating for the

Board to see repeat fact patterns come before it. Mr. Johnson described the ARC's efforts to educate its members.

Response

The Board thanks ARC for its interest in the Board's rulemaking process.

MODIFICATIONS AND RESPONSE TO COMMENTS RESULTING FROM
THE 15-DAY NOTICE OF PROPOSED MODIFICATIONS

No further modifications to the information contained in the Initial Statement of Reasons are proposed as a result of the 15-day Notice of Proposed Modifications mailed on June 11, 2007. In response to the 15-day notice, however, the Board received some additional written comments, most of which duplicate comments made in response to the initial notice and were responded to above. The Board also received the following new comments.

Summary and Response to Written Comments:

Comment

The Division of Occupational Safety and Health believes that the proposed modification to section 355 and the decision not to amend section 386 are consistent with the Division's prior comments.

Response

The Board thanks the Division for its participation in the rulemaking process.

Comment

The Division believes that the timeframes specified in proposed section 392.4 (motions on reconsideration) should mirror those in section 371, which pertains to pre-hearing motions. The Division believes this would provide greater consistency and would be more convenient for the parties. The Division contends that the convenience and consistency created by this change would be less burdensome to small businesses and would eliminate the potential for "some adverse economic impact" on business generally.

Response

In the 15-day notice, the Board extended the timeframes originally proposed for section 392.4 because a prior public comment asserted that the timeframes initially proposed were too short and might make it difficult for businesses to meet the deadlines imposed. In contrast, this commenter would have the Board shorten the timeframes originally proposed. The Board continues to agree with the initial commenter, an attorney who represents various construction business associations, and believes the longer timeframes will increase the parties' ability to act in a timely manner. Moreover, while the Board agrees that the pre-hearing and reconsideration motion deadlines are inconsistent, the Board notes that these two processes are governed by different rules and laws, and generally encompass different requirements. Accordingly, the Board does not believe that this

incremental additional inconsistency between these two distinct phases of the appeal process will impose any hardship on the business community.

MODIFICATIONS MADE IN RESPONSE TO OAL REVIEW

In addition to the previously mentioned revisions, the Board made non-substantive revisions in response to the review conducted by the Office of Administrative Law prior to filing.

ADDITIONAL DOCUMENTS RELIED UPON

None.

ADDITIONAL DOCUMENTS INCORPORATED BY REFERENCE

None.

DETERMINATION OF MANDATE

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

ALTERNATIVES CONSIDERED

The Board invited interested persons to present statements or arguments with respect to alternatives to the proposed regulation. No alternative considered by the Board would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the adopted action.