

Occupational Safety and Health Appeals Board Proposed Regulations

OSHAB STAY OF ABATEMENT REGULATIONS

362 Stay of Abatement Period and Abatement Changes

(a) Unless otherwise provided by statute, all abatement periods and changes required by the Division are stayed upon the filing of a docketed appeal with the Appeals Board and remain stayed until withdrawal of the appeal or a final disposition of the proceeding by the Appeals Board. Except as provided in subdivision (b), the filing of a petition for reconsideration suspends for a period of 10 days the order or decision affected, insofar as it applies to the parties to the petition, unless otherwise ordered by the Appeals Board. Except as provided in subdivision (b), the Appeals Board, upon the terms and conditions which it by order directs, may stay, suspend, or postpone the order or decision during the pendency of the reconsideration. Pending reconsideration, the Board shall not order an employer to abate a citation which has been dismissed or vacated by Order or Decision of an Administrative Law Judge.

(b) In appeals involving a citation classified as serious, repeat serious, or willful serious, the filing or pendency of a petition for reconsideration of a final order or decision shall not stay or suspend the requirement to abate the hazards affirmed by the decision or order, unless a petition to stay or suspend meeting the following conditions in (1) through (4) is filed:

(1) The employer must request a stay or suspension of abatement by filing a written, verified petition to stay or suspend within 10 days after the issuance of the decision or order of an Administrative Law Judge;

(2) The petition shall be served on all parties who have been joined in the proceeding at the time of filing. A petition to stay or suspend abatement that meets all requirements of these regulations and the Labor Code shall be deemed filed on the date received by the Appeals Board;

(3) The employer's written petition is accompanied by supporting declarations that set forth evidence demonstrating by a preponderance of the evidence that a stay or suspension of abatement will not adversely affect the health and safety of employees;

(4) A petition to stay or suspend abatement that lacks a proper verification or is not accompanied by a proof of service shall be considered filed in accordance with subparagraph (1) if the petitioner files the required verification or proof of service within five days of the date of service of a letter from the Appeals Board noting the omission(s);

(5) Failure to perfect a petition to stay or suspend abatement in accordance with subsection (4) shall result in the dismissal of the petition.

(6) An opposing party may file an answer to the petition to stay or suspend abatement no later than 7 days from the service of the petition.

(7) The Board shall issue an order or decision granting the petition to stay or suspend abatement within 30 days of filing. Should the Board fail to act within 30 days, the petition shall be deemed denied.

(c) Staying of order or decision under appeal: proper and timely filing of a petition to stay or suspend abatement with the Board shall temporarily stay abatement during the pendency of the Board's review of the petition to stay or suspend abatement.

NOTE: Authority cited: Section 148.7, Labor Code. Reference: Sections 148.7, 6603 and 6625 Labor Code.

364 Withdrawal of Appeal

(a) An ~~appellant~~ employer or obligor may withdraw an appeal by written notification at any time before a decision is ~~issued~~ final or by oral motion before or during a hearing ~~on the hearing record~~. The Appeals Board shall issue an order granting the withdrawal of the appeal and serve the order on the participants identified in the official address record. ~~grant such withdrawal by letter, order or decision served on the parties.~~

(b) An appeal so dismissed shall be reinstated by the Appeals Board if the employee or obligor ~~appellant~~ files a written motion with sufficient facts to show that the withdrawal resulted from misinformation, given by the Division or the Appeals Board, or from fraud, or coercion, undue influence, mutual mistake of fact, or violation of applicable law. A motion for reinstatement must be filed with the Appeals Board within ~~60~~ 30 days of service of the ~~letter, order~~ granting withdrawal of the appeal. ~~or decision or,~~ In the event of fraud which could not have been suspected or discovered with the exercise of reasonable diligence, a motion for reinstatement must be filed with the Appeals Board within ~~60~~ 30 days of discovery of such fraud.

(c) The motion to reinstate the appeal shall be accompanied by a declaration containing a statement that any facts therein are based upon the personal knowledge of the declarant.

NOTE: Authority cited: Section 148.7, Labor Code. Reference: Sections 148.7 and 3619(g), Labor Code.

364.1 Withdrawal of All or Part of Division Action.

(a) The Division may withdraw its action by written motion at any time ~~or~~ by oral motion made ~~on the hearing record~~ in the presence of the Administrative Law Judge and all parties, or by issuing a Notice of Withdrawal of Citation which satisfies the service and posting requirements of Labor Code Sections 6317 and 6318 and is served on the Appeals Board. If no objection to the Notice of Withdrawal of Citation is received by the Appeals Board within 30 days of service of the Notice, the Notice will become a final order of the Appeals Board. An objection to a Notice of Withdrawal of Citation shall be in the form of a petition for reconsideration, the grounds for which shall be misrepresentation, fraud, undue influence, mutual mistake of fact, or violation of applicable law.

(b) If the Division makes a motion to withdraw a citation ~~the motion is made~~ prior to the hearing, the Division shall serve a copy of the motion ~~to withdraw~~ on each party and on any authorized employee representative if known to the Division to represent affected employees. Service shall be in the manner as prescribed in Section 355(e).3, and proof of ~~such~~ service meeting the requirements of Section 355(e).3 shall be filed with the Appeals Board.

(c) ~~Upon a showing of good cause, the Appeals Board shall grant such withdrawal by order or decision served on the parties.~~ The Division may withdraw part of its action by issuing an amended citation that removes an item or instance alleging a violation or reduces a proposed penalty. Upon service of such amended citation on all parties and the Appeals Board, the amended citation will be consolidated into any pending appeal of the citation and replace the original citation. Any amendments that either remove items or penalties from the original citation, or grant an abatement credit not granted in the original citation, will become part of the Division action as if they were the original appealed citation unless an objection to partial withdrawal is filed within 30 days from the date the amended citation is served on all parties and the Appeals Board.

(d) The only grounds for an objection to an amended citation of an inspection withdrawing part or all of a Division action that is already the subject of an appeal pending before the Appeals Board are misinformation, fraud, undue influence, mutual mistake of fact, or violation of applicable law. Employer need not file a new appeal to amendments made under subdivision (c). Employer's original appeal shall remain valid. If an objection to the amended citation is received, the Administrative Law Judge shall rule on the objection in the final order or decision.

(~~e~~) The employer shall post for 15 working days a copy of the ~~order or decision granting the withdrawal.~~ Posting shall be in a manner as prescribed in Section 356(a). ~~amended citation,~~ pursuant to Section 356, subsection (a).

NOTE: Authority cited: Section 148.7 and 6603(a), Labor Code. Reference: Sections 148.7, ~~and~~ 6614 and 6625, Labor Code.