

INITIAL STATEMENT OF REASONS

OSHA Rulemaking Package Modifying Requirement to Produce Citations on Appeal and Modifying Discovery Rules

California Labor Code (LC) section 148.7 permits the Occupational Safety and Health Appeals (Appeals Board or Board) to adopt, amend, or repeal rules of practice and procedure pertaining to hearing appeals and other matters falling within its jurisdiction. Pursuant to its authority under LC section 148.7, the Board proposes to adopt modifications to its Rules of Practice and Procedure contained in Title 8 of the California Code of Regulations.

PROBLEM STATEMENT:

Sections 347, 359.1, 361.3, and 373—Changes to the Board’s Rules to Remove the Requirement that the Employer Provide Copies of the Citations It Is Appealing.

Currently, under section 359.1, in order for an employer’s appeal to be docketed and perfected, an employer must provide the Board copies of the citation(s) it is appealing. This requirement has proven to be confusing and counterintuitive for some employers resulting in the dismissal of some employers’ appeals on procedural grounds due to failure to comply with this requirement. Through the proposed revisions to sections 359.1 and 361.3, the Board seeks to avoid the harsh result of dismissal on such procedural grounds by shifting the duty to provide copies of the citations from the employer to the Division of Occupational Safety and Health (Division), thereby making the appeal process simpler for employers. This shift requires the Board to modify its rules concerning docketing and perfecting an appeal. It also requires some related changes to the Board’s other rules, including changes to sections 347 and 373, to make the Board’s rules internally consistent.

Section 372.2—Change to Subpoena Rules to Allow Attorneys to Issue Subpoenas and to Allow the Board Five Working Days to Process Requests.

Under section 372.2, the Board has a mandatory duty to issue subpoenas for attendance of a person or production of documents at a hearing upon party request, including for those parties represented by counsel. However, several California jurisdictions allow licensed members of the California State Bar to issue subpoenas on their own. It is routinely allowed by California courts and by some other state agencies. (See, e.g., Code of Civil Procedure § 1985.) The Board discerns no reason why attorneys permitted to issue subpoenas in California courts should not also be allowed to do so in Board proceedings. Board staff must spend a considerable amount of time processing party requests for subpoenas. Through this rulemaking, the Board intends to require that licensed members of the California State Bar, acting in a representative capacity, issue their own subpoenas. The Board anticipates that the proposed modification to section 372.2, requiring members of the California State Bar to issue their own subpoenas, will reduce

the amount of staff time spent processing subpoena requests. This modification will ensure better utilization of Board resources. The Board also often receives belated subpoena requests with very little time to process them. The Board seeks to enable Board staff to better manage and predict their workload by reducing late and dilatory subpoena requests.

Section 372.9—Repeal of Rule Requiring the Division Production of Evidence at Filing of Appeal.

Section 372.9 currently requires, in each case, that the Division automatically provide each appealing employer copies of all documents and evidence within its possession related to the employer's appeal. Division personnel are required to spend a considerable amount of time in order to comply with this requirement. Not every case needs or benefits from this mandatory discovery rule. Many cases settle early without the need for an exchange of documents and evidence. In such cases, the automatic production of discovery required in section 372.9 becomes an unnecessary burden on the Division.

Section 372.9 also requires employers to incur unnecessary copying costs in some instances. Under section 372.9, the Division must make copies of all documents and evidence in its file in each case and provide them to employer. The Division charges employers a certain amount of money for these copies, e.g. \$20 for the production of a compact disk with the discovery information. Not all cases uniformly need or benefit from this mandatory discovery rule, particularly those cases that settle early. In such cases, the automatic production of discovery becomes an unnecessary cost for employers.

BENEFIT STATEMENT:

Sections 347, 359.1, 361.3, and 373—Changes to Rules to Remove the Requirement that the Employer Provide Copies of the Citations It Is Appealing.

The proposed changes to sections 347, 359.1, 361.3, and 373 will benefit employers by eliminating the requirement that they provide the Board copies of the citations they are appealing. Instead, the Division will be required to provide copies of the appealed citations. This change will make the process of appealing a citation simpler and more intuitive for employers. It is anticipated that this rule change will result in a decrease in the number of appeals dismissed for procedural irregularities. The proposed rule changes, including to sections 347 and 373, will also ensure the Board's rules are internally consistent and that the requirements are made readily understandable.

Section 372.2—Change to Subpoena Rules to Allow Attorneys to Issue Subpoenas and to Allow the Board Five Working Days to Process Subpoena Requests.

The proposed change to section 372.2, requiring that licensed members of the California State Bar issue their own subpoenas, will benefit the Board by reducing the amount of staff-time spent processing subpoena requests for those parties represented by counsel. Further, the modification to section 372.2, allowing Board staff five working days to process subpoenas, will benefit the Board by ensuring that Board staff is not unnecessarily burdened with last minute requests for issuance of subpoenas, allowing Board staff to better plan, predict, and manage their workload.

Section 372.9—Repeal of Rule Regarding Division Production of Evidence at Filing of an Appeal

It is anticipated that the repeal of this section will provide some reduction in the Division’s workload and allow better utilization of Division resources. Rather than being required to automatically produce discovery in all cases, the Division will only need to produce discovery when an employer makes a written discovery request under the Board’s other existing discovery regulations (e.g. sections 372, 372.1), and it is anticipated that such written requests will not be made in every case. Likewise, the repeal of this section will benefit employers since they will not automatically incur copying charges in each case, but rather only in cases where they explicitly make a written discovery request.

PURPOSE STATEMENT:

Section 347, subsection (b)(7): The addition of a new definition for “Docket Number,” discussed below, requires the renumbering of the remaining subsections in this section. It also requires that the reference to subsection (r) within subsection (b)(7) be changed to a reference to subsection (s). This is a non-substantive change.

Section 347, subsection (l): Modifies the definition of the term “Docketed” to reflect that an appeal may be docketed before it is deemed perfected. It removes the term perfected from the definition.

Section 347, subsection (m): Adds a new definition for the term “Docket Number.” “Docket Number” is defined to mean the number assigned to each docketed matter by the Appeals Board for identification purposes. For citations, the docket number will be the same as the inspection number listed on the citation.

Section 347, subsections (n) through (ee): The addition of a new definition for “Docket Number” requires the renumbering of the remaining subsections in this section. This renumbering is a non-substantive change.

Section 359.1 (Title): The title of the subdivision is modified to “Docketing and Perfecting an Appeal” to reflect that the proposed new rule will distinguish the procedures and requirements for docketing and perfecting an appeal.

Section 359.1, subsection (a): This subsection is modified to delineate the specific information that must be submitted for an appeal to be docketed. This subsection lists the requirements to docket an appeal in plain and readily understandable language. This subsection is also modified to allow an appeal to be docketed without regard to whether it is timely under section 359, and without regard to whether it has been perfected. The perfection and timeliness considerations, originally located in this subsection, were removed from this subsection and relocated to subsection (g), to occur after the Division provides copies of the appealed citations.

Section 359.1, subsection (b): This subsection specifies that when an appeal is initiated by telephone, in writing, or online form, but is incomplete and unable to be docketed, the appellant only has 20 days after the Board's written or electronic acknowledgment of the receipt of an intent to appeal to provide the information necessary to docket the appeal. Failure to comply with this time requirement is grounds for dismissal.

Section 359.1, subsection (d): This subsection is modified to specify that an employer's appeal will be docketed after the information required by subsection (a) is provided to the Board and it is confirmed to be complete.

Section 359.1, subsection (e): This subsection is modified to specify that after an appeal is docketed, the Board will serve on each party a "Notice of Docketed Appeal" advising that the matter has been docketed and providing the docket number assigned to the appeal. The Board will also serve on each party the appeal information and copies of any documents submitted by the appellant pursuant to subdivision (a).

Section 359.1, subsection (f): Adds a new subsection that specifies that the Division shall provide the Board a copy of all appealed citations within 15 working days after service of the "Notice of Docketed Appeal" and other information specified in subsection (e). The subdivision also notes that if the Division fails to provide a copy of all appealed citations in a timely manner, the Board will notify the Division of the deficiency and provide a reasonable opportunity for cure. It also specifies that an employer's appeal will not be prejudiced by any Division deficiency.

Section 359.1, subsection (g): Adds a new subsection that specifies that an appeal will be deemed perfected if the Board determines the appeal has been initiated timely, as required by section 359, and all required information and documents have been submitted to the Board in accordance with the requirements of this section, including the documents set forth in subdivision (f). It specifies that the Board will issue a notice to the parties advising when an appeal has been deemed perfected.

Section 359.1, subsection (h): This subsection specifies that discovery may commence upon perfection of an appeal. It also specifies that the Board will send the parties a notice advising them of the discovery mechanisms available under the Board's regulations.

Section 361.3, subsection (a): Modifies the subdivision to specify that when an employer appeals a citation, it must specify the inspection number listed on the citation. The employer must also identify the individual citations being appealed, and the basis for the appeal, through reference to the citation number(s) and item number(s).

Section 372.2, subsection (a)(1): Adds a new subsection specifying that the Appeals Board has five working days to process requests for subpoenas, but provides that the Board may expedite a request on a showing of good cause.

Section 372.2, subsection (c): Adds a new subsection specifying that licensed members of the California State Bar, acting as an attorney of record for a party, shall issue subpoenas and subpoenas *deuces tecum* on their own. It also specifies that the Appeals Board shall furnish optional subpoena forms for attorneys to use.

Section 372.2, subsection (c)(1): Adds a new subsection specifying that when a licensed member of the California State Bar, acting as an attorney of record for a party, issues a subpoena or subpoena duces tecum in accordance with subsection (c), the subpoena shall contain a notice, in font that is not less than 12 point, advising the subpoenaed party or witness that if they object to the subpoena, or seek modification of the subpoena, they should file a timely motion with the Board to quash or modify the subpoena.

Section 372.2, subsection (d) through (g): The addition of a new subsection requiring licensed members of the California State Bar to issue subpoenas necessitates that the remaining subdivisions in the section be renumbered. This renumbering is a non-substantive change. The Board has also modified subsection (d), former subsection (c), to reflect that a subpoena issued by an attorney extends to all parts of the State, and must be served in the same manner as a Board issued subpoena.

Section 372.9: The rule is being repealed.

Section 373, subsection (c): Specifies that the Board shall additionally serve on the parties a copy of the notice advising that the appeal has been perfected.

Section 373, subsection (c)(1): Specifies that a telephonic status conference shall be held within 30 days of the perfection of the appeal, rather than 30 days of docketing.

NECESSITY STATEMENT:

Section 347, subsection (b)(7): The addition of a new definition for “Docket Number” requires the renumbering of the remaining subsections and requires that the reference to subsection (r) in subsection (b)(7) be changed to a reference to subsection (s). This is a non-substantive change.

Section 347, subsection (l): The Board's rules do not currently distinguish between a docketed and a perfected appeal; the terms are functionally synonymous. To remove the requirement that an employer provide copies of the citations being appealed and place that burden on the Division, it is necessary for the Board to modify its rules concerning docketing and perfecting an appeal. The Board will need to distinguish a docketed appeal from a perfected appeal. Importantly, the Board will need to allow an appeal to be docketed before it is deemed perfected. The Board will have to delay determination of whether an appeal has been perfected until after it receives a copy of the appealed citations from the Division. The change to the definition of "Docketed" within section 347, subsection (l), helps accomplish this procedural modification, by removing the perfection language from the definition of "Docketed."

Section 347, subsection (m): The addition of a new definition is necessary to add greater clarity and consistency in Board proceedings by specifying that the docket number is the same as the inspection number.

Section 347, subsections (n) through (ee): The addition of a new definition for "Docket Number" at subsection (m) requires the renumbering of the remaining subsections to accommodate the inclusion of the new subsection. This is a non-substantive change.

Section 359.1, subsection (a): As discussed above, the Board's rules do not currently distinguish between a docketed and perfected appeal; the terms are functionally synonymous. To remove the requirement that an employer provide copies of the citations being appealed and place that burden on the Division, the Board will need to distinguish a docketed appeal from a perfected appeal. Importantly, the Board will need to allow an appeal to be docketed before it is deemed perfected. The Board will have to delay determination of whether an appeal has been perfected until after it receives a copy of the appealed citations from the Division. The proposed changes to section 359.1, subsection (a), helps accomplish this change. This subsection delineates the specific information that must be submitted for an appeal to be docketed, and it helps distinguish a docketed appeal from a perfected appeal. The requirements for perfecting an appeal, including ascertaining its timeliness, are removed from subsection (a) and moved to subsection (g), as discussed below, to occur after the Division provides copies of the appealed citations.

Section 359.1, subsection (b): This subdivision is necessary to delineate the time-periods that apply when an appellant initiates its appeal, but the appeal is incomplete and unable to be docketed. The appellant has 20 days after the Board's written or electronic acknowledgment of the receipt of an intent to appeal to provide the information necessary to docket the appeal listed in subsection (a). Failure to comply with this time requirement is grounds for dismissal.

Section 359.1, subsection (d): The change to this subsection merely specifies that when an employer provides the Board the information required by subsection (a), its appeal will be

docketed when it is confirmed to be complete. The changes clarify the requirements governing the docketing of an appeal.

Section 359.1, subsection (e): Since the Division will be required to provide a copy of the appealed citations, the Division will need to know when its duty to provide the citations commences. The Division will also need sufficient information to identify and locate the citations that it must provide. The provisions of this subsection, and the notice of docketed appeal, serve to inform the parties that an appeal has been docketed. The provisions of the subsection also serve to provide the Division a mechanism alerting them of the need to provide the citations, and provide sufficient information to identify the citations it must produce.

Section 359.1, subsection (f): The addition of this subsection is necessary to delineate the timeframes applicable to the Division's duty to provide copies of the appealed citations. It specifies the Division will have 15 working days to provide the Board a copy of the appealed citations after service of the notice of docketed appeal and other documents referenced in subsection (e). This subdivision is also necessary to delineate the consequences if the Division fails to provide the citations in a timely manner. It specifies that the Division's failure to comply with this timeframe will not prejudice an employer's appeal. It also specifies that the Division will be notified of any deficiency and it will be given a reasonable opportunity for cure.

Section 359.1, subsection (g): As discussed above, to remove the requirement that an employer provide copies of the citations being appealed and place that burden on the Division, the Board will need to distinguish a docketed appeal from a perfected appeal, and differentiate the requirements for docketing and perfecting an appeal. The Board will have to delay determination of whether an appeal has been perfected until after it receives a copy of the appealed citations from the Division. This new subsection clarifies that an appeal will not be perfected until the Board receives the citations from the Division. This new subsection also delineates the procedures that will govern the Board's determination as to whether an appeal has been perfected. An appeal will be deemed perfected if the Board determines the appeal has been initiated timely, as required by section 359, and all required information and documents have been submitted to the Board in accordance with the requirements of this section, including the documents set forth in subdivision (f).

Section 359.1, subsection (h): The changes to this subsection are necessary to specify that discovery between the parties shall not commence until the appeal is deemed perfected. In addition, once an appeal is perfected, the Board will also notify the parties of the discovery mechanisms available in an effort to ensure that employers, particularly those acting in pro per, are able to properly utilize, and benefit from, the Board's existing discovery procedures.

Section 361.3, subsection (a): Although the employer will no longer be required to provide copies of the citations being appealed, it is still necessary for the Board, and the Division, to have

sufficient information to identify the citations being appealed. This rule change, working in conjunction with the changes to section 359.1, specifies that as part of an appeal, an employer will be required to identify the inspection number listed on the citation and specify the individual citations being appealed by citation number and item number. In other words, the employer must provide the inspection number, and identify the individual citations being appealed, and the bases for the appeal, through reference to the citation number(s) and item number(s).

Section 372.2, subsection (a)(1): The addition of this new subdivision, providing the Board five working days to process subpoenas, is necessary to allow Board staff to better predict and manage their workload, and to limit dilatory requests for issuance of subpoenas.

Section 372.2, subsection (c): This new subdivision is necessary to require licensed members of the California State Bar, acting in a representative capacity, to issue subpoenas and subpoenas duces tecum on their own. It also specifies that the Appeals Board shall furnish optional subpoena forms for attorneys to use.

Section 372.2, subsection (c)(1): This subsection is necessary to ensure that a subpoenaed witness or party is aware of the Board procedures to contest compliance with a subpoena or to contest the contents of a subpoenas.

Section 372.2, subsections (d) through (g): The addition of a new subsection allowing licensed members of the California State Bar to issue subpoenas requires that the remaining subdivisions in the section be renumbered to accommodate the new subsection. This renumbering is a non-substantive change. The Board has also modified subsection (d), formerly subsection (c), to reflect that a subpoena issued by an attorney extends to all parts of the State and must be served in the same manner as a Board issued subpoena.

Section 372.9: To alleviate the unnecessary burdens imposed by section 372.9, it is necessary to repeal this section in its entirety.

Section 373, subsection (c): The Board proposes these modifications to section 373 to make it consistent with the changes to sections 359.1 and 361.3.

Section 373, subsection (c)(1): The Board proposes these modifications to section 373 to make it consistent with the changes to sections 359.1 and 361.3.

TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDY, REPORTS, OR DOCUMENTS:

The Board has not relied on any technical, theoretical, or empirical studies or reports in proposing this rulemaking.

SPECIFIC TECHNOLOGIES OR EQUIPMENT

These proposals will not mandate the use of any specific technologies or equipment.

ECONOMIC IMPACT ASSESSMENT:

Economic Impact Assessment per Government Code section 11346.3, subdivision (b):

The Board has made a determination that this proposal will not result in a significant, statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states. The amendments affect only procedural aspects of administrative proceedings regarding Occupational Safety and Health citations. The modifications are intended to increase efficiencies in Board proceedings and to provide mechanisms to lessen the burden on the stakeholders affected by the regulations. These amendments to the Board's Rules of Practice and Procedure are anticipated, on balance, to make appeal and adjudication of citations simpler, more efficient, and less costly for businesses, particularly the provisions shifting the burden to provide copies of the citations from the employer to the Division and the provision allowing attorneys to issue their own subpoenas.

(1) CREATION/ELIMINATION OF JOBS WITHIN THE STATE OF CALIFORNIA

The Board finds that the changes proposed to the Board's rules of practice are unlikely to have any direct impact on the creation or elimination of jobs within the State of California. As discussed above, the amendments affect only procedural aspects of administrative proceedings regarding Occupational Safety and Health citations. The modifications are intended to increase efficiencies in Board proceedings and to provide mechanisms to lessen the burden on the stakeholders. These amendments to the Board's Rules of Practice and Procedure are anticipated, on balance, to make appeal and adjudication of citations simpler, more efficient, and less costly for businesses.

(2) CREATION OF NEW OR ELIMINATION OF EXISTING BUSINESSES WITHIN THE STATE OF CALIFORNIA

It is estimated that no businesses within the State of California will be created or eliminated by these proposed changes to the regulations. Again, the amendments affect only procedural aspects of administrative proceedings regarding Occupational Safety and Health citations. The modifications are intended to increase efficiencies in Board proceedings and to provide mechanisms to lessen the burden on the stakeholders. These amendments to the Board's Rules of Practice and Procedure are anticipated, on balance, to make appeal and adjudication of citations simpler, more efficient, and less costly for businesses.

(3) EXPANSION OF BUSINESSES WITHIN THE STATE OF CALIFORNIA

It is not expected that any business will find reason to expand its business based on these regulations. Again, the amendments affect only procedural aspects of administrative proceedings

regarding Occupational Safety and Health citations. The modifications are intended to increase efficiencies in Board proceedings and to provide mechanisms to lessen the burden on the stakeholders. These amendments to the Board's Rules of Practice and Procedure are anticipated, on balance, to make appeal and adjudication of citations simpler, more efficient, and less costly for businesses.

(4) *BENEFITS OF THE REGULATION TO THE HEALTH AND WELFARE OF CALIFORNIA RESIDENTS, WORKER SAFETY, AND THE STATE'S ENVIRONMENT*

The amendments directly benefit the health and welfare of California workers by clarifying and increasing efficiency in the administrative process generally and in the discovery process. This is a benefit to working Californians who rely on the Board's process for timely resolution of Cal/OSHA appeals.

REASONABLE ALTERNATIVES TO THE REGULATION AND THE AGENCY'S REASONS FOR REJECTING THOSE ALTERNATIVES:

No reasonable alternatives to the proposed changes have been identified by the Board or have otherwise been identified and brought to its attention that would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provisions of the law.