PROPOSED MODIFICATIONS

The Board is proposing further modifications to the proposed amendments to section 359.1. The original proposal is in single underline and single strike-through. The further proposed modifications to the original proposal are shown in double underline and double strike-through.

The further proposed modifications may be found within:

- **Section 359.1, subdivision (a)(2)(C)(i);**
- **Section 359.1, subdivision (b)(1);**
- **Section 359.1, subdivision (f)(1); and**
- **Section 359.1, subdivision (h).**

Occupational Safety and Health Appeals Board Proposed Regulations 2019

§ 347. Definitions

For the purpose of these rules:

(a) "Administrative Law Judge" means any person appointed by the Appeals Board pursuant to Labor Code Sections 6605 and 6607 as a hearing officer to conduct hearings and to decide matters within the jurisdiction of the Appeals Board;

(b) "Administrative Record" includes the following:

(1) Pleadings;

(2) All notices issued to parties;

(3) All orders issued;

(4) Any decision by an Administrative Law Judge;

(5) The final decision;

(6) Emails received from or sent to parties to the case;

(7) The hearing record as defined by subsection (~~r~~s);

(8) Petition(s) for reconsideration and answers;

(9) Dispositions of petitions for reconsideration;

(10) Other documents entered into the record by the Appeals Board after a "Petition for Reconsideration" is received;

(11) Briefs;

(12) Motions;

(13) Stipulations;

(14) Party correspondence related to the proceeding;

(15) Other documents submitted by the parties related to the hearing; and

(16) Official Address Record;

(c) “Affected Employee” means an employee of a cited employer who is exposed to the alleged hazard described in the citation as a result of assigned duties;

(d) “Appeals Board” or “Board” means the Occupational Safety and Health Appeals Board, and includes the chairperson and members of the Appeals Board, administrative law judges, and staff of the Appeals Board;

(e) “Authorized Employee Representative” means a labor organization which has a collective bargaining relationship with the cited employer and which represents affected employees or an employee organization which has been formally acknowledged by a public agency as an employee organization that represents affected employees of the public agency;

(f) “Completed Appeal” means all required information submitted in writing, signed by employer or employer's representative, the citation(s) that are the subject of the appeal, and notification of penalty;

(g) “Day”, unless specifically stated otherwise means calendar day;

(h) “Decision by an Administrative Law Judge” means a decision signed and issued by the Administrative Law Judge and submitted by the Administrative Law Judge to the Appeals Board;

(i) “Declaration” means a certification in substantially the following form:

I, [*identify declarant*], declare that I have personal knowledge of the following facts:

1.....
2.....
3.....

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at (*city*), California (or other state/country) on (*date*).
(*Signature*)_____

(j) “Division” means the Division of Occupational Safety and Health;

(k) “Division Action” means any citation, notice, special order, order to take special action, notification of penalty, notification of failure to abate alleged violation and of additional civil penalty, or notification of failure to return a signed statement of abatement issued by the Division pursuant to Part 1 (commencing with Section 6300) of Division 5 of the Labor Code or Section 2950 of the Health and Safety Code, which by statute may be appealed to the Appeals Board;

(*l*) “Docketed” means the Appeals Board has acknowledged receipt of all information required under these rules to initiate ~~and perfect~~ an appeal as required by Sections 355.1, 355.3, 355.4, 359, 359.1, and 361.3;

(m) "Docket Number" means 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);

(~~m~~n) "Electronic Signature" means an electronic symbol (e.g., a graphic representation of a person in JPEG file), or process (e.g., a procedure that conveys assent), attached to or logically associated with a record, and executed or adopted by a person with the intent to sign the record;

(~~n~~o) "Employee" means every person who is required or directed by any employer, to engage in any employment, or to go to work or be at any time in any place of employment;

(~~o~~p) "Employee Appeal" means any appeal filed by an employee from the period allowed by the Division to abate the alleged violation;

(~~p~~q) "Employer" means the state and every state agency, each county, city, district, and all public and quasi-public corporations and public agencies therein, every person including any public service corporation, which has any natural person in service, and the legal representative of any deceased employer;

(~~q~~r) "Hearing" means any hearing before the Appeals Board or an Administrative Law Judge set for the purpose of receiving evidence;

(~~r~~s) "Hearing Record" means the official record of evidence taken during, and if allowed by order after, the hearing until the Appeals Board or Administrative Law Judge conducting the hearing orders the record closed to further evidence. The "Hearing Record" contains the hearing recording as described in Section 376.7, all documentary evidence and other evidence offered or admitted during the hearing or by affidavit (excluding withdrawn documents), such as admitted confidential evidence sealed from further disclosure by order of the Administrative Law Judge, admitted confidential evidence described in Section 376.6, and physical, mechanical or demonstrative exhibits returned to a party for storage pursuant to Section 376.4;

(~~s~~t) "Intervenor" means a person, group of persons, trade association, legal foundation, or public or private interest group who has been granted leave to intervene in any proceeding;

(~~t~~u) "Memorandum of Items of Costs" means an itemization of costs claimed pursuant to Section 149.5 of the Labor Code;

(~~u~~v) "Obligor" means a person other than an employer who is obligated to an employer to repair any machine, device, apparatus, or equipment and to pay any penalties assessed against an employer;

(~~v~~w) "Participation Notice" means a notice informing affected employees of their right to participate in certain proceedings;

(~~w~~x) “Party” means a person who has made an appearance before the Appeals Board and been granted party status;

(~~x~~y) “Person” means an individual, firm, partnership, trust, estate, association, corporation, company, or other entity;

(~~y~~z) “Petition for Costs” means any claim for reasonable costs to be awarded by the Appeals Board pursuant to Section 149.5 of the Labor Code;

(~~z~~aa) “Pleading” means a citation, notification of penalty, paper or electronic appeal form, other document or information submitted in place of an appeal form, and amendments thereto which contain the allegations of the parties of their respective charges and defenses;

(~~aa~~bb) “Proceeding” means any adjudicatory action begun by the filing of an appeal and includes a hearing, prehearing conference, petition for costs, reconsideration, or any other act that may result in an order or decision of the Appeals Board;

(~~bb~~cc) “Representative” means a person authorized by a party or intervenor to represent that party or intervenor in a proceeding;

(~~cc~~dd) “Rule” means any section set forth in this chapter adopted by the Appeals Board;

(~~dd~~ee) “Working Day” means any day that is not a Saturday, Sunday or State-recognized holiday as provided in Government Code Sections 6700 and 6701.

Note: Authority cited: Section 148.7, Labor Code. Reference: Section 2015.5, Code of Civil Procedure; and Sections 148.7, 149.5, 6301, 6302, 6304, 6304.1, 6305(b) and 6603, Labor Code.

§ 359.1. Docketing and Perfecting an Appeal

~~(a) An appeal is perfected and may be docketed if it is timely, as required by Section 359, and all required information is submitted to the Appeals Board in accordance with this section.~~

~~(b)~~(a) ~~If an appeal is initiated by telephone, in writing, or by online form, but is incomplete,~~ For an appeal to be docketed, the ~~additional~~ following information ~~required shall~~ must be submitted to the Appeals Board by mail, hand delivery, or online via the OASIS system accessible through the Board's website~~.~~:

(1) ~~Failure to submit copies of all citations being appealed,~~ The contact information ~~as~~ required ~~in~~ by Section 355.1, including the name, postal address, and email address of any party or obligor, and the name, postal address, and email address of any party or obligor's representative~~,~~; and

(2) ~~t~~The information required by Section 361.3, including:

(A) The inspection number listed on the citation,

(B) The identity of the citation(s) being appealed through reference to both citation number(s) and item number(s); and

(C) The components of the Division citation(s) being challenged as well as any affirmative defenses through reference to both citation number(s) and item number(s).

(i) The different components of the Division's citation that may be challenged are listed in Section 361.3, subsection (a), and also listed on the optional appeal forms supplied by the Board.

(b) If an appeal is initiated by telephone, in writing, or by online form, but is incomplete, the failure to provide the information listed in subsection (a) to ~~with~~ the Appeals Board within 20 days of written or electronic acknowledgement by the Board of the receipt of an intent to appeal constitutes grounds for dismissal.

(1) The receipt of an intent to appeal by telephone will not be sufficient by itself to docket an appeal.

(c) The Appeals Board shall furnish optional appeal forms upon request and shall provide them to the district offices of the Division.

(d) After ~~required~~ the information ~~and documents are~~ required by subsection (a) is submitted either on paper or online via the OASIS system, and confirmed to be complete, the appeal will be docketed.

(e) Upon docketing of an appeal, the Appeals Board shall 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. Accompanying the notice of docketed appeal, the Board will also serve on each party the appeal information~~,~~ and copies of any documents submitted pursuant to subsection (a)~~, and the docket number(s) assigned to the appeal~~.

(f) The Division shall provide a copy of all appealed citations to the Appeals Board within 15 working days after service of the notice and appeal information described in subsection (e). This will not constitute an ex parte communication, notwithstanding Section 352, and service on other parties is not required. If the Division fails to provide a copy of all appealed citations within 15 working days, the Board will notify the Division of the deficiency and provide a reasonable opportunity for cure. The Division's failure to timely comply with this subsection shall not prejudice an employer's appeal.

(1) An employer may also voluntarily elect to provide a copy of all appealed citations to the Appeals Board. If an employer provides the Appeals Board copies of all appealed citations prior to receipt of the citations from the Division, the Appeals Board may proceed to the procedure set forth in subsection (g) without waiting for a copy of the appealed citations from the Division. An employer's act of providing the Board with a copy of the citations it has appealed does not relieve the Division from its duty to provide a copy of all the appealed citations.

(g) An appeal will be deemed perfected if the Appeals Board determines it is timely, as required by Section 359, and all required information and documents have been submitted to the Appeals Board in accordance with this section, including those documents set forth in subdivision (f). The Board shall serve on each party a notice advising when an appeal has been deemed perfected.

(h) ~~Discovery may commence upon perfection of the appeal.~~ The Board shall also serve on the parties a notice of the right to discovery. The notice of the parties' right to discovery shall inform the parties of the discovery mechanisms available under its regulations, including those contained in Sections 372, 372.1, 372.2, and 372.3.

Note: Authority cited: Section 148.7, Labor Code. Reference: Sections 148.7, 6600, 6601 and 6603, Labor Code.

§ 361.3. Issues on Appeal.

The issues on appeal shall be limited to those arising out of the facts set forth in the Division action, and the grounds set forth in the appeal.

(a) ~~If the Division action appealed from is a citation,~~ When appealing a citation or citations, the employer shall specify the inspection number listed on the citation(s) and shall specify the individual citation(s) being appealed through reference to both the citation number and item number. For each appealed citation number and item number, the employer shall also specify which of the following components of the Division citation it is challenging in its appeal, as well as any affirmative defenses as described in subsection (b):

(1) The existence of the violation alleged in the underlying citation;

(2) The classification of the violation;

(3) The abatement period;

(4) The reasonableness of the changes required by the Division to abate the violation;

(5) The reasonableness of the proposed penalty.~~;~~

(b) Affirmative defenses.

(1) An affirmative defense is a justification or excuse that, if proved by appellant, relieves the cited employer of all or some of the responsibility for the alleged violation. An affirmative defense must be timely raised by appellant. Examples of affirmative defenses that may be raised by the appellant include, but are not limited to:

(A) Independent employee action caused the violation.

(B) A different safety order applied to the work activity that is the subject of the citation, and appellant was in compliance with that other safety order. The different safety order should be identified.

(C) An exception exists in the California Code of Regulations, Title 8, which allows for the action that is the subject of the citation. The specific safety order containing the exception should be identified.

(D) The inspection that gave rise to the citation was invalid because the Division employee who inspected appellant's worksite failed to comply with laws governing administrative searches.

(E) Another affirmative defense. Other affirmative defenses may exist and can be asserted by the employer.

(2) If the appellant contends one or more affirmative defense(s) exist(s), the appellant may, but is not required to, provide a short, plain statement in writing setting forth the facts or circumstances which, if true, would prove the affirmative defense.

(c) If the appeal contests only the reasonableness of the proposed penalty, the issues on appeal shall be limited to the classification of the violation and the reasonableness of the proposed penalty.

(d) Amendments to the citation and the appeal may be made by parties in accordance with Section 371.2.

(e) If a citation is classified as a repeat violation pursuant to Section 334, subsection (d), the earlier citation established by failure to appeal or the entry of a final disposition by the Appeals Board shall not be in issue and shall not be a docketed appeal.

(f) If an employer files a timely appeal from a notification of failure to abate but did not file an appeal from the underlying citation, the existence of the alleged violation shall be an issue in the same hearing if the employer files a motion, in accordance with Section 371, demonstrating good cause for having not appealed the underlying citation.

(g) If the Division amends a citation for the sole purpose of granting or revoking an abatement credit, the employer may appeal the grant or revocation within 15 working days from receipt of the amended citation. The amendment shall not give the Appeals Board jurisdiction over any other issue.

Note: Authority cited: Section 148.7, Labor Code. Reference: Sections 148.7, 6317, 6319.5, 6601 and 6603, Labor Code.

§372.2. Subpoena and Subpoena Duces Tecum.

(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. After the hearing has commenced, the Appeals Board may, upon a showing of good cause by the requesting party, issue a subpoena or subpoena duces tecum.

(1) The Appeals Board shall have five working days to process any request for a subpoena or subpoena duces tecum. The Board may permit the issuance of a subpoena in less than five working days if the party submits an affidavit establishing good cause.

(b) Application to the Appeals Board for a subpoena duces tecum requires:

(1) Compliance with the provisions of Section 1985 to 1985.4, inclusive, of the Code of Civil Procedure as a condition precedent to the issuance of a subpoena duces tecum; and that

(2) The application for a subpoena duces tecum shall be in the form of an affidavit or declaration under penalty of perjury and shall show good cause for the production of the document or thing requested, specifying the exact document or thing desired to be produced, setting forth in full detail the materiality thereof to the issues involved in the proceeding, and stating that the witness has the desired document or thing in the possession or control of the witness. The application shall also state that if the personal attendance of the witness or other qualified custodian of the records is not required, compliance pursuant to Article 4 (commencing with Section 1560) of the Evidence Code will be permitted.

(c) Licensed members of the California State Bar, acting as an attorney of record for a party, are required to issue their own subpoenas and subpoenas duces tecum. When issuing subpoenas, the attorney shall comply with the provisions of Sections 1985 to 1985.6, inclusive, of the Code of Civil Procedure. The Appeals Board shall furnish optional subpoena and subpoena duces tecum forms upon request for attorneys to use.

(1) 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, using a font size not less than 12 point, containing the following language: "If you object to the subpoena, seek modification of the subpoena, or believe that the subpoena is otherwise improper, you may file a timely motion with the Board to quash or modify the subpoena, pursuant to California Code of Regulations, title 8, section 372.2, subsection (g)."

(~~c~~d) Any subpoena or subpoena duces tecum issued pursuant to subdivision (a) or (c) extends to all parts of the State. The provisions of Sections 1987 and 1988 of the Code of Civil Procedure are applicable to the service of a subpoena or a subpoena duces tecum. Service must be made so as to

allow the witness a reasonable time for preparation and travel to the place of attendance. Service of a subpoena or subpoena duces tecum is made by delivering a copy to the witness together with a copy of the affidavit or declaration upon which the subpoena duces tecum is based, giving or offering at the same time, if demanded, the fees to which the witness is entitled for travel to and from the place designated. See Section 382 for amount of witness fees and mileage. Service shall be made by personal delivery or by certified mail return receipt requested or by messenger.

(1) Service by personal delivery may be made by any person.

(2) Service by messenger shall be effected when the witness acknowledges receipt of the subpoena to the sender, by telephone, by mail, or in person, and identifies himself or herself either by reference to date of birth and driver's license number or Department of Motor Vehicles identification number, or the sender may verify receipt of the subpoena by obtaining other identifying information from the recipient. The sender shall make a written notation of the acknowledgment. A subpoena issued and acknowledged pursuant to this section has the same force and effect as a subpoena personally served. Failure to comply with a subpoena issued and acknowledged pursuant to this section may be punished as a contempt and the subpoena may so state.

(~~d~~e) All witnesses appearing pursuant to subpoena, other than the parties or officers or employees of the State or any political subdivision thereof, shall receive fees, and all witnesses appearing pursuant to subpoena, except the parties, shall receive mileage in the same amount and under the same circumstances as prescribed by law for witnesses in civil actions in a superior court. Fees and mileage shall be paid by the party at whose request the witness is subpoenaed. See Section 382 for amount of witness fees and mileage. All reasonable costs, as defined at Section 1563(b)(1) of the Evidence Code, incurred by a witness not a party, with respect to the production of a business record pursuant to a subpoena duces tecum, shall be paid to the witness before being required to deliver the document.

(~~e~~f) No witness shall be obligated to attend unless the witness is a resident of the state at the time of service.

(~~f~~g) Upon timely motion of a party or witness, or upon its own motion, after notice to the parties and an opportunity to be heard, upon a showing of good cause, the Appeals Board may order the quashing of a subpoena or subpoena duces tecum entirely, may modify it, or may direct compliance with it upon other terms or conditions. In addition, the Appeals Board may make any other order as may be appropriate to protect a party or witness from unreasonable or oppressive demands.

NOTE: Authority cited: Sections 148.7 and 6603(a), Labor Code. Reference: Sections 1985, 1987 and 1988, Code of Civil Procedure; Section 1563, Evidence Code; Sections 11181, 11184, 11450.10, 11450.20, 11450.30, 11450.40, 11450.50, 68093, 68097.1 and 68097.2, Government Code; and Sections 148.7, 148.8, 149.5 and 6603(a), Labor Code.

§372.9. Division Production of Evidence at Filing of Appeal. (Repeal)

~~Within 30 days of receipt of service of the documents as described in Section 355.3, the Division shall provide the employer with copies of all documents and evidence within its possession that is related to the employer's appeal, including reproductions of photographs, videotapes or other media. The Division will update the employer with any newly discovered, relevant material, on an ongoing basis throughout the duration of employer's appeal. Attorney-client, work product, and other privileged information is not subject to disclosure by the Division. The Presiding Administrative Law Judge or Administrative Law Judge assigned to prehearing proceedings may be contacted by the parties, and shall act on any claim or dispute related to confidentiality or privilege.~~

Note: Authority cited: Sections 148.7, 149.5 and 6603(a), Labor Code. Reference: Sections 148.7, 149.5 and 6603(a), Labor Code.

§373. Expedited Proceeding.

(a) Upon motion of a party or upon its own motion, the Appeals Board may order an expedited proceeding. All parties shall be notified and shall be expected to do all things necessary to complete the proceeding in the minimum time consistent with fairness. Time limits for filing a motion to compel discovery, and for responsive filings under Section 372.6 may be shortened as necessary to accommodate the expedited date for disposition of the case.

(b) Where the Appeals Board is aware or is notified that an alleged violation appealed is classified by the Division of Occupational Safety & Health as a Serious, Repeat Serious, Willful Serious, Willful, Willful Repeat or Failure to Abate, and either abatement is on appeal, or abatement has not occurred, the Appeals Board shall expedite the proceeding.

(c) The Appeals Board shall serve parties written explanation of the expedited process, a notification of docketing, a copy of the docketed appeal forms and citations, a copy of the notice advising that the appeal has been perfected, a standing order compelling discovery, a stipulation form, and a status conference notice.

(1) A telephonic status conference shall be held within 30 days of the ~~docketing~~ perfection of the appeal. At that time, the ALJ will confirm that the expedited process is appropriate, review the requirements of the expedited process with the parties, review pending and impending discovery, and make such orders regarding any matter as needed to meet the timetable of this section,

(2) A telephonic prehearing conference shall be held within 60 days of the status conference. The prehearing conference will proceed under Section 374. The parties will be required to stipulate to undisputed facts, identify issues, and raise issues regarding the admissibility of evidence. The parties shall identify all witnesses and exhibits they intend to call or introduce at the hearing.

(3) A hearing shall be held within 60 days of the prehearing conference and will be scheduled for one day and adjusted, if necessary.

(4) The Appeals Board or a party may bring a motion to shorten the timeframes set forth in subsections (c)(1)-(3) on a showing of good cause.

Note: Authority cited: Sections 148.7 and 149.5, Labor Code. Reference: Sections 148.7 and 149.5, Labor Code.