

FINAL STATEMENT OF REASONS

OSHAB Rulemaking Package Modifying Requirement to Produce Citations on Appeal and Modifying Discovery Rules Notice File Number Z2019-0620-01

UPDATE OF INITIAL STATEMENT OF REASONS

Pursuant to Government Code Section 11346.9, subsection (d), the Board incorporates the Initial Statement of Reasons prepared in this rulemaking.

MODIFICATIONS RESULTING FROM THE 45-DAY PUBLIC COMMENT PERIOD (July 5, 2019 to August 22, 2019)

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

On August 22, 2019, the Occupational Safety and Health Appeals Board (Appeals Board or Board) held a Public Hearing to consider the proposed revisions to California Code of Regulations, title 8, sections 347, 359.1, 372.2, 372.9, and 373. The Appeals Board received oral and written comments on the initial proposed text. The proposed rulemaking for section 359.1 underwent several modifications in response to the comments received. The Board circulated all modifications for additional comment. The 15-day notice of modifications was issued, with the comment period from October 28, 2019 to November 12, 2019.

Specifically, as a result of the public comments during the initial comment period, the Board proposed to additionally modify section 359.1 to add three new subsections: (a)(2)(C)(i), (b)(1), and (f)(1). The Board also modified the initial proposed text in section 359.1, subsection (h), by removing a sentence.

Section 359.1, subsection (a)(2)(C)(i): The Board proposed to add a new subsection to clarify the meaning of the term “components of the Division(s) citation being challenged,” which is found in the initial proposed modifications to section 359.1, subsection (a)(2)(C). New subsection (a)(2)(C)(i) states, “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.”

Section 359.1, subsection (b)(1): The Board proposed adding a new subsection clarifying that the telephonic initiation of an appeal will not be sufficient by itself to docket an appeal. New subsection (b)(1), states, “The receipt of an intent to appeal by telephone will not be sufficient by itself to docket an appeal.”

Section 359.1, subsection (f)(1): The Board proposed adding a new subsection to clarify that an employer may, but is not required to, voluntarily provide the citations to the Board. New subsection (f)(1), states, “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."

Section 359.1, subsection (h): The Board's initial proposed text in section 359.1, subsection (h), included a sentence stating, "Discovery may commence upon perfection of the appeal." The Board proposed removal of that sentence from the proposed text of subsection (h).

Updated Necessity Statement:

Section 359.1, subsection (a)(2)(C)(i): The addition of this proposed subsection is necessary to clarify the meaning of the term "components of the Division(s) citation being challenged" in section 359.1, subsection (a)(2)(C). During the initial public comment period, as discussed below, the Board received a public comment suggesting the term "components of the Division(s) citation being challenged," might be confusing for some employers. This addition removes any ambiguity as to the meaning of the term, including through its specific reference to section 361.3, subsection (a).

Section 359.1, subsection (b)(1): The addition of this proposed subsection is necessary to clarify that a telephonic initiation of an intent to appeal will not be sufficient by itself to docket an appeal, and emphasizes that additional information must be supplied to the Board by mail, hand delivery, or online via the OASIS system to docket an appeal, as noted in section 359.1, subsection (a). During the initial public comment period, as discussed below, the Board received a public comment asking that the Board clarify the effect of a telephonic intent to appeal on the docketing process.

Section 359.1, subsection (f)(1): This addition is necessary to clarify that, although an employer will no longer be required to provide copies of the citations being appealed as part of the appeal process, the employer may still voluntarily elect to provide copies of the citations to the Board. During the initial public comment period, the Board received a public comment, as discussed below, requesting clarification on whether an employer may elect to provide the Board copies of the citations voluntarily. This addition addresses that comment. This addition also provides an employer flexibility to voluntarily elect to provide copies of the citations to potentially expedite Board review and perfection of employer's appeal without having to wait for the Division to supply copies of the citations.

Section 359.1, subsection (h): The removal of the following sentence from the proposed language in subsection (h) is necessary to prevent confusion: "Discovery may commence upon perfection of the appeal." The Board received public comments during the initial comment period, as discussed below, questioning whether the language might be confusing to parties, particularly with regard to whether it could be misconstrued to prevent Division requests for information that occur at the pre-citation stage. Concerns were also raised that it could unnecessarily delay early exchange

of information that could facilitate disposition of cases. Therefore, the Board proposed removal of that sentence from the proposed modifications to subsection (h).

SUMMARY AND RESPONSE TO WRITTEN AND ORAL COMMENTS
RESULTING FROM THE 45-DAY COMMENT PERIOD
(July 5, 2019 to August 22, 2019)

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

I. Written Comments.

Mr. Jorge M. Otano, Deputy City Attorney, City of Los Angeles, by Letter Dated August 19, 2019

Comment #1: With respect to the proposed rule changes to section 359.1, the letter states, “[W]ith the rule change, may an employer still perfect the appeal by filing the citation with the appeal or does the employer now have to wait for the Division to file the citations.”

Response: In response to this comment, the Board has modified the text of section 359.1. The Board has added section 359.1, subsection (f)(1), to clarify that an employer may still voluntarily elect to provide a copy of all appealed citations to the Appeals Board, without having to wait for the Division to supply copies of the citations. However, an employer’s act of providing the Board with a copy of the citations does not relieve the Division from its duty to provide a copy of all the appealed citations.

Comment #2: With respect to the proposed rule change to section 359.1, the letter asks “when will the employer be apprised of the perfected appeal? Furthermore, how long will the Board delay determination of whether an appeal has been perfected after the Board receives a copy of the appealed citation from the Division?”

Response: Under the proposed rule change to section 359.1, upon receipt of the appealed citations from the Division, the Board will endeavor to engage in a diligent and expeditious review of all filings and information to determine whether an employer’s appeal has been perfected and whether to issue a notice of perfection. The Board does not intend to delay determination of whether the appeal has been perfected. The exact amount of time it will take for Board staff to undertake a review and, where appropriate, issue a notice of perfection, will vary from case to case. The Board declines to modify the proposal any further in response to this comment.

Comment #3: With respect to the proposed rule changes to section 359.1, the letter asks, “[W]hat will happen when the Division fails to provide the Board a copy of the citations being appealed within the proposed 15 working days?”

Response: The Board believes that the proposed modifications to section 359.1 sufficiently identify what will occur if the Division fails to provide the citations within the proposed 15

working days. Per proposed section 359.1, subsection (f), should the Division fail to comply with the requirement to provide the citations within 15 working days, the Board will notify the Division of the deficiency and provide a reasonable opportunity for cure. Proposed section 359.1, subsection (f), further specifies any Division delay shall not prejudice an employer's appeal. The Board declines to modify the proposal further in response to this comment.

Comment #4: With respect to the proposed rule changes to section 359.1, the letter states, “[A]n employer, under the proposed changes, may not be aware the appeal was not properly docketed because the employer may have to wait until after the Division has provided copies of the citations being appealed and wait for the Board to determine that the employer's appeal was initiated timely and all the required information has been submitted.”

Response: This comment appears to misunderstand the proposed rule change to section 359.1. The rule changes to sections 359.1 and 361.3 will allow an employer's appeal to be docketed without first being perfected when it provides the Board certain basic information, such as its contact information, the inspection number, the citation and item numbers it is appealing, and the components of the citation(s) it is challenging. The docketing of an appeal will not be dependent on whether citations were provided to the Board by the Division nor whether the appeal was timely. Under the rule change, these latter considerations pertain to whether the appeal may be perfected. A notice of docketing will issue before a determination of whether the appeal has been perfected occurs.

The Board does recognize that shifting the duty to provide the citations from the employer to the Division may cause some delays in the time it takes for the Board to determine whether an employer's appeal has been, or is, perfected. Per the changes to section 359.1, the Board will need to notify the Division it received and docketed an employer appeal and provide the Division time to provide the Board copies of the appealed citations. The rule provides the Division 15 working days to provide the Board with the citations. Upon receipt of the appealed citations from the Division, the Board will endeavor to engage in a diligent and expeditious review of all filings and information to determine whether an employer's appeal has been perfected and to determine whether to issue a notice of perfection.

Despite the brief delay in time it will take for the Division to supply copies of the citations, on balance, the Board believes that the regulated community would be better served by this rule change, as it will prevent the harsh result of dismissal of an appeal that currently occurs on some occasions when an employer fails to understand or comply with the requirement that it provide the Board copies of the citation(s) it is appealing. Therefore, the Board declines to modify the proposal further in response to this comment.

Comment #5: “In addition, the proposed change may affect when the parties may commence discovery because of a potential delay upon the perfection of an appeal.”

Response: As originally noticed and proposed, section 359.1, subsection (h), stated that discovery could not occur until perfection of the appeal. In response to public comments, the Board has modified the proposal to remove that restriction from the text. The Board received public comments questioning whether that language might be confusing to parties, particularly with

regard to whether it could be misconstrued to prevent Division requests for information that occur at the pre-citation stage. In addition, concerns were raised that it could unnecessarily delay early exchange of information that could facilitate early disposition of cases.

Comment #6: The City of Los Angeles objects to the proposed repeal of section 372.9 on the grounds that the Division has not complied with it. The letter states,

At the outset, having filed appeals concerning citations out of the Los Angeles District Office and the Van Nuys District Office, the City has never received nor has either Division ever "automatically provided ... [the] appealing employer copies of all documents and evidence within its possession related to the employer's appeal within 30 day time-period" as required by the current rule. The fact the documents are supposed to be provided "automatically" has not occurred. Therefore, prior to eliminating this proposed regulation, the Board should actually ascertain if it is even enforced or followed. According to the rule, the employer should not have to ask for the government's proof it should have been provided "automatically." My experience has been it has not be provided automatically in over 20 cases involving the City of Los Angeles. The Van Nuys District, when asked, did provide the documents upon request.

However, the Los Angeles District Office has stated on several occasions that "all documents and evidence within its possession related to the employer's appeal" are only provided in expedited cases and the City would have [sic] pay for copies otherwise. The fact that the rule does not indicate such a restriction and yet it was used to delay discovery is troubling. It begs the question, why change a rule that is not enforced or followed?

Response: The letter states that the Division has not strictly complied with section 372.9. The Board has also received information corroborating such assertions from other sources, including assertions that the Division's non-compliance is due to a typographical error in a section reference. However, the Board cannot comment on case-specific or anecdotal failures to comply with regulations in this rulemaking. The appropriate vehicle to address such concerns would have been a motion before the assigned administrative law judge.

Ultimately, that the Division has allegedly not strictly complied with section 372.9, neither means the rule is well-devised nor that it should not be repealed. The Division's alleged lack of strict compliance appears to be emblematic, and perhaps a potential outgrowth, of the deficiencies with the rule. The Board continues to believe repeal of section 372.9 is appropriate due to deficiencies with the rule as it is written. Section 372.9 requires the Division in each case to provide all documents and evidence related to an employer's appeal. The Board estimates it takes on average one hour and 15 minutes for a Division Management Service Technician (MST) to prepare and produce such discovery to an employer in each case. However, many cases settle early without the need for an exchange of documents and evidence. In such cases, the automatic production of

documents and information required in section 372.9, and the time and expense of such a production, becomes an unnecessary burden on the Division and a waste of resources. The repeal of this section will ensure better utilization of resources.

The Board also believes that a better use of the Division's resources would be to require the Division to provide copies of the appealed citation(s) to the Board, per the proposed modifications to section 359.1.

The Board does not believe that repeal of section 372.9 will present any notable hardship on the parties, nor deny employers access to materials, information and documents necessary to the defend their case. Proceedings before the Board have occurred without the provisions of section 372.9 for decades. Section 372.9 has only been operative since 2016. Following the repeal of section 372.9, discovery will continue to be available through sections 372 [Identify of Witnesses], 372.1 [Access to Documents], 372.2 [Subpoena and Subpoena Duces Tecum], and 372.3 [Deposition]. An employer must simply request the discovery, rather than receiving it automatically.

The Board also notes that section 372.9 is not required by the Board's enabling statutes. Under Labor Code section 6603, with regard to discovery, the Board has a mandate to be consistent with the discovery mechanisms set forth in Government Code section 11507.6. The Board's other operative discovery regulations, including sections 372 and 372.1, fully comply with that requirement.

Finally, although the Board will repeal section 372.9, the Board intends to provide parties additional educational information regarding the other available discovery mechanisms. In conjunction with the repeal of rule 372.9, the Board proposes to adopt section 359.1, subsection (h), which will educate the parties on the availability of these other discovery mechanisms. That subsection will require the Board serve on the parties a notice of the right to discovery. The notice will advise of the availability of the Board's other discovery mechanisms.

Based on the foregoing, the Board declines to modify the proposal further in response to this comment and continues to believe repeal of section 372.9 is appropriate.

Comment #7: Discussing the repeal of rule 372.9, the letter states,

Although I agree that every case may not need mandatory discovery, the City disagrees with the notion that there is no benefit to mandatory discovery on the part of the government. An employer, knowing the evidence and documentation of [sic] Division, may be quicker to resolve the matter and save time and money on behalf of the employer and the Division. The employer knowing the Division's documents and evidence may be able to proceed with a more fruitful and mutually beneficial informal conference to end the matter and make the workplace safer.

Response: The comment suggests that an employer will not be able to obtain the Division's documents and evidence. However, that is not the case. The repeal of section 372.9 will not prevent an employer from obtaining and reviewing the Division's documentation and evidence in an effort to evaluate their case and potentially facilitate settlement. An employer will still be able to make an appropriate discovery request. As discussed above, the parties will still have multiple discovery mechanisms at their disposal, including those set forth in sections 372 [Identify of Witnesses], 372.1 [Access to Documents], 372.2 [Subpoena and Subpoena Duces Tecum], and 372.3 [Deposition].

Further while the Division's production of documents and evidence may not occur automatically, the Board also proposes to adopt section 359.1, subsection (h), which will educate the parties on the availability of the Board's other discovery mechanisms. Please also see the Board's response to Comment #6 of the letter of Jorge Otano, Deputy City Attorney, City of Los Angeles. The Board declines to modify the proposal further in response to this comment and continues to believe repeal of section 372.9 is appropriate.

Comment #8: Discussing the repeal of rule 372.9, the letter states,

Another troubling aspect of eliminating this rule is that a party being uninformed of all the facts of the citation and not being given proper notice or an opportunity to be heard on charges. The Board's elimination of 8 CCR, §372.9 seems to violation fundamental due process guaranteed by both the United States and California constitutions. Under due process, the government does not decide when to withhold material evidence which would inform the alleged wrongdoing of its violations.

Response: The Board does not believe that repeal of section 372.9 will result in a denial of due process, nor result in an employer being uninformed. An employer will still be able to receive the information, evidence and documents necessary to defend its case. Following repeal of section 372.9, and consistent with the Board's governing statutes, multiple discovery mechanisms will still be available in Board proceedings allowing an employer to request and receive the Division's documents and evidence. Discovery will be available through sections 372 [Identify of Witnesses], 372.1 [Access to Documents], 372.2 [Subpoena and Subpoena Duces Tecum], and 372.3 [Deposition]. An employer must simply request the discovery, rather than receiving it automatically. That an employer must simply request the discovery, rather than receiving it automatically, does not mean there is a due process violation. Indeed, discovery has proceeded using those mechanisms for decades prior to the recent enactment of section 372.9 in 2016.

In addition, the analogies to criminal proceedings and the prosecutor's duty of disclosure are not entirely apt. As discussed in *Salwasser Mfg. Co. v. Occupational Safety & Health Appeals Bd.* (1989) 214 Cal.App.3d 625, 631-633, the "primary purpose of a Cal-OSHA inspection is not to discover evidence of a crime but rather to enforce standards designed to assure safe and healthful working conditions for employees." Please also see the Board's response to Comments #6 and 7 of the letter of Jorge Otano, Deputy City Attorney, City of Los Angeles.

The Board declines to modify the proposal further in response to this comment and continues to believe repeal of section 372.9 is appropriate.

Comment #9: With regard to the repeal of section 372.9, the letter states:

The Board states that automatic production of discovery creates an unnecessary burden on the Division. Again, the aforementioned statement begs the question as to how the production of discovery already in the possession of the Division create an unnecessary burden? It is assumed prior to citing an employer, the Division has marshalled all its evidence to prove the allegation in the citation and at some point in time has converted the notes and documents into a digital file to send to employers on CDs, DVDs, or email attachments.

Response: The Board believes that the comment makes an inaccurate assumption. While the Division presumably has in its possession the evidence it believes will prove the allegations within the citation(s), the Board does not believe that the Division automatically converts such evidence and documents into a digital file readily available to send to employers, e.g. a file on CDs, DVDs, or email attachments. In other words, the Board does not believe the Division stores the information in a manner readily transmittable to an employer, but rather must spend additional time and effort readying the material for transmission to an employer. The Board estimates it takes on average one hour and 15 minutes for a Division MST to prepare and produce all documents and evidence to an employer in each case. However, again, many cases settle early without the need for such a production and exchange of documents and evidence. In such cases, the automatic production of discovery required in section 372.9, and the time and expense to make such a production, becomes an unnecessary burden on the Division and a waste of resources. The Board declines to modify the proposal further in response to this comment and continues to believe repeal of section 372.9 is appropriate.

Comment #10: With respect to the repeal of section 372.9, the letter states, “The City appreciates the Board's proposal that the Division will only be required to provide discovery when it receives a written discovery request. However, the language concerning the request ‘where the discovery is needed and wanted’ may prove to be limiting on the ability to receive requested information, and it would be tantamount to denial of proper discovery.”

Response: The comment refers to a statement within the notice of rulemaking, which stated “the Division will only be required to produce discovery when it receives a written discovery request, i.e. where the discovery is needed and wanted by the requesting employer.” The Board wishes to clarify that the language “needed and wanted” within that sentence was not meant to, nor does it, act as a limitation on when discovery may be requested by an employer. It merely reflects that there may be occasions when discovery is neither needed nor wanted by an employer, and in such cases, where no discovery request is made and no automatic production requirement exists, the Division will not be required to unnecessarily expend time and effort producing discovery. The Board declines to modify the proposal further in response to this comment and continues to believe repeal of section 372.9 is appropriate.

Comment #11: With regard to the repeal of section 372.9, the letter states:

If the repeal of **8 CCR, §372.9** will result in the employer no longer being required to incur copying charges in each and every case the employer seeks copies of all documents and evidence, the employer may benefit from the change. However, the employer should not be precluded from receiving all documents and evidence in the possession of the Division to defend against the citation or having to pay for the government's evidence where the employer explicitly makes a written discovery request.

Response: First, the repeal of section 372.9 will not preclude an employer from receiving the information, evidence and documents necessary to defend its case. Following repeal of section 372.9, multiple discovery mechanisms will still be available in Board proceedings allowing an employer to request and receive the Division's documents and evidence. Discovery will be available through sections 372 [Identify of Witnesses], 372.1 [Access to Documents], 372.2 [Subpoena and Subpoena Duces Tecum], and 372.3 [Deposition].

However, the repeal of section 372.9 will not mean an employer will not receive copying charges when the employer seeks or requests copies of the Division's documents and evidence. Although section 372.1 allows a party to make a request to inspect and copy a number of different types of documents and evidence, it provides that the party making the request must pay for the copying. Section 372.1, subsection (g), specifically states, "Unless other arrangements are made, the party requesting the writings must pay for the copying." The requirements of section 372.1 and the cost provisions therein are not a subject of this rulemaking. Please also see the Board's response to Comments #6 and 7 of the letter of Jorge Otano, Deputy City Attorney, City of Los Angeles. The Board declines to modify the proposal further in response to this comment.

Comment #12: With regard to the repeal of section 372.9, the letter states:

Under the cost impact for repealing section 372.9, the Board suggests that the repeal of the automatic discovery rule may provide savings to the employers since they will only be required to incur copying charges for discovery that they specifically request, rather than the automatically incurred copying charges in all cases. The Board's assumption is erroneous. The repeal will NOT save the employer money because under the current mandatory discovery rule, the employer is supposed to receive the documents at no charge. There is no mention of a fee for receiving required documents from the Division.

Response: The comment refers to one of the potential benefits following the repeal of section 372.9, which is that it could save employers money in some circumstances. The Board observed that the repeal of the section will benefit some employers because they will not be required to incur copying charges in each and every case, but rather only in cases where they explicitly make a

written discovery request. While the comment argues that the Division should not charge costs when making a production under section 372.9, the comment is at odds with the Board's understanding of the Division's current position. The Division takes the position that an employer would have to pay for copying charges for discovery produced under section 372.9. And absent any contrary ruling, the Division's position on costs is still in existence and the repeal of the automatic discovery rule may indeed provide some savings to employers. The Board declines to modify the proposal further in response to this comment and continues to believe repeal of section 372.9 is appropriate.

Comment #13: With regard to the repeal of section 372.9, the letter states:

A better phrasing of the ruling making change to **8 CCR, § 372.9** would be modification or amendment, not repeal. A proposed repeal of section 372.9, without a replacement would leave the Division with no mandatory discovery mechanism on behalf of the accused employer which violates fundamental fairness.

Response: The Board continues to believe repeal of section 372.9 is appropriate. However, the Board does note that it proposed to adopt section 359.1, subsection (h), which will educate parties on the availability of other available discovery mechanisms by requiring the Board serve on the parties a notice of the right to discovery. Please also see the Board's response to Comments #6 and 7 of the letter of Jorge Otano, Deputy City Attorney, City of Los Angeles. The Board declines to modify the proposal further in response to this comment and continues to believe repeal of section 372.9 is appropriate.

The Board thanks Mr. Otano and the City of Los Angeles for participating in the rulemaking process and for commenting on the regulatory package.

Ms. Jora Trang, Worksafe, by Letter Dated August 21, 2019

Comment #1: With regard to the changes to proposed regulation section 359.1, the letter states:

As written, the proposed regulations for 359.1 appear to eliminate a step for employers to docket an appeal. Although Section 356, which requires employers to give notice to employees of the appeal is not changing, we are concerned about the shortened time frame and the possible unintended repercussions to employees. We want to ensure that employees are informed of this shortened time frame with sufficient notice to be ready to take action should an appeal be docketed.

Response: The Board does not believe that employees will suffer any detriment due to the proposed rule changes to section 359.1. Section 356 requires an employer to give notice to its employees of an appeal by posting the docketed appeal. Prior to the instant rule change, section 359.1 did not distinguish between a docketed and a perfected appeal; the terms were functionally synonymous. An employer would not receive, nor have to post, a docketed appeal until the appeal had been perfected, meaning it was found to be timely and all required information had been

submitted. However, under the rule change to section 359.1, an employer's appeal may be docketed before it is deemed perfected once certain prescribed information is provided. In practice, this will mean that the notice of docketing, and the requirement for employer to post the notice, will now occur at earlier stage. This will effectively mean that employees will actually receive more notice of an employer's intended appeal, rather than less notice. They will receive notice of a docketing before the appeal is even perfected. Therefore, the Board declines to modify the proposal further in response to this comment. However, the Board does plan to hold a stakeholder meeting to address some possible changes to the Board's regulations governing employee and third party notice and participation in the near future, with the goal of ensuring greater transparency and participation.

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

Mr. Fred Walter, Walter & Prince, LLP, by Letter Dated August 20, 2019

Note: Mr. Walter's letter contains some comments directed at the current rulemaking and some comments directed to other matters outside the rulemaking. The response will only address those comments directed to the current rulemaking.

Comment #1: With regard to section 359.1, subsection (f), Mr. Walter's letter states,

Extending the time to perfect an appeal will lengthen the life of that appeal. It will be extended even further if the Division fails to provide the Board with the citations in the time allowed. Our experience in discovery has taught us that the Division is not always responsive to its obligations for timely production under the discovery rules.

What will the Board consider to be a "reasonable time to cure"?
What conditions would have to occur for the Board to allow time to cure?

Response: Under the proposed modifications to section 359.1, subsection (f), if the Division fails to provide a copy of all appealed citations to the Appeals Board within 15 working days after service of the notice of docketed appeal and other information described in that section, the Board will notify the Division of its deficiency and provide a reasonable opportunity for cure. The Board declines to modify the proposal further to specify an exact number for what constitutes a reasonable amount of time to cure. What is reasonable may depend on the specific reason for the Division's delay, and the facts and circumstances applicable to each specific case.

Please also see the Board's response to Comment #4 of the letter of Jorge Otano, Deputy City Attorney, City of Los Angeles.

The Board declines to modify the proposal further in response to this comment.

Comment #2: Mr. Walter’s letter also states, “What sanctions will the Board impose if the Division unreasonably fails to comply with this section?”

Response: Where there has been a continued failure to comply with the requirements of proposed section 359.1, subsection (f), the deficiency will be brought to the attention of an appropriate administrative law judge who, under the Board’s current rules, has authority to address such issues. (See, e.g. § 350.1.) The specific action taken by the administrative law judge, or sanction imposed, will require discretionary evaluation of the facts of each case. The Board declines to modify the proposal further in response to this comment.

Comment #3: With regard to section 359.1, subsection (h), Mr. Walter’s letter states,

It is our understanding that once the citations have been issued, the inspection file becomes a public document. It is our practice therefore to request discovery at or shortly after filing our clients' appeals. We request clarification that the wording "Discovery may commence upon perfection of the appeal" does not preclude an employer from requesting the Division's discoverable materials before the appeal is perfected.

Response: Please see the Board’s response to Comment #5 of the letter of Jorge Otano, Deputy City Attorney, City of Los Angeles.

The Board thanks Mr. Walter and Walter & Prince, LLP for participating in the rulemaking process and for commenting on the regulatory package.

II. Oral Comments on August 22, 2019.

Mr. Fred Walter, Walter & Prince, LLP

Comment #1: Mr. Walter, consistent with his written comments, expressed concern that the Division may not timely comply with its duty to provide the Board copies of the appealed citations, as required by section 359.1, subsection (f). He is concerned that absent a sanction the Board and the parties will be waiting more than 15 working days for the Division to provide the required documents to the Board. Mr. Walter proposed dismissal of the citation(s) as an appropriate sanction.

Response: Please see the Board’s response to Comment #2 of the letter of Fred Walter of Walter & Prince, LLP. Please also see the Board’s response to Comment #4 of the letter of Jorge Otano, Deputy City Attorney, City of Los Angeles. The Board declines to modify the proposal further in response to this comment.

Comment #2: Mr. Walter stated that he would not want section 359.1, subsection (h), to mean that the parties cannot begin discovery prior to perfection of the appeal, noting that his office sends out a discovery letter at the beginning of the appeal.

Response: Please see the Board’s response to Comment #5 of the letter of Jorge Otano, Deputy City Attorney, City of Los Angeles.

Comment #3: Mr. Walter notes that over time, Board proceedings have become incrementally more complex, and questioned whether some of that is reversible.

Response: The Board appreciates this comment, but notes that it addresses matters beyond the scope of the current rulemaking. The Board declines to modify the proposal further in response to this comment. However, the Board will consider holding a stakeholder meeting to solicit comments regarding the possibility of further changes to its procedural rules to simplify the Board’s processes.

The Board thanks Mr. Walter and Walter & Prince, LLP for participating in the rulemaking process and for commenting on the regulatory package.

Mr. Bruce Wick, California Professional Association of Specialty Contractors

Comment #1: Mr. Wick stated that he echoed Mr. Walter’s concern that the Division may not timely comply with its duty to provide the Board copies of the appealed citations, as required by section 359.1, subsection (f). He is concerned as to what will happen if the Division does not comply with these requirements in a timely fashion.

Response: Please see the Board’s response to Comment #2 of the letter of Fred Walter of Walter & Prince, LLP. Please also see the Board’s response to Comment #4 of the letter of Jorge Otano, Deputy City Attorney, City of Los Angeles. The Board declines to modify the proposal further in response to this comment.

Comment #2: With regard to the repeal of the automatic production provisions contained in section 372.9, Mr. Wick commented that the appeals process can be complex and “mind-boggling” particularly for smaller employers who do not have the resources to hire counsel. He wants to ensure that unrepresented employers can interact with the Board efficiently. Mr. Wick also commented that many employers would say the Board should not be worried about saving the Division money, noting that employers pay millions of dollars in workers’ compensation surcharges to pay for these things.

Response: The Board shares Mr. Wick’s goal of making the appeal process simpler for unrepresented employers. Much of the current rulemaking package is intended to serve that purpose. For example, the proposed modifications to section 359.1 will shift the duty to provide the citations from the employer to the Division in an effort simplify the appeal process for employers.

Further, the Board notes, despite the proposed repeal of section 372.9, that employers will still have access to all documents, evidence, and information necessary to defend their case. They merely need to make a discovery request. Discovery will continue to be available through sections 372 [Identify of Witnesses], 372.1 [Access to Documents], 372.2 [Subpoena and Subpoena Duces Tecum], and 372.3 [Deposition]. In addition, to help simplify the process for employers, the

proposed rulemaking includes section 359.1, subsection (h), which will require the Board to issue employers a notice of the right to discovery, educating employers on the availability of these other discovery mechanisms. Therefore, the Board declines to modify the proposal further in response to this comment and continues to believe that repeal of section 372.9 is necessary to ensure better utilization of state resources and avoid unnecessary waste, which are important goals.

Comment #3: With regard to the repeal of the automatic production provisions contained in section 372.9, noting that many employers will have had limited interaction with Board proceedings or are “first timers,” Mr. Wick noted that most employers, who cannot figure this whole thing out, would pretty readily take and review a CD they received so they could look through it and see what is in the file and better understand the facts and evidence in support of Division’s position. Mr. Wick noted that seeing what is in the Division’s file really impacts employers, especially the smaller first time employer, because they may not have understood the whole story. Mr. Wick suggests that perhaps one option would be to simply place a check box on the appeal form to allow an employer to request discovery simultaneous with the initiation of the appeal for a specified cost, e.g. 20 dollars. Mr. Wick would prefer a more clear option rather than having employers have to figure out how to request such information and documents.

Response: Please see the Board’s response to Comment #2 of Mr. Bruce Wick.

Next, with respect to the creation of an alternative mechanism for an employer to request discovery to replace section 372.9, such as a checking a box on the appeal form, the Board appreciates this suggestion and will give it consideration as a potential part of a future rulemaking. However, the Board believes that such a change should occur as part of a separate stakeholder meeting and rulemaking package so that the suggestion may be appropriately discussed and vetted with the stakeholder community.

The Board declines to modify the proposal further in response to this comment and continues to believe that repeal of section 372.9 is necessary.

Comment #4: Mr. Wick noted that he did not understand the nexus between how many cases settle within the first 90 days and why they would not request a copy of the discovery file. He noted that sometimes people who cannot hire an attorney for a whole appeal will hire someone to assess the case up front, do an analysis, provide a recommendation, and then oftentimes they will settle. He also noted that he does not understand how settling in 90 days does not mean somebody would not automatically want a copy of what is in the file.

Response: The reference to 90 days within the Board’s notice of rulemaking concerned estimated savings following the repeal of section 372.9. The Board estimates that at least 34 percent of cases, or approximately 952 of 2800 cases annually, settle within the first 90 days (based on a sample of approximately 900 cases). Following the repeal of section 372.9, an employer desiring discovery will not be entitled to discovery as a matter of right, but will need to make a written request to the Division pursuant to the Board’s other discovery rules (i.e., sections 372 and 372.1). Although, as Mr. Wick points out there may be some exceptions the Board estimates that typically, after an appeal has been initiated and perfected, it will take more than 90 days for an employer to make, and for the Division to respond to, a discovery request. That means that if a case settles within 90

days, the Division will not incur costs producing discovery, nor will an employer have to pay any copying charges for such a production. The Board declines to modify the proposal further in response to this comment.

The Board thanks Mr. Wick and the California Professional Association of Specialty Contractors for participating in the rulemaking process and for commenting on the regulatory package.

Mr. Kevin Bland, Ogletree Deakins, Representing Western Steel Council, the California Framing Contractors Association, and the Residential Contractors Association.

Note: Mr. Bland provided some comments directed at the current rulemaking and some comments directed to other matters outside the rulemaking. The response will only address those comments directed to the current rulemaking.

Comment #1: The Board’s rules provide that an appeal can be initiated by telephone. However, for an appeal to be docketed section 359.1, subsection (a), provides that certain information must be submitted to the Appeals Board by mail, hand delivery, or online via the OASIS system. Mr. Bland comments that perhaps some additional language could be added that clarifies the effect of the phone call or “identifies what the phone call is versus the other.”

Response: The Board believes that section 359 and 359.1 sufficiently distinguish between the procedures pertaining to filing an intent to appeal, including via telephone, and those pertaining to docketing an appeal. However, in response to this comment, the Board has added section 359.1, subsection (b)(1), to state that “an intent to appeal by telephone will not be sufficient by itself to docket an appeal.” This will help clarify that in order to docket an appeal, the information required by section 359.1, subsection (a), must be submitted to the Appeals Board by mail, hand delivery, or online via the OASIS system, and that a telephone call is not sufficient by itself to docket an appeal.

Comment #2: Mr. Bland comments that section 359.1, subsection (a)(2)(C), uses the term “components of the Division citation(s).” Mr. Bland noted that those terms could be confusing for some employers and also for some representatives that do not regularly participate in Board proceedings.

Response: In response to this comment, the Board has added section 359.1, subsection (a)(2)(C)(i), to provide a further explanation for the term. The new subsection states, “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.”

Comment #3: Section 359.1, subsection (f), provides that the Division will provide the Appeals Board copies of all appealed citations and notes that this will not constitute an ex parte communication. Mr. Bland comments that the employers should also be sent a copy of the citation packet, noting that, on occasion, the packet the employer receives is incomplete or something is missing.

Response: The Board does not believe a change is necessary to the rule. Once the Division provides a copy of the appealed citations to the Appeals Board they will become available and

accessible to an employer on the OASIS system, which an employer may access. Therefore, the Board declines to modify the proposal further in response to this comment.

Comment #4: Mr. Bland comments that there should be a penalty if the Division fails to provide the citations in a timely manner.

Response: Please see the Board's response to Comment #2 of the letter of Fred Walter of Walter & Prince, LLP. The Board declines to modify the proposal further in response to this comment.

Comment #5: Mr. Bland commented that discovery may be requested beyond what is in Division's investigation file, noting that when he requests information he asks for things that are not necessarily in the investigation file. He commented that discovery and the Division's investigation file are not synonymous. Mr. Bland commented that it should be made clear that additional information may be requested beyond what is in the investigation file.

Response: The Board's notice of discovery proposed under section 359.1, subsection (h), will sufficiently address the concerns raised in this comment. When the Board provides the notice of the right to discovery under section 359.1, subsection (h), that notice will provide employers information on the types of documents and things that may be requested per the Board's discovery rules. Therefore, the Board declines to modify the proposal further in response to this comment.

Comment #5: Mr. Bland commented that discovery should not be delayed until after perfection of the appeal, noting that he sends discovery requests simultaneously when he files the appeal. Mr. Bland also noted, whether the employer gets a copy of the file automatically or not, it is very important for an employer to be able to get the file early so that they/it can assess the strengths and weaknesses of the case.

Response: Please see the Board's response to Comment #5 of the letter of Jorge Otano, Deputy City Attorney, City of Los Angeles.

Comment #6: Mr. Bland commented that there should be a tracking mechanism to keep track of the documents and things provided by the Division, such as bate stamps labels.

Response: With respect to the creation of a tracking mechanism for discovery document productions, the Board appreciates this suggestion and will give it consideration as a potential part of a future rulemaking. However, the Board believes that such a change should only occur as part of a separate stakeholder meeting and rulemaking package so that the suggestion may be appropriately discussed and vetted with the stakeholder community. The Board declines to modify the proposal further in response to this comment.

Comment #7: Mr. Bland commented that it would be good to have an explicit statement as to what discovery consists of in Cal/OSHA cases.

Response: The Board believes that such a statement already exists within section 372.8, which lists the exclusive discovery provisions in Board proceedings. The Board does not see the necessity

for any further changes to this rulemaking package. Therefore, the Board declines to modify the proposal further in response to this comment.

Comment #8: With regard to the changes to section 372.2 governing the issuance of subpoenas, Mr. Bland comments that the incorporation by reference of provisions of the California Code of Civil Procedure can be confusing.

Response: The changes proposed to section 372.2 will predominantly affect attorneys, rather than self-represented employers or lay persons. They will allow attorneys licensed by the California State Bar, and acting in a representative capacity, to issue subpoenas. Rule 372.2 incorporates by reference, and requires compliance with, certain provisions of the California Code of Civil Procedure governing issuance of the subpoenas. The Board believes that such licensed attorneys will be able to sufficiently understand and navigate the requirements of the regulation, including requirements incorporated by reference. Therefore, the Board declines to modify the proposal further in response to this comment.

Comment #9: Mr. Bland commented that perhaps the changes regarding docketing and perfecting an appeal could be simplified by putting them in more straight forward language in the regulation, or by providing assistance through the “question and answer” method on the Board’s website.

Response: The Board believes that the regulation is sufficiently clear. However, as discussed above in response to Mr. Bland’s comments #’s 1 and 2, the Board has added some language to the regulation to offer greater clarity. The Board will also update the explanatory information it offers to employers via its website in plain terms to reflect the changes made to these regulations. The Board declines to modify the proposal further in response to this comment.

The Board thanks Mr. Bland of Ogletree Deakins, and Western Steel Council, the California Framing Contractors Association, and the Residential Contractors Association for participating in the rulemaking process and for commenting on the regulatory package.

Ms. Jora Trang, Worksafe

Comment #1: Ms. Trang expressed concern that the changes to section 359.1 that distinguish between docketing and perfecting an appeal may cause confusion for unions, unorganized workers, or affected employees. She expressed concern that they will be confused as to when a case will be docketed or confused as to the timeline. Ms. Trang expressed concern that they may not know when to file a motion for party status.

Response: As discussed in the response to Comment #1 to the letter from Ms. Jora Trang, Worksafe, dated August 21, 2019, section 356 requires an employer to give notice to its employees of an appeal by posting the docketed appeal. Under the proposed rule change to section 359.1, an employer’s appeal may be docketed before it is deemed perfected once certain prescribed information is provided. In practice, this will mean that the notice of docketing, and the requirement for employer to post the notice, will now occur at earlier stage. This will effectively mean that employees and other affected individuals or organizations will actually receive more notice of an employer’s intended appeal, rather than less notice. They will learn of the docketed

appeal before it is even perfected, allowing them more time to become apprised of Board processes and preserve their rights. The Board declines to modify the proposal further in response to this comment.

However, the Board does plan to hold a stakeholder meeting to address some possible changes to the Board's regulations governing employee and third party notice and participation in the near future, with the goal of ensuring greater transparency and opportunity for employee and potential third party participation.

Comment #2: Ms. Trang requested to know, with regard to the proposed rule change to section 372.2 allowing licensed attorneys to issue subpoenas, whether an affected employee, worker, or union that does not have an attorney can still ask the Board for a subpoena.

Response: The proposed rule change will not prevent a party or entity without an attorney from requesting that the Board issue a subpoena and/or subpoena duces tecum. The Board declines to modify the proposal further in response to this comment.

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

Mitch Steiger, California Labor Federation, AFL-CIO

Comment #1: Mr. Steiger echoed the comments of Ms. Trang and urged those involved in the rulemaking to make sure that workers' rights are protected and in no way limited or inhibited.

Response: Please see the response to the Oral Comment #1 by Ms. Trang of Worksafe. The Board declines to modify the proposal further in response to this comment.

Comment #2: Mr. Steiger also noted that he shared the employer community's concerns with unnecessary delays in the appeal process and noted that efforts to speed the process would likely benefit all parties.

Response: The Board has made some additional changes that will help address this concern and expedite the process. Please see the Board's response to Comments #1 and #5 of the letter of Jorge Otano, Deputy City Attorney, City of Los Angeles.

The Board thanks Mr. Steiger and the California Labor Federation, AFL-CIO for participating in the rulemaking process and for commenting on the regulatory package.

Katherine Wolfe, Attorney

Comment #1: Ms. Wolfe commented that she likes the idea of keeping the requirement that the Division automatically provide the documents and evidence related to an employer's appeal, noting that in criminal cases there is an automatic right to discovery.

Response: The Board continues to believe repeal of this rule is appropriate due to deficiencies with the rule as it is written. Please additionally see the Board’s response to Comments #6, 7, and 8 of the letter of Jorge Otano, Deputy City Attorney, City of Los Angeles. The Board declines to modify the proposal further in response to this comment.

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

Mr. Jorge M. Otano, Deputy City Attorney, City of Los Angeles

Note: Many of Mr. Otano’s oral comments were similar or substantially overlapped those presented in writing in his letter dated August 19, 2019, discussed above. Therefore, the Board also refers to its responses to the comments in that letter.

Comment #1: With regard to the repeal of section 372.9, Mr. Otano expressed that he is concerned that there is no production of evidence prior to a party having to make the decision to go forward to a hearing. He is also concerned regarding the copying costs on employers.

Response: Please see the Board’s response to Comments #’s 7, 8, and 11 of the letter of Jorge Otano, Deputy City Attorney, City of Los Angeles. The Board declines to modify the proposal further in response to this comment.

Comment #2: Mr. Otano also argues against the repeal of section 372.9 noting that, as a former prosecutor, he has never been able to prosecute a case without informing the person accused of all facts and evidence in his possession. Mr. Otano sees no reason why the Division should not be required to do the same as a matter of fairness.

Response: Please see the Board’s response to Comments #6, 7, and 8 of the letter of Jorge Otano, Deputy City Attorney, City of Los Angeles. The Board declines to modify the proposal further in response to this comment.

Comment #3: Mr. Otano notes that one of the stated purposes of the repeal of section 372.9 is to save money and time; however, he notes that the Division has not complied with its duties under this section in any of the cases he has handled.

Response: Please see the Board’s response to Comment #6 of the letter of Jorge Otano, Deputy City Attorney, City of Los Angeles. The Board declines to modify the proposal further in response to this comment.

Comment #4: Rather than repeal section 372.9, Mr. Otano would advocate for a modification of the rule. Mr. Otano also suggests, as a potential alternative mechanism, is that if an employer writes a letter to the Division the discovery should be provided free of charge.

Response: Please see the Board’s response to Comments #’s 11 and 13 of the letter of Jorge Otano, Deputy City Attorney, City of Los Angeles. The Board declines to modify the proposal further in response to this comment.

Comment #5: Mr. Otano notes that exchange of documents and evidence helps resolve cases either in an informal conference, a mediation, or some other form of dispute resolution, as it gives the employer all necessary information to make an informed decision.

Response: Please see the Board’s response to Comment #7 of the letter of Jorge Otano, Deputy City Attorney, City of Los Angeles. The Board declines to modify the proposal further in response to this comment.

Comment #6: Mr. Otano commented that the restriction on when discovery commences, found in section 359.1, subsection (h), may be problematic, as the Division often sends requests for information at the pre-citation stage.

Response: Please see the Board’s response to Comment #5 of the letter of Jorge Otano, Deputy City Attorney, City of Los Angeles. The Board declines to modify the proposal further in response to this comment.

Comment #7: Mr. Otano believes that it is an issue of fairness and due process to have the prosecuting attorney provide the alleged violator with all the information necessary to make an informed decision on whether to pay the fine.

Response: Please see the Board’s response to Comments # 6, 7, 8 and 11 of the letter of Jorge Otano, Deputy City Attorney, City of Los Angeles. The Board declines to modify the proposal further in response to this comment.

The Board thanks Mr. Otano and the City of Los Angeles for participating in the rulemaking process and for commenting on the regulatory package.

SUMMARY AND RESPONSE TO WRITTEN AND ORAL COMMENTS
RESULTING FROM THE 15-DAY NOTICE OF PROPOSED MODIFICATION
(October 28, 2019 to November 12, 2019)

The modified text was made available to the public from October 28, 2019 to November 12, 2019 for comment. The Board did not receive any comments on the modified text during that time.

ADDITIONAL DOCUMENTS RELIED UPON

None.

ADDITIONAL DOCUMENTS INCORPORATED BY REFERENCE

None.

DETERMINATION OF MANDATE

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

ALTERNATIVES THAT WOULD LESSEN ADVERSE ECONOMIC IMPACT ON SMALL BUSINESS

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

ALTERNATIVES DETERMINATION

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