

DEPARTMENT OF INDUSTRIAL RELATIONS
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

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FINAL STATEMENT OF REASONS

CALIFORNIA CODE OF REGULATIONS
TITLE 8: Chapter 3.3, Articles 1, 3 and 4
Sections 350.1, 371, 371.1, 373, 374.2 and 376

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

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

The modifications to the information contained in the Initial Statement of Reasons are limited to the following substantive, sufficiently related modifications that are the result of public comment and Board evaluation.

Section 373:

After further evaluation of the administrative needs of the Board in enacting the proposed changes to the expedited proceedings for matters where the hazard cited remains unabated, the Board voted to remove this proposed change from the package of proposed changes. The proposed changes did not impact any other sections proposed for change in this Notice. Withdrawing the proposed changes thus does not affect the remaining approved changes.

Section 376(c):

In response to comments received from the public during the comment period, the Board opted to remove the portion of the proposed change that allowed the Board to schedule an administrative hearing regarding the same facts as arise in a criminal charge at the request of the Employer. The Board also revised the rule to require further continuance of a hearing on notice by a prosecuting authority to allow for full criminal prosecution to precede the administrative proceeding. The new rule removes the Board's discretion in continuing a hearing in a matter under review by the Bureau of Investigations, and wherein criminal charges have been filed, but only requires the delay upon receipt of such notice. The completion of a criminal prosecution is defined. This clarifies the duration of the mandatory continuance.

Summary and Response to Oral and Written Comments

Section 350.1:

There were no comments from the public regarding this change.

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Section 371:

There were no comments from the public regarding this change.

Section 371.1:

The Board received public comment on this change.

Ms. Corey Friedman, appearing on behalf of Worksafe, commented that without a firm due date for rulings on continuances, parties may have to assemble witnesses on the day of the hearing only to learn that a continuance was granted, and she suggested the proposal should require motions for continuances be granted or denied by the Board 24 hours before the scheduled hearing.

RESPONSE: The Board thanks Ms. Friedman for her comments. The Board declines to make the further suggested changes, because doing so would limit the Board's flexibility to grant continuances filed late, or even at the hearing, when the situation merits a continuance. The proposed benefit of 24 hour notice is outweighed by the need for the Board to retain control over its hearings to meet the circumstances of each case.

Ms. Marty Fisher, representing California Chamber of Commerce, commented orally and in writing on this change. Ms. Fischer supports changes to the continuance rule. She hopes the changes result in grants of continuances for good cause. Commenters Kevin Bland, attorney, and Steve Johnson of Associated Roofing Contractors Bay Area Counties, agree with the oral comment of Ms. Fisher. Joining in Ms. Fisher's written comment are Associated General Contractors of California, Associated Roofing Contractors of the Bay Area Counties, Inc., California Professional Association of Specialty Contractors, California construction and Industrial Materials Association, California Framing Contractors Association, Residential Contractor's Association, and Walter & Prince, LLP.

RESPONSE: The Board thanks Ms. Fischer, Mr. Bland and Mr. Johnson for their oral comments. The Board thanks the various associations and entities who joined in these comments.

Section 373(b):

The Board withdrew this proposed addition to the regulations in its entirety by unanimous vote on October 19, 2011.

Section 374.2:

No comments were received on this section.

Section 376(c):

The Board received comments on this section. The Board thanks those who commented, and appreciates the public participation in these changes. The comments are set forth separately for

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each commenter.

Ms. Fran Shreiberg, attorney, representing herself. Her written and oral comments are summarized as follows:

The proposed change allows the administrative case to go forward, even if the Division objects, when an employer requests it. This would allow the employer to call witnesses who might appear in the criminal case but whom the employer would not have a chance to depose prior to the criminal case. Additionally, the regulation does not require the Appeals Board to delay the proceeding, and the regulation should require delay until the completion of a criminal prosecution. Furthermore, no additional time is required to account for prosecution time after a “review” period, which term is unclear. Last, a prosecuting authority should be allowed to request a continuance, not just a party to an appeal.

Corey N. Friedman, of Worksafe Inc., Jeremy Smith, Deputy Legislative Director, State Building & Construction Trades Council of California, and Anne Kattan, Director, Pesticide and Work Safety Project, California Rural Legal Assistance Foundation, join in these comments from Ms. Schreiberg.

Jim Provenza, Los Angeles District Attorney’s Association, commented as follows:

Having an administrative and criminal proceeding at same time is always a problem. 376(c) should be changed so that it is not subject to written request, but contains an absolute right to delay the administrative proceeding until the criminal matter is concluded.

Amy Martin, Chief Counsel of the Division of Occupational Safety and Health, agrees with oral and written comments, proposed changes in written comments by Fran Shreiberg and the oral comments of Jim Provenza regarding changes to 376(c).

Corey Friedman also agreed with the comments of Jim Provenza.

EXTENDED WRITTEN COMMENT PERIOD

During the public hearing, Fran Schreiberg asked for a two week extension to receive comment from Attorney General Kamala Harris, which was granted.

Within this comment period, one written additional comment was received from John M. Fentis, a retired prosecutor. To summarize, Mr. Fentis stated the proposed changes did not do enough to remedy the procedural problems created by the original rule. The proposed change did not give prosecutors the requisite amount of control over the proceeding, which he believed was absolute authority over both proceedings. He articulated dissatisfaction with either the employer or the Division of Occupational Safety and Health having any control over the proceeding at the Appeals Board. He stated that the proposed changes continued to provide an employer with “free discovery” of the evidence against it by having the administrative hearing precede the

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criminal proceeding.

RESPONSE: The Board thanks Mr. Fentis for his comments. The Board disagrees that the proposed rule prohibits any district attorney or prosecuting authority from completing a criminal prosecution. The proposed rule does not require the Appeals Board to set an administrative proceeding when a criminal matter is being considered by the Bureau of Investigations or a prosecuting authority. The proposed rule does not give the administrative proceeding precedence over the criminal matter. The proposed rule leaves the setting of hearings to the discretion of the Appeals Board. The proposed rule does not contain a requirement that a prosecutor notify the appeals board of any pending prosecution, and so the Appeals Board must consider each request to set a hearing or to continue the hearing on a case by case basis.

SUMMARY RESPONSE: The Appeals Board thanks all of those who commented for their thoughtful input.

The Appeals Board, in response, proposed further changes to the proposed changes, and noticed an additional 15-day comment period. The Board agrees that the criminal prosecution should be completed before the administrative proceeding commences. The Board is unable to abdicate its authority over the administrative proceeding as suggested by Mr. Fentis, and believes a mandatory continuance on proper notice of a prosecuting authority or the Bureau of Investigations ensures criminal prosecution precedes the administrative proceeding without impairing the Appeals Board's ability to resolve appeals.

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

Information contained in the Initial Statement of Reasons regarding proposed changes to section 376(c) is modified. Regarding the procedures for continuing the hearing of a case that is also under investigation by the Bureau of Investigations or a prosecuting authority, additional proposed changes were proposed. Specifically, administrative proceedings shall be delayed until the completion of the criminal prosecution upon notice by the Bureau of Investigations or a prosecuting authority that charges have been filed. The Board no longer allows an employer to request that an administrative hearing be set prior to the completion of any criminal investigation or prosecution. For cases wherein the Board receives notice of review by the Bureau of Investigations, the Board shall delay the administrative hearing until review is complete. So, while the delays are now required rather than discretionary, they will not occur until notices are received by the Board that review or prosecution is occurring.

Comments received during 15-day comment period regarding additional proposed changes to section 373(c):

Fran Schreiber commented that she agreed with the further proposed changes.

RESPONSE: The Board thanks Ms. Shreiber for her participation.

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