

## **SUPPLEMENTAL STATEMENT OF REASONS**

### OSHAB OASIS System Rules of Practice and Procedure SAR 5108

#### **PURPOSE STATEMENT:**

Section 355.5: To define the form and size requirements for documents filed by parties with the Board electronically or by paper. Pursuant to subsection (a), the Board sets rules for all documents submitted, either electronically or in paper form, that will ensure that the documents will be readable, clear, and scannable into the Board's computer system. The requirements in section 355.5, subsection (b) set forth the rules for electronic documents filed by parties. The requirements in subsection (b) will limit the amount of embedded or other malicious data and viruses that may be uploaded into the Board's electronic system, and ensure the integrity of the Board's electronic system. Subsection (d) and (g) provide an exception for oversized documents, photographs, and other evidence and submissions, which may not necessarily be capable of meeting the conventions set forth in subsections (a) and (b), but will still be accepted by the Board.

Section 355.6: This section has been DELETED from the rulemaking package.

Section 371: Change to ensure cross-references to other regulations, are correct. Here, the references to Sections 355(d) and 355(f), are amended to reference section 355.3.

Section 371.1: References to Sections 355(d) and 355(f), are amended to reference Section 355.3. The language "directed to" is amended to read as "filed with" for a non-substantive changes, as is the addition of the clause "as required in Section 355.4."

Section 371.2: Change to conform to an internal regulation cross-reference. The reference to Section 355 is proposed to be changed to reference Sections 355.3 and 355.4. Revisions made to capitalization for internal consistency.

Section 372.6: In subsection (a), addition of the terms "intervenor, or obligor" are added to reflect all potential parties to a Board action. In subsection (c), add the term "subsection" for consistency in language. Add language to clarify the timelines for filing an answer to a motion to compel, to ensure hearings move forward in a timely manner. Add language clarifying an existing practice, allowing the ALJ to hold a conference that may be telephonic with the parties regarding the motion to compel.

Section 376: Changes to this section withdrawn from Board's rulemaking package.

Section 376.1: Changes to conform to internal regulation reference number changes. The references to Sections 355(c) and 355(e) changed to Sections 355.3 and 355.4.

Section 378: Change to conform to an internal regulation reference number change. The references to Sections 355(c) and 355(e) are no longer valid; the references are updated to Sections 355.4 and 355.3. Addition of term “intervenors and obligors” in subsection (d) to reflect all parties who may appear before the Board in an appeal.

Section 380: To specify the practices related to brief filing in use at the Board. To specify the standard procedures utilized in Board practices, including the simultaneous filing of briefs and 15 page limits on briefs, unless otherwise ordered by the ALJ, in subsections (a) and (b). Provide parties with information on what information should be contained in a brief, so that parties submit relevant and useful briefs, in subsection (c). Provide the authority for an ALJ to order pre-hearing briefs, in subsection (d). References to Sections 355(c) and 355(e) are changed to reflect new section numbering, now Section 355.3.

Section 392: Change to conform to an internal regulation reference number change. The reference to Sections 355(c) and 355(e) changed to cross-reference Sections 355.3 and 355.4.

Section 392.4: Change to conform to an internal regulation reference number change. The references to Section 355(c) changed to 355.2.

**NECESSITY:**

Section 346.1: Subsection (a) provides the foundation for the Board’s new electronic case management and document management system, OASIS. The subsection notifies the public that pursuant to the Board’s regulatory scheme, scanned documents must have the same force and effect as an original document, once scanned into the OASIS system, in order for the electronic system to function as a replacement to the Board’s current paper filing system. In creating this rule, the Board has both looked to other procedural rules of other administrative adjudicatory agencies with online filing and case management capabilities, including the Workers’ Compensation Appeals Board, and has determined the capabilities of the system that it will be implementing in the future. Subsection (b) is necessary as in the Board’s day to day functioning, small changes will occur between original documents and scanned documents—such as, bar codes or other identifiers may be added to original documents before scanning, or the scanning process may shrink documents slightly or otherwise create minute variations in ink tone. These variations will not preclude documents from being considered identical copies of an original document. Subsection (c) is required to prevent unnecessary and time-consuming disputes regarding the validity of documents that are electronically scanned, by creating a stated procedure for a party to contest the validity of a document that has properly been entered into the system. Subsection (d) is required to account for the marking of documents that may occur during the course of a hearing, and allows the ALJ to enter both the marked and an unmarked copy of a document into the record, so as to ensure the clarity of the record, and eliminate disputes as to what constitutes the official exhibit. Subsection (e) takes into account that

documents in the hearing dispute process must often be authenticated as a true and correct document, and that the Board's rules related to scanning and entering documents into the OASIS system do not override the usual adjudicatory process for authenticating a document as evidence.

Section 346.2: The Board is responsible for taking evidence and maintaining the record in the appeals of citations issued by the Division of Occupational Safety and Health. Pursuant to its responsibility to maintain the official hearing record, the Board must maintain its official documents, and the Board will do so in an electronic manner with the OASIS system, necessitating subsection (a). Because not all documents and evidence will be capable of scanning, subsection (a)(1) creates an exception for storage of non-scannable documents. The Board has included a 6 month retention policy for original documents after scanning, in order to ensure that a safeguard is in place should an error in scanning be made. The Board's limited paper storage capabilities limit the amount of paper storage available, making a 6 month rule as found in subsection (b) reasonable. Because the Board's document retention policy requires that all Decisions of the Board be retained for 3 years, which the Board interprets to include all evidence and documents related to a Decision, the regulation at subsection (c) includes a 3 year retention period for electronic files. The rule clarifies that all documents filed in electronic form have the same force and effect as a paper filed document, and allows the Board to also produce documents, such as its Decisions, Decisions After Reconsideration, Orders, and other Board-produced documents, in electronic format, with the same legal effect, pursuant to subsections (d) and (e).

Section 350.4: To authorize the issuance of Orders that become effective at a time stated as long as no objection to the order which demonstrates good cause is filed within a stated period of time. Without self-executing orders, the ALJ must issue a notice of intent, track the time for a party to show good cause, and then render an Order after good cause is given or not shown. Even if there is no good cause the judge must render an order to dismiss the case. This section reduces the number of documents staff must issue, and the time it takes to track timeframes, because this Order executes and becomes effective upon the date stated in the order when there is a timely showing of good cause. With self-executing orders, the order becomes the final order, unless there is a showing of good cause for the judge to rule otherwise. Self-executing orders are consistent with concepts of due process because the Order does not go into effect until the time to object and show good cause expires giving the effected person notice of the order and an opportunity to be heard. The rule is modeled after a similar rule at the Workers' Compensation Appeals Board, California Code of Regulations, title 8, section 10349 which states, "An order with a clause rendering the order null and void if an objection showing good cause is filed within ten (10) days shall be deemed equivalent to a ten (10) day notice of intention." and is This section is necessary to eliminate redundant procedural steps and delay in processing orders for the parties.

Section 352: Clarifies the rules regarding an “ex parte communication”. In subsection (c) the rule defines the actions an ALJ and the Appeals Board must take, should an ex parte communication be received. The change is necessary so that Board ALJs, or Board Members and parties do not unwittingly make ex parte communications, by describing what communications between the Board Members/ALJs and parties, intervenors, obligors and/or representatives are appropriate in subsection (b). All other communications, except for those in subsection (d), may appropriately be considered ex parte if they are “regarding a proceeding” under subsection (a), giving the Board Members, ALJs, and parties to a proceeding a clear guideline for appropriate communications. The rule further defines in subsection (c) the steps that are to be taken if an ex parte communication is made, so as to inform those making such communications that the ALJ or Board is required to rectify the communication through an appropriate action as defined in the rule. The section is necessary to eliminate disparate treatment of ex parte communications by different hearing officers / ALJs or the Board, and to put all parties on notice of how ex parte communications will be handled, should one occur. The rule also clarifies in subsection (d) that simple communications regarding procedures, status of a proceeding, or scheduling does not constitute an ex parte communication.

Section 355.1: The rule is necessary to ensure that all parties, intervenors and obligors to a Board appeal can be timely reached by the Board. The rule requires under subsection (a) that each party provide their name, address, and email address (if any) to the Board, as well as one preferred method of service that they would like from the Board (i.e., mail or email), so that the Board can reach the party quickly and accurately. Subsection (b) requires the party to promptly notify the Board of any changes to any of this information, at the most 30 days after a change is known to a party, so that the Board can update its records and ensure that the party receive any important documents related to hearing dates and other pertinent information related to their case. They must also serve the information on the other parties to the case, so that discovery and other communications between the parties can continue efficiently. Subsection (c) provides for the option of dismissal of an appeal should a party fail to notify the Board of changes in address and the Board is unable to communicate with the party. This rule provides the Board with a necessary tool to ensure that parties provide updated information, and allows the Board to dismiss those cases that cannot effectively go forward because a party can no longer be reached because there is no longer accurate contact information.

Section 355.2: Explains the methods of service a party may elect from the Board (mail or email, but not both) and as part of the move to a modernized, optional electronic system, includes a new email service option from the Board to the parties. All parties must have one service method on file in order for the Board to be able to properly reach the party in an efficient and timely manner. The rule is necessary to ensure the parties are aware of and may utilize the new electronic service option available with the Board’s electronic case management system. Pursuant to subsection (b), when parties meet before an ALJ in person, they may exchange

documents by hand, saving time and expense. While parties may be represented by a third party, such as an attorney or other representative, pursuant to subsection (c), in order to ensure that the employer does not miss key deadlines when a representative relationship is terminated or changed, the employer and the representative both shall be served by the Board. When the Board serves the parties, proof of service is made via one of the four methods listed under subsection (e), defined to ensure that parties are notified of the Board's designated service methods and will accept service from the Board. Should service fail, the Board will attempt to re-serve the party by an alternate method, if the Board has an alternate address, pursuant to subsection (f). This rule is necessary to ensure that parties are given notice of the Board's efforts to ensure that parties will receive service, and the necessity of providing full and complete contact information so that the Board may complete service even if one means of service fails. Subsection (g) notifies the parties that it is their responsibility, rather than the Board's, to ensure that their email address is in good working order, and that the Board will assume that any email address provided for service is functional until a party notifies the Board otherwise. This rule is necessary to ensure that parties do not attempt to use failure to receive email from the Board as a good cause excuse for failure to appear, respond to a Board order or other communication, and the like. It puts the onus on the party electing email as a method of service to ensure they have a working email box, and to promptly notify the Board should they have an issue with their email service.

Section 355.3: Explains the methods by which parties may serve other parties. This rule is necessary to ensure parties are able to timely file appeals and serve other documents on the parties in a Board action. Section 355.3, subsection (a) is required to ensure that parties are aware of the methods of service the Board has designated is appropriate for service between parties. The service methods, including personal delivery, mail, overnight mail, or a commercial delivery service, are largely identical to the Board's current section 355. The Board has removed facsimile copies as a service provision, as facsimiles are becoming less prevalent in the workplace. Rather, the Board has added a provision allowing the parties to stipulate to email service amongst themselves as an alternative means of service, in order to allow electronic service between parties, but not mandate such a practice. The Board's subsections (c) and (d) service rules, as currently in effect, are largely similar to the California Code of Civil Procedure, sections 1010-1020, including rule in subsection (d) which finds service to be complete when mailing occurs. The Board also includes provisions for re-service, should a party be notified that service fail, under subsection (f). This rule is necessary to ensure that reasonable attempts are made to complete service on all parties, but ensures that a party need not go to unreasonable lengths to attempt re-service. For instance, if a party does not receive notice that service fails, it need not make a re-service attempt. Under the terms of subsection (g), the parties may stipulate to service by electronic methods. The rule is necessary to allow parties to come to agreement to exchange documents and things between themselves in a way that is convenient for the parties. This may be by email or some other electronic method. The subsection also establishes that parties who stipulate to email service must still comply with subsections (d) and (f).

Section 355.4: This rule is necessary to ensure efficiency in Board proceedings, and to ensure all parties receive timely communications from the Board. To assure paper and electronic filing are equivalent and for electronic filing to assure integrity of contents of the Board's electronic file documents. As in section 355.3, the section largely maintains the document service rules found in the current section 355, while removing references to facsimile service, and adding electronic service and filing as a new option under the Board's OASIS computer system in subsections (a), (d), (e), (f), and (g). The rejection of non-conforming electronic filings as defined in subsection (h) is required to ensure the accuracy of the electronic file the Board is responsible for maintaining through the appeal process. The section is necessary for the Board to be able to reject and return to sender those documents that do not meet its filing requirements, so that it is not responsible for maintaining and storing non-conforming documents.

Section 355.5: This section explains the requirements for documents filed by parties with the Board both electronically and in traditional paper fashion. The Board explored regulations at other agencies which use electronic case management systems, such as the Workers Compensation Appeals Board, as well as the various options for scanning technologies, to determine the best practices that would be encapsulated in this regulation. The regulation explains the requirements for documents filed by parties with the Board in paper format or electronically, in subsection (a), as well as subsections (d) through (g). Regarding section 355.5 subsection (b), it is necessary to ensure that documents submitted electronically are properly entered into the Board's electronic case management system. The Board must ensure that these documents do not contain viruses, malware, or embedded data that may compromise the Board's OASIS system, thereby creating technical issues that may impede the functions of the Board. These subsections are necessary to ensure that documents submitted both paper can be received into the Board's electronic case management system by scanning performed by Board staff, after receipt of the paper document through the mail, by hand delivery, or other acceptable method of paper service.

Section 356.2: A non-substantive change updating a reference in subsection (c) from "Section 361(e)" to the correct Section 361.1, subsection (d) is made.

Section 359: Under Labor Code 6601 and 6601.5, a party may initiate an appeal simply by showing an "intent" to file an appeal—it does not need to actually complete the appeal, but needs only inform the Board that it has an interest in appealing a citation in order to meet the statutory deadline for filing. The Board clarifies its current rule which recognizes that an appellant has met the 15 day statutory deadline for demonstrating intent to file an appeal in subsections (a), (b), (c), (d), (e), and (f). The subsections do not change the Board's current regulation in practice, but clarify the language to ensure that parties are aware that intent may be demonstrated in one of four ways: via phone, writing (which may use an optional form provided by the Board), in person, or via the OASIS internet system. The new section 359 clarifies the current section 359 by breaking it into its smaller components. Because parties often attempt to inform the Division

of Occupational Safety and Health of their intent to file an appeal, subsection (c) makes clear that this does not constitute “intent to file an appeal”. The rule in subsection (g) also sets forth the Board’s good cause for late appeal standard. Where the Division and employer have reached settlement of a citation, and the employer can show that the settlement was actively pursued by the parties during the 3 months after issuance of the citations, the Board may find good cause for late appeal. The regulation is necessary to allow the Board to have a uniform good cause standard for all such late settlement cases, and to allow the granting of good cause in the cases that meet the criteria listed in subsection (g), so that the parties’ settlement may be executed. Subsection (i) provides all parties with notification that subsection (g) should not be seen as a reason for not filing a timely appeal. Should settlement negotiations break down, or not wind up within the timeframes stated in subsection (g), parties will not have good cause for late appeal and appeal rights will not be preserved. Subsection (j) clarifies that the Board may find good cause for late appeal on abatement issues where a proof of abatement has been timely submitted to the Division as required, but that proof of abatement is not accepted, or the Division fails to modify a penalty despite receiving notification of adequate abatement. This regulation is necessary to ensure that a party who has attempted to comply with the Division’s abatement procedures may contest an issue related to abatement where there is a dispute between the Division and employer regarding that abatement or the penalty associated, in order to ensure the employer has a procedure for being heard once it has notice that there is a dispute on this issue.

Section 359.1: This section establishes the procedures that an appellant must engage in to perfect an appeal that has been initiated. While an appeal may be initiated pursuant to the procedures described in section 359, in order to meet the statutory deadline of 15 days for showing intent to file an appeal, the Board has historically used its authority under Labor Code sections 6603 and 148.7 to create rules of procedure describing with particularity how a party may perfect that appeal that has been initiated. The Board under subsection (b) now proposes to amend the regulation to allow a party to perfect an appeal by submitting the required information by the OASIS electronic system, as well as by the current approved methods, which are mail and hand delivery. The information required remains the same as in the current regulation, but is more clearly stated in subsection (b). Because the Board is moving from a paper filing system to a computerized case management system, it foresees that timelines to perfect the appeal under the computerized system will be more accurately, and more rigidly, enforced. To ensure that parties have necessary time to submit the information required to perfect an appeal, the Board proposes extending the timeline for perfecting an appeal from 10 to 20 days. This extension of time will ensure that parties are able to submit all necessary documents within the deadline, preserving their due process rights to be heard on the merits of the appeal, rather than facing dismissal for failure to submit documents timely. Subsection (c) makes clear that the Board will continue to produce and distribute an optional paper form for parties to utilize, should they wish to perfect their appeal in writing and would prefer an established form to aid in submitting the required information. New subsection (d) is a rewording of the current subsection (d), and informs the

appellant that once the necessary information is received, either online or by paper, the appeal will be docketed. Finally, subsection (e) is necessary to inform the parties that it is the responsibility of the Board, rather than the appellant, to serve the complete appeal package on the parties once the employer has perfected the appeal, and to inform the parties what the docket number assigned to the appeal is.

Section 361.3: Section (a) defines the issues on appeal as those arising out of the facts and allegations set forth in the Division's action and the grounds set forth in the appeal. The employer is asked to list the affirmative defenses it is raising. Necessary to ensure all parties are aware of the issues being litigated, thereby creating a more efficient appeal process. The regulation lists the affirmative defenses that are recognized by the Board, in subsection (6)(A)(i) through (iv), and allows an appellant to list any new or alternative defenses it may believe should be considered by the Board in (v). A party may, but is not required to, provide a statement setting forth facts that would establish the affirmative defense, pursuant to (a)(6)(B). This regulation is necessary to assist litigants in understanding their burden of proof in establishing an affirmative defense, as well as in informing the ALJ and the Division as to the issues that will be relevant at prehearing conference and at hearings, so that the parties may make optimal use of their time and focus on the appropriate issues. The remainder of the regulation is largely unchanged, with the exception of subsection (c), which informs the parties that amendments to the citation and appeal may be made according to the Board's regulation section 371.2; this subsection puts the parties on notice of their time frames for amending their defenses, and how such amendments can appropriately be made. A party who may be under a time deadline to file their appeal may need this information in order to go back and amend their appeal at a later time.

Section 364.2: Allows for the disposal of an appeal by the Board via Settlement Order bearing signature of the Division and employer or obligor, at any time after the Board obtains jurisdiction of the Appeal. Allows 30 days for filing of Petition for Reconsideration by affected employees based on certain defined grounds, pursuant to subsection (b)(7). Creates greater efficiency in Board proceedings, by eliminating unnecessary steps in procedure that currently require time and paperwork processing by Board staff and ALJs. This is necessary to allow employers to withdraw their appeals with minimal delays and procedural burdens, and for increased Board efficiency.

Section 372.6: This rule specifies the procedures for compelling discovery in Board proceedings. Simplifies and removes unnecessary and unclear language from the regulation. In subsection (a), the Board adds language clarifying that the regulation also applies to intervenors and obligors, who may be parties to a Board appeal. The Board has withdrawn changes proposed to subsection (b).

Section 376: The Board has WITHDRAWN the changes to section 376 from this rulemaking action.

Section 376.4: Documents may be released to a party by stipulation or order of the ALJ for safekeeping during the pendency of the appeal and decision process if they are too big or otherwise inappropriate to be scanned, demonstrative evidence, or other evidence, until a final determination is reached. The rule is necessary to ensure that exhibits are held for safe-keeping through the pendency of all appeals, and that the exhibits are available should a higher court wish to access said exhibits at a later time. Once all appeals have been exhausted, the Board will release the party from its responsibility for keeping the exhibit, and the party is no longer responsible for it, pursuant to subsection (d). Allows photographs to be substituted in the record for evidence that cannot be scanned, at the agreement of the parties, pursuant to subsection (c), so that parties need not be responsible for holding an actual oversized exhibit throughout all stages of litigation. The rule is necessary to ensure efficient maintenance of evidence in Board proceedings as the Board has limited space and resources for storage of large evidence, and appeals through all levels of litigation, including the writ stage in superior court and appellate court, may take many years. The rule ensures that exhibits are not lost during the pendency of these appeals.

Section 376.7: Adds the option that either a hearing recording or court reporter transcript may be used at Board hearings as the official record, pursuant to subsections (a)(1) or (2). Pursuant to subsection (b), where agreed to, a court reporter will be paid for by the parties at their own expense. The necessity of the regulation is that in its current form, only the Board's audio hearing recording may be recognized as the official recording. Allowing the parties and the ALJ to adopt a court reporter's transcript as the recording is necessary for increased efficiency in Board proceedings as these proceedings have become longer and more complex over time. Subsection (c) allows the parties to agree to have the Board's recording of a hearing transcribed by a court reporter, again, as in subsection (b), at the expense of the parties rather than the Board, and with a copy of the transcription provided to the Board, so that the ALJ may use the same transcript that the parties are using in rendering his or her decision.

Section: 376.8: Identifies the process through which the Board or ALJ marks evidence in the record, and certifies that the evidence is recorded. The regulation is necessary to ensure that all documents are marked and received into evidence in a consistent manner, so that scanning technicians who are tasked with entering paper evidentiary documents into the OASIS system can properly scan and sort those exhibits into the respective locations in the OASIS file, pursuant to subsection (b). By ensuring that documents are marked in a consistent manner pursuant to subsections (a)(1) through (7), it is less likely that there will be confusion or lost documents in the future. Subsection (b) further eliminates the risk of lost or misplaced documents by requiring the scanning of evidence within two working days. This provides a reasonable time for scanning, but does not allow scanning of evidence to be set aside, leaving the potential for evidence to become misplaced, lost, or confused. Subsection (c) ensures the integrity of the entire record, by asking the ALJ to create a thorough list of all evidence entered, all witnesses, and to certify that

the proceedings were either electronically recorded or recorded by a certified court reporter. This is necessary to ensure that the Board has, at a time close to the proceeding, a list of all pertinent documents and things, that have been verified by a responsible party, that may be referred to should any questions arise concerning the contents of the record.

Section 383: The rule is necessary so that the rules reflect current practice and to provide parties, and ALJs, clear guidance on the dismissal procedures for failure to appear and the steps for appealing such a dismissal. Current Board processes include the issuance of an Order to Show Cause why an appeal should not be dismissed for failure to attend a telephonic prehearing conference, and a small but consistent number of cases are dismissed using this discretionary process of a judge. The proposed regulation describes the process an ALJ engages in before dismissing an appeal for failure to appear, including the steps a party may take if it wishes to appeal that dismissal (subsection b), and also extends the dismissal procedure to non-appearance at prehearing and settlement conferences. The regulation in subsection (c) describes what constitutes good cause for failure to appear. This definition ensures that parties will provide the appropriate information in the request for reinstatement. By including dismissal as a potential consequence for failing to attend a telephonic prehearing conference, the rule better informs the regulated community of existing specific Board processes. The regulation also describes appropriate service and includes electronic service procedures so that the parties and Board may more efficiently communicate where electronic service has been selected by a party, under subsection (e).

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

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