

# OSHA PROPOSED REGULATIONS FOR 2015

Draft: 374 Prehearing Conference for March 5, 2015

## 374 Prehearing Conference

~~(a) At any time before a hearing, upon motion of a party or upon its own motion, the Appeals Board may notice and order a prehearing conference for the purpose of simplifying issues, expediting a hearing and affording the parties an opportunity to participate in the disposition of the appeal. The prehearing conference may be conducted by means of telephonic conference call.~~

~~(b) Each party to a prehearing conference shall be prepared to discuss the issues, stipulate to any factual or legal issue about which there is no dispute, stipulate to the identification and admissibility of documentary evidence, comply with any request for discovery, report on discovery status where the ALJ has compelled discovery prior to the prehearing, and to do such other things as may aid in the disposition of the proceeding.~~

~~(c) The failure of a party or its representative to prepare for and participate in the prehearing conference shall be grounds for the imposition of such sanctions, inferences or other orders, then or during the hearing, as the Appeals Board may deem appropriate. These sanctions may include striking or excluding evidence offered by the non-complying party on that dispute, or precluding that party from contesting the position or information on that issue provided by the complying party.~~

(a) No sooner than 90 days and no later than 180 days after an appeal is docketed, a prehearing conference shall be held in each case. Prior to a prehearing conference, the parties shall identify issues that are in dispute that arise out of the facts and circumstances apparent from the pleadings. The parties shall identify all documents or other non-testimonial evidence each party may rely on to resolve the issues that remain in dispute. The parties shall identify the witnesses that will be called to give testimony regarding the issues that remain in dispute, and the substance of each witnesses testimony shall be described with sufficient specificity to enable the Administrative Law Judge to determine which witnesses testimony will be relevant to each issue. This information shall be in writing, and shall be known as the Statement of Issues, Witnesses and Non-testimonial Evidence.

(b) Prior to submitting the written Statement of Issues, Witnesses and Non-Testimonial Evidence, the parties shall meet and confer regarding the items required in the statement. The date of this meeting, which may be telephonic, will be included in the statement. If the parties resolve some but not all issues prior to submitting the written statement, these shall be presented in the written statement as stipulations and designated as such. The Statement of Issues, Witnesses and Non-Testimonial Evidence may be submitted jointly by the parties, or each party may submit its own Statement. There will be no written rebuttal to the Statements. Failure to submit a signed completed Statement timely shall result in issue sanctions related to the issues, witnesses or non-testimonial evidence omitted from the Statement unless ordered otherwise by the Administrative Law Judge on a showing of good cause for the omission. Additional sanctions may be ordered as allowed in Section 381.

# OSHAB PROPOSED REGULATIONS FOR 2015

Draft: 374 Prehearing Conference for March 5, 2015

(1) For appeals with no citations classified as serious, the pre-hearing conference shall be set as a telephonic event. The parties shall submit the statement in writing 10 days prior to the scheduled prehearing conference.

(A) During the prehearing, the ALJ shall determine the contested issues based on the written statements and discussion with the parties.

(B) For appeals that do not resolve entirely, Minutes of Hearing shall be issued by the ALJ.

(i) The minutes shall identify the issues to be determined at a hearing, the evidence of every kind to be submitted for each issue;

(ii) The minutes shall identify three proposed hearing dates for which mutual agreement exists among the parties. These dates shall be within 45 days of the date of the prehearing conference;

(iii) The minutes may incorporate by reference and attachment portions of the parties' written Statements of Issues, Witnesses and Non-Testimonial Evidence; and

(iv) The minutes will be served on the parties with the Notice of Hearing.

(2) Either party may request that a telephonic pre-hearing conference be converted to an in-person prehearing conference as set forth in subsection (3). This request must be in writing and filed with the Appeals Board within 30 days of the date the Notice of Prehearing Conference was issued. All parties must be served with this request in accordance with Section 355.3.

(3) For appeals with at least one contested citation classified as serious, repeat, willful, or failure to abate, the prehearing conference shall be held in person. The written statement of issues, witnesses and non-testimonial evidence shall be submitted to the ALJ at the prehearing conference. Any evidence a party lists in the statement that has not been previously disclosed to the other parties through discovery requests or other means shall be disclosed and provided to the other parties at the prehearing conference.

(A) If the matter does not resolve at the prehearing conference, a Minutes of Hearing shall be issued. The Minutes of Hearing shall:

(i) Be signed by the Administrative Law Judge and the parties or their representatives;

# OSHA PROPOSED REGULATIONS FOR 2015

Draft: 374 Prehearing Conference for March 5, 2015

- (ii) Identify each issue remaining to be resolved, and the witnesses and non-testimonial evidence to be presented to resolve each remaining issue; and
  - (iii) Identify three dates mutually agreeable to all parties within 45 days of the prehearing conference on which the hearing may be set.
- (c) Each party has a continuing duty to disclose to all other parties any evidence discovered or obtained after the date of the prehearing conference that is or may lead to evidence relevant to any remaining issues. If such evidence is not disclosed to all other parties within 10 days of its discovery, issue sanctions shall be imposed at the discretion of the assigned Administrative Law Judge. Additional sanctions under Section 381 may also be imposed.
- (d) Rebuttal evidence, which is required to counter surprise testimony at the hearing, need not be disclosed at the prehearing conference. A party wishing to offer previously undisclosed evidence in rebuttal must demonstrate it is reasonably surprised by the evidence which it attempts to rebut with the proffered rebuttal evidence.
- (e) Any party to any appeal for which a prehearing conference has been scheduled may request a telephonic status conference with the prehearing Administrative Law Judge to obtain assistance with resolving some or all of the issues in an appeal. Such requests must be made in writing, filed with Appeals Board and served on all parties in accordance with Sections 355.3 and 355.4. The request must be made no later than 30 days prior to the scheduled prehearing conference and must contain three mutually agreed upon proposed times for the requested status conference. Status conferences are not required to settle a case.
- (f) A case that does not resolve in full will be set for hearing within 45 days of the prehearing conference, unless good cause is shown for holding the hearing at a later time.
- (g) Parties participating in the prehearing conference or hearing shall have immediately available an individual with settlement authority. "Immediately available" means either present at the prehearing conference or hearing, or readily available via telephone.
- (h) The Administrative Law Judge who conducted the prehearing conference shall not be the Administrative Law Judge who conducts the evidentiary hearing unless all parties waive the requirements of this subsection and agree to both proceedings being conducted by the same Administrative Law Judge. The prehearing Administrative Law Judge is the assigned Administrative Law Judge until the Notice of Hearing is issued designating the hearing Administrative Law Judge.
- (i) The 180-day deadline contained in this rule may be extended based on the same grounds delineated in Section 371 subsection (1) concerning hearing dates.

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