

OSHAB Proposed Regulations for 2015

For discussion March 5, 2015

Key:

1	2	3	4	5
OASIS	New or substantially modified rule	Revision of rule to conform to current practice	AB 1634	Fixing incorrect references to other regulations

346 OSHAB Scheduling and Information System - OASIS [1]

- (a) The California Occupational Safety and Health Appeals Board's (OSHAB's) document management, case management and court calendaring system is known as OASIS.
- (b) OASIS is an acronym for OSHAB Appeals Scheduling and Information System.

NOTE: Authority cited: Section 148.7, Labor Code. Reference: Section 148.7 Labor Code.

346.1 Validity of Scanned Documents [1]

- (a) Scanned documents shall be identical to the content of the original document.
- (b) The following differences in the scanned document do not preclude it from being deemed identical to the original document:
 - (1) The physical dimensions of a scanned document may be slightly different than the original;
 - (2) The Appeals Board's scanning process may affix to the scanned document a bar code, unique number, or any other marking necessary to scan or index the document.
- (c) If a party, intervenor, obligor or their representatives contest the validity of a scanned document, the party contesting the validity of a document has the burden of proof to show good cause why the contested document should be excluded as evidence pursuant to the following criteria:

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(1) Excepting the changes to a scanned document identified in subsection (a)(1) or (2) above, the party or participant contesting the document must prove by a preponderance of the evidence that the document's content has been materially altered after it has been scanned; and

(2) The party or participant contesting the validity of a scanned document shall prove by a preponderance of the evidence that the changes to the document render the changed document unreliable as evidence.

(d) Prior to being scanned into the hearing record, documents and photographs that are used as hearing exhibits may be altered during the course of the hearing for demonstrative purposes. Witnesses may mark photographs or other exhibits to identify a physical location or to illustrate a clarifying point. The marked or altered document becomes the original document for purposes of scanning and authenticity.

(e) Nothing in this section abrogates the responsibility of parties to authenticate documents at hearing for the purpose of entering them into evidence.

NOTE: Authority cited: Section 148.7, Labor Code. Reference: Sections 148.7 Labor Code.

346.2 Official Record and OASIS Electronic File [1]

(a) OASIS stores documents in electronic form. When OASIS becomes operative, the official administrative record of an appeal shall be those electronic documents and evidence stored in the OASIS electronic file, except that:

(1) Oversized, demonstrative, or other non-standard sized documentary evidence incapable of being scanned into an electronic form but admitted into evidence at a hearing shall be retained outside of OASIS pursuant to the provisions of Section 376.4 and continue to be part of the administrative record.

(b) After OASIS becomes operative, electronic filing via OASIS is preferred, but not mandatory. All documents submitted to the Appeals Board in a non-electronic format shall be scanned into an electronic format and placed into the corresponding electronic case file, except for those documents lodged with the Appeals Board for in camera inspection.

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(1) Documents scanned into the OASIS case file shall have the same authenticity and evidentiary value as the original the document.

(2) After being scanned into OASIS, the original documents shall be retained for at least six months. Following this six month period, the Appeals Board may destroy the original paper documents.

(c) The OASIS electronic file shall be retained and shall remain accessible until legal proceedings involving the electronic file and the associated appeal case have legally concluded in a final form. At the time the appeals case has concluded in a final form, the OASIS electronic file shall be electronically archived in a retrievable format for a three year period following the conclusion of legal proceedings. At the expiration of the three year period, the Appeals Board shall purge and destroy the electronic file.

(d) Parties, intervenors, obligors and their representatives may file specified documents in an electronic form pursuant to Section 355.4, subsection (f). Documents filed in electronic form shall have the same legal effect as a document in paper form.

(e) The Appeals Board may electronically file any decision, findings, order, decision after reconsideration, denial of reconsideration or any other official document produced by the Appeals Board in accordance with Section 355.2. Any document that is electronically filed by the Appeals Board shall have the same legal effect as a document in paper form.

NOTE: Authority cited: Section 148.7, Labor Code. Reference: Section 148.7 Labor Code.

347 Definitions [1]

For the purpose of these rules:

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

(b) "Administrative Record" includes the following listed items:

(1) Pleadings;

(2) All notices issued to parties;

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- (3) All orders issued;
- (4) Any decision by an Administrative Law Judge;
- (5) The final decision;
- (6) Emails received from or sent to parties to the case;
- (7) The hearing record as defined by section 376.7;
- (8) Petition(s) for reconsideration and answers;
- (9) Dispositions of petitions for reconsideration;
- (10) Other documents entered into the record by the Appeals Board after a "Petition for Reconsideration" is received;
- (11) Briefs;
- (12) Motions;
- (13) Stipulations;
- (14) Party correspondence related to the proceeding;
- (15) Other documents submitted by the parties related to the hearing; and
- (16) Official Address Record.

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

~~(c)~~ "Appeals Board" or "Board" means the Occupational Safety and Health Appeals Board, and includes the chairperson and members of the Appeals Board, Administrative Law Judges, and staff of the Appeals Board;

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

~~(e)~~ "Completed Appeal Form" means all required blanks filled in and boxes checked, with the signature of information submitted in writing, signed by employer or employer's

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~~representative, and the citation(s) that are the subject of the appeal, and notice penalty appealed from attached to the appeal form.~~

~~(fg) "Day", unless specifically stated otherwise means calendar day.~~

~~(gh) "Declaration" means a certification in substantially the following form:~~

~~-(1) If executed within California:~~

~~I declare under penalty of perjury that the foregoing is true and correct.~~

~~Executed at _____ (City), California on _____ (Date),~~

~~(Signature) _____ (Typed or printed name)~~

~~-(2) If executed outside California:~~

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

~~_____ (Signature) _____~~

~~(Date) (Typed or printed name)~~

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

1.....

2.....

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3.....

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

Executed at (city) , California on (date).

(Signature)

(i) "Decision by an Administrative Law Judge" means a decision signed and issued by the Administrative Law Judge and submitted by the Administrative Law Judge to the Appeals Board for approval, and is not a draft decision being reviewed by supervisors;

(h) "Division" means the Division of Occupational Safety and Health;

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

~~(j) "Docketed" Appeal" means any completed appeal form which has been received by the Appeals Board and assigned a specific docket number;~~ the Appeals Board has acknowledged receipt of all information required under these rules to initiate and perfect an appeal as required by the following Sections: 355.1, 355.3, 355.4, 359, 359.1, and 361.3.

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

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

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

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

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

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

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

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

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

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

(~~tw~~) "Party" means a person who has made an appearance before the Appeals Board and been granted party status;

(~~ux~~) "Person" means an individual, firm, partnership, trust, estate, association, corporation, company, or other entity.

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

(z) "Pleadings" means citations, notifications of penalties, appeal forms, other documents submitted in place of appeal forms, and amendments thereto;

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

(~~z~~bb) "Representative" means a person authorized by a party or intervenor to represent that party or intervenor in a proceeding;

(~~y~~cc) "Rule" means any section set forth in this chapter adopted by the Appeals Board;

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

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

348 Computation of Time **[1]**

(a) In computing the time within which a right may be exercised or an act is to be performed, the first day shall be excluded and the last day shall be included. If the last day is not a working day, time shall be extended to the next working day.

(b) Unless otherwise indicated by proof of service, if the envelope was properly addressed, the mailing date shall be presumed to be:

(1) the postmark date appearing on the envelope if first-class postage was prepaid; or

(2) the date of delivery to a common carrier promising overnight delivery as shown on the carrier's receipt.

(c) Where service of any document, letter, application, request, motion, pleading, brief, decision, petition, answer, memorandum, response, or other writing is by mail or email, and if within a given number of days after such service, a right may be exercised, or an act is to be

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performed, the time within which such right may be exercised or act performed is extended five calendar days if the place of address is within the State of California, and ten calendar days if the place of address is outside the State of California but within the United States. Such extension shall not apply to extend the time for filing an appeal.

NOTE: Authority cited: Section 148.7, Labor Code. Reference: Section 1013(a), Code of Civil Procedure; and Sections 148.7 and 149.5, Labor Code.

350.3 California Code of Judicial Ethics [2]

The California Code of Judicial Ethics adopted by the Conference of California Judges Administrative Adjudication Code of Ethics, is adopted and shall apply to the extent noted in Article 16 (commencing with Section 11475) of Chapter 4.5 of Division 3 of Title 2 of the Government Code, to the Hearing Officers and Administrative Law Judges of the California Occupational Health and Safety Appeals Board.

Note: Authority cited: 148.7, 148.8 Labor Code. Reference: Section 148.7, Labor Code and Section 11475, Government Code.

350.4 Self-Executing Order

An order with a clause rendering the order null and void if an objection showing good cause is filed within ten days shall be deemed equivalent to a ten day notice of intention.

352 Ex Parte Communications [2]

(a) Except as provided in subsection (b), a ~~person~~ party, intervenor, obligor or their representatives shall not communicate with Appeals Board Members or Administrative Law Judges of the Appeals Board regarding a proceeding.

(b) The following communications are permitted:

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(1) Written communications, if copies of them ~~document(s)~~ are contemporaneously served by the communicator on all parties to a proceeding in accordance with Sections ~~355(d), and 355(f);~~ 355.3 and 355.4;

(2) Oral communications, if advance notice of the communication is given by the communicator to all parties to a proceeding and adequate opportunity is afforded to all parties to participate in the communication;

~~(3) Oral or written request for information related solely to the procedure of the Appeals Board or the status of a proceeding are not ex parte communications.~~

~~(4)~~ (3) Oral or written communications which all the parties to a proceeding have agreed may be made on an ex parte basis;

~~(5)~~ (4) Oral or written communications proposing settlement, or an agreement for disposition of any or all issues in a proceeding; and

~~(6)~~ (5) Oral or written communications concerning a proceeding, if made more than 30 days after service by the Appeals Board of a final order or decision in that proceeding.

(c) If an ex parte communication not within the exceptions allowed in subsection (b) is received by the an Administrative Law Judge, the Administrative Law Judge who received the communication shall, as soon as practicable after receipt of the ex parte communication, inform all parties of the communication. If the ex parte communication received is in writing, the Administrative Law Judge who received the communication shall serve copies of the writing on all parties. If the communication is oral, the Administrative Law Judge receiving the communication shall inform all parties of the substance of the communication either orally or in writing.

(d) Oral or written request for information related solely to the procedure of the Appeals Board or the status or schedule of a proceeding are not ex parte communications.

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

354 Party Status

[...]

(i) A person whose motion for party status has been granted by the Appeals Board becomes a party to the proceeding and is entitled to service of all documents and notices. Each party shall serve within 10 working days of the order granting party status, copies of all documents

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previously filed with the Appeals Board and not served on the new party. Service shall be in a manner as prescribed in Section 355(e),3 and proof of such service meeting the requirements of Section 355(e),3 shall be filed with the Appeals Board.

Note: Authority cited: Sections 148.7 and 6603(a), Labor Code. Reference: Sections 148.7, 6319(b), 6600 and 6603(a), Labor Code.

355. Proper Method of Service.

~~(a) The Appeals Board shall maintain in each proceeding an official address record which shall contain the names and addresses of all parties and intervenors and their representatives. Documents sent by the Appeals Board to the official address of record for the employer that are returned or undeliverable may result in dismissal of the appeal if the Appeals Board is unable to effectively communicate with the employer.~~

~~(b) Any change or substitution in the name and address of any party or intervenor, or its representative, must be communicated, in writing, promptly, and in no case more than 30 days after the change, to the Appeals Board's Sacramento office. The written communication must also be served on all parties and intervenors. Failure to communicate changes or substitutions promptly in writing by the employer may result in dismissal of the appeal if the Appeals Board is unable to effectively communicate with the employer.~~

~~(c) Service on a party or intervenor who has appeared through a representative shall be made upon such representative.~~

~~(d) Unless otherwise required, service may be made by personal delivery or by depositing the document in a post office, mailbox or mail chute, or other like facility regularly maintained by the United States Postal postage prepaid, by deposit with a carrier guaranteeing overnight delivery, or by facsimile ("FAX") machine, as provided in subsections (i) and (j) below.~~

~~(e) Service is complete at the time of personal delivery or mailing.~~

~~(f) Proof of service shall be filed with the document and may be made by any of the following means:~~

~~(1) Affidavit or declaration of service by personal delivery, mail, overnight courier or FAX;~~

~~(2) Written statement endorsed upon the document served and signed by the party making the statement; or~~

~~(3) Letter of transmittal.~~

~~(g) Proof of service by the Appeals Board may be made by endorsement on the document served, setting forth the fact of service on the persons listed on the official address record on the date of service. The endorsement shall state whether such service was made personally, by mail, overnight courier or FAX, the date of service and the signature of the person making the service.~~

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~~(h) Where service is made by the posting of a document, citation, notice, order or decision, proof or certification of such posting shall be filed with the issuing office of the Division not later than the second working day following the posting.~~

~~(i) The Appeals Board may serve documents on parties and parties may file documents with the Appeals Board and serve them on other parties by means of FAX under the following conditions:~~

~~(1) The length of the document to be filed and/or served shall be no more than twelve (12) pages including cover page and attachments;~~

~~(2) A cover sheet shall be attached containing the number of pages transmitted, the FAX number of the sender, the sender's telephone number, and the name of a contact person;~~

~~(3) If a document is filed by FAX, all parties shall be served in the same manner or by guaranteed overnight delivery. The FAX transmission shall include a proof of service indicating the method of service on each party.~~

~~(j) A document is considered received on the following working day if transmission begins later than 5:00 p.m. Pacific Time.~~

NOTE: Authority cited: Section 148.7, Labor Code. Reference: Sections 148.7, 149.5 and 6610, Labor Code.

This section intentionally left blank

§ 355.1 Official Address Record **[1]**

(a) The Appeals Board shall maintain in each proceeding an official address record which shall contain the following information **provided by each party, intervenor and obligor:**

(1) The name, postal address and email address of each party, intervenor, or obligor

(2) The name, postal address and email address of each party, intervenor or obligor's representative;

(3) When a party, Intervenor, obligor or their representative does not have an email address; and

(4) An election by each party, intervenor and obligor of the method of service a party, intervenor, obligor or representative shall receive from the Appeals Board pursuant to Section 355.2(a).

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(b) Any change or substitution in the name, postal address, or email address of any party, intervenor, or its representative, must be communicated to the Appeals Board in Sacramento in writing as soon as practicable after the change is known, but in no case more than 30 days after the change is known to the party, intervenor, or its representative. The written communication must also be served on all parties, intervenors, or its representative. Failure to communicate changes or substitutions promptly in writing by the employer may result in dismissal of the appeal if the Appeals Board is unable to effectively communicate with the employer.

Note: Authority cited: Section 148.7, Labor Code. Reference: Sections 148.7, 149.5 and 6610, Labor Code.

355.2 Proper Method of Service by Appeals Board [1]

- (a) Parties, Intervenors, obligors and their representatives shall elect postal mail or email as their preferred method of service, but not both, for documents served on them by the Appeals Board. If a party does not disclose an email address in the official address record, service shall be by postal mail.
- (b) When a hearing or conference occurs where the parties, intervenors, obligors, or their representatives appear in person, the Administrative Law Judge conducting the hearing or conference may elect to personally serve Appeals Board documents where practicable.
- (c) Service by the Appeals Board on a party, intervenor, or obligor who has appeared through a representative, shall be made upon such representative in addition to the party, intervenor, or obligor being represented.
- (d) Service is complete at the time of personal delivery or mailing. Absent evidence to the contrary, service by email shall be deemed complete at the time of transmission, unless a document is re-served in accordance with subsection (g).
- (e) Proof of service by the Appeals Board may be made by:
 - (1) Endorsement on the document served, setting forth the fact of service on the persons listed on the official address record and the date of service. The endorsement shall state whether such service was made by postal mail, email, personally, or by overnight courier, the date of service and the signature of the person making the service.

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- (2) Affidavit or declaration of service by personal delivery, postal mail, or email.
 - (3) Letter of transmittal.
 - (4) Designating a party, intervenor, obligor, or their representative to perform service on all participants in the official address record and file the proof of service with the Appeals Board documenting that service.
- (f) This subsection shall apply where, after serving the document(s) in accordance with subsection (d), the Appeals Board subsequently receives notification that the service to one or more parties (or to their agents, representative or attorneys of record) failed. A party must notify the Appeals Board within 24 hours of an interruption of email service.
- (1) When the Appeals Board receives notification of failed service to any intended recipient(s), the Appeals Board shall promptly re-serve the document on the intended recipient(s) using the method of service (i.e. email, postal service) best calculated to result in valid service on the intended recipient(s), even if the intended recipient(s) did not previously designate that method as their preferred method of service.
 - (2) The Appeals Board need not re-serve the document on intended recipients for whom the Appeals Board did not receive notification of failed service.

Note: Authority cited: Section 148.7, Labor Code. Reference: Sections 148.7, 149.5 and 6610, Labor Code.

355.3 Service by Parties, Intervenors, Obligors and Representatives. [1]

(a) When a party, intervenor, obligor or their representative serves document(s) on another party, intervenor or representative, that service shall occur by first class postal mail, a carrier defined in subsection (b) or personal service.

(b) A carrier will satisfy subsection (a) if it provides an alternative method that will effect service that is equivalent to or more expeditious than first-class mail. For purposes of this subsection,

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“an alternative method that will effect service that is equivalent to or more expeditious than first-class mail,” shall be limited to either:

(1) Use of express (overnight) or priority mail; or

(2) Use of a bona fide commercial delivery service or attorney service promising delivery within two business days, as shown on the service’s invoice or receipt.

(c) Service by postal mail is made by depositing the document in a post office, mailbox, or mail chute, or other like facility regularly maintained by the United States Postal Service, sealed, properly addressed, with first-class postage prepaid, or by deposit with a carrier as defined in subsection (b).

(d) Service is complete at the time of personal delivery or mailing.

(e) Proof of service shall be filed with the document and may be made by any of the following means:

(1) Affidavit or declaration of service by personal delivery, mail, or overnight courier;

(2) Letter of transmittal.

(f) If a party, intervenor, obligor or their representative responsible for serving the document(s) on another party, intervenor, obligor or their representative, receives notification that the service to an intended recipient failed, the party responsible for sending the document(s) shall promptly re-serve the document on the intended recipient(s) using the method of service best calculated to result in valid service on the intended recipient(s).

(1) The server need not re-serve the document on intended recipients for whom the server did not receive notification of failed service.

(2) On re-service, the server shall execute a new proof of service in accordance with subsection (e) showing re-service on the intended recipient(s).

(g) By written stipulation of all parties, service between the parties may be by electronic methods.

Note: Authority cited: Section 148.7, Labor Code. Reference: Sections 148.7, 149.5 and 6610, Labor Code.

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355.4 Filing documents with the Appeals Board^[1]

(a) A party, intervenor, obligor or their representative shall file documents with the Appeals Board by one of the following methods:

(1) First class mail, or

(2) An alternative method of filing that is equivalent to or more expeditious than first-class mail as defined in Section 355.3, or

(3) Personal service, or

(4) Electronic service pursuant to subsection (f).

(b) Any document(s) filed with the Appeals Board must be served on the other parties, intervenors, obligors or their representative.

(c) Unless otherwise specified in another Section, a document shall be deemed filed with the Appeals Board on the date a document is hand delivered, electronically filed, or the date the document is received by the Appeals Board.

(d) An electronically filed document shall be considered received by the Appeals Board the following working day if transmission begins later than 5:00 p.m. Pacific Time.

(e) Proof of service shall be filed with the document and may be made by any of the following means:

(1) Affidavit or declaration of service by personal delivery, mail, **electronic service if stipulated to in accordance with Section 355.6 subsection (g)**, or courier;

(2) Letter of transmittal.

(f) Only the following documents may be filed directly into OASIS from the OASIS internet home page. Documents filed pursuant to this subsection shall comply with the requirements of Section 355.5. Documents not listed in this subsection shall be filed pursuant to subsections (a)(1), (2), or (3) of this Section:

(1) Appeal information and citation and notification of penalty;

(2) Change to the Official Address Record including change of representative, change of address, or change of email address;

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- (3) Motion for Change of Venue;
- (4) Motion for a Continuance;
- (5) Motion for a Discovery Order;
- (6) Motion to Withdraw Appeal;
- (7) Motion to Withdraw Citation;
- (8) Motion to File Late Appeal;
- (9) Motion for Intervenor/Party status;
- (10) Petition for Reconsideration;
- (11) Request of Issuance of Subpoena;
- (12) Motion to Amend Appeal;
- (13) Motion to Amend Citation;
- (14) Request for conference with Appeals Board;
- (15) Request for Hearing Record;
- (16) Briefs;
- (17) Proof of service by party on behalf of Appeals Board as allowed in Section 355.2 subsection (e)(4); and
- (18) Settlement Order and proof of service of Settlement Order.

(g) When filing a document electronically as allowed by subsection (f), the following information shall be provided:

- (1) Document title;
- (2) Date of document being filed;
- (3) Inspection number, or docket number (if one exists);
- (4) Identification of party submitting the document;
- (5) The identification of the party's representative who is filing the document, if any.

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(h) Documents filed in violation of this Section shall be rejected and shall not be filed in the Appeals Board electronic case file.

Note: Authority cited: Section 148.7, Labor Code. Reference: Sections 148.7, 149.5 and 6610, Labor Code.

355.5 Form and Size Requirements for Electronic Filed Documents [1]

(a) Electronic document filing shall be in accordance with the following standards:

(1) All electronically filed documents shall be submitted in response to prompts and instructions on the Appeals Board's OASIS Internet site.

(2) Any document that may be filed in an electronic form shall be submitted in one of the following three formats: PDF/A (Portable Document Format), Tiff, or JPEG. Filing using the "PDF/A" format is preferred.

(3) With the exception of electronic forms and required attachments, no embedded data shall be allowed in electronically filed documents.

(4) The filing party shall take all reasonable steps to ensure that the filing does not contain computer code, including viruses that might be harmful to OASIS or to other users of OASIS. Any electronically submitted document that is determined to contain a virus or other potentially harmful computer code may not be processed and may be deleted.

(5) If it is necessary to submit an electronic document allowed by OASIS, the filing party shall verify the readability of the scanned document before submitting it to OASIS.

NOTE: Authority cited: Section 148.7, Labor Code. Reference: Section 148.7, Labor Code.

355.6 Form and Size Requirements for Filed Paper Documents [1]

(a) All documents filed with the Appeals Board, whether filed in paper or electronically, shall be filed in accordance with the following standards:

(1) Only one side of each paper shall be used;

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(2) All margins shall be at least one inch and shall be without typed or handwritten text in any margin;

(3) The first page shall include a case caption that shall include the name and address of the employer, the assigned docket number, and the title of the document.

(4) Documents shall be prepared in a font no less than 12 points in size.

(5) No single document shall exceed 25 pages in length without the prior permission of the Appeals Board, a Presiding Administrative Law Judge, or an Administrative Law Judge who is assigned the case.

(6) Documents filed with the Appeals Board shall be double spaced or one and one-half spaces; however, captions, headings, headers, footnotes, footers and block quotations may be single spaced.

(7) Paper documents shall be flat, without folds and without staples. Non-conforming submissions may be rejected and returned to the submitter.

(8) No documents filed with the Appeals Board shall contain bar codes, unless those bar codes are added after the document is filed as part of the scanning or document processing procedures initiated by the Appeals Board as a requirement of OASIS.

(b) Oversized documents and photographs shall be filed only at the time of hearing.

(c) Printed paper documents shall be printed with black ink on white paper that is 8 ½ x 11 inches and at least 20 pound weight.

(d) Parties, intervenors, and obligors who are not represented by legal counsel may file legible hand-written documents; however, those documents must comply with subsections (a)(1), (2), (3),(5), and (7).

(e) The document form requirements in this section apply only to those documents prepared by a party, intervenor, obligor, or their representative, and does not apply to documents submitted as evidence at a hearing.

NOTE: Authority cited: Section 148.7, Labor Code. Reference: Section 148.7, Labor Code.

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356. Notice to Employees of Appeal and Hearing.

(a) The employer shall give notice of an appeal to its employees by posting the docketed Appeal information or Form, Participation Notice, and Notice of Hearing at or near the site of the alleged violation, positioned so as to be easily read by employees working in the area. If it is not practicable to post the document at or near the site of the alleged violation, the document may be posted in a conspicuous place where it will be readily observable by employees, or at a location to which employees report each day, or at a location from which employees operate to carry out their duties. The docketed Appeal information or Form, Participation Notice, and Notice of Hearing shall be posted immediately upon receipt from the Appeals Board and shall remain posted until the date of the hearing or receipt of an order disposing of the appeal.

(b) In addition to posting as required in subsection (a), ~~§~~service of the docketed Appeal Form, Participation Notice, and Notice of Hearing is required, in addition to posting, under the following circumstances:

- (1) If affected employees are represented by an authorized employee representative, service in a manner prescribed in Section 355~~(e)~~.3 shall be made upon the representative.
- (2) If an employee sustained a serious injury or illness, or was killed, as a result of an alleged violation that is being appealed, service in the manner prescribed in Section 355~~(e)~~.3 shall be made upon the employee or the representative of the deceased employee.

NOTE: Authority cited: Section 148.7, Labor Code. Reference: Section 6603(a), Labor Code.

356.1 Form of Participation Notice

(a) The Participation Notice required by Section 356 shall be in the following form:

“Your employer, (name of employer), has been cited by the California Division of Occupational Safety and Health for violation of an Occupational Safety and Health standard. The citation and/or civil penalty has been contested and will be the subject of a hearing before the Occupational Safety and Health Appeals Board. Affected employees are entitled to participate in this hearing as parties under terms and conditions established by the Occupational Safety and Health Appeals Board in its rules of practice and procedure by filing a motion for party status. The motion for party status shall be sent to the Occupational Safety and Health Appeals Board, at the Appeals Board's principal office in Sacramento, California, and shall be

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accompanied by a proof of service and shall indicate that it was served on the Division and Employer and any other parties as provided in Sections 355.3 and 355.4.

“All papers filed relative to this matter may be inspected at: (A place reasonably convenient to employees, preferably at or near work place.)”

Where appropriate, the second sentence of the above notice will be deleted and the following sentence will be substituted:

“The reasonableness of the period prescribed by the Division of Occupational Safety and Health for abatement of the violation has been contested and will be the subject of a hearing before the Occupational Safety and Health Appeals Board.”

(b) For a special order or an order to take special action, the first two sentences of the above notice will be deleted and the following sentences will be substituted:

“Your employer, (name of employer), has been issued an order by the California Division of Occupational Safety and Health. The order has been contested and will be the subject of a hearing before the Occupational Safety and Health Appeals Board.”

(c) An employer shall file with the issuing office of the Division, not later than the second working day following the service or posting, proof or certification of service or posting of the docketed Appeal and Participation Notice.

(d) This section and Section 356 do not apply to appeals from citations issued pursuant to Section 2950 of the Health and Safety Code.

NOTE: Authority cited: Sections 148.7 and 6603(a), Labor Code. Reference: Sections 148.7, 6602 and 6603(a), Labor Code.

356.2 Responsibility of Employee to Notify Employer and Other Employees of Proceeding.

[...]

(c) When an Employee Appeal is filed by an employee and there are other employees who are represented by an authorized employee representative, the employee shall, upon receipt of the docketed Employee Appeal and the statement by the Division required by Section 361(e) relating to the reasonableness of the abatement period, serve a copy of the Employee Appeal, the Participation Notice, and the statement on the authorized employee representative. Service shall be in a manner as prescribed in Section ~~355(e)~~3 and proof of such service meeting the requirements of Section ~~355(e)~~3 shall be filed with the Appeals Board.

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[...]

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

359 Filing of Appeal—~~Date~~ Timeliness. **[1]**

(a) Except as provided in Section 361.1(b), an appeal shall be deemed filed on the date the Appeals Board is notified of an intent to file an appeal. An intent to file an appeal may be made by telephone, in writing, or in person, or by electronic submission via the Appeals Board website access to the OASIS system. If written, the intent may be made by submitting information required in Section 359.1 through the mail, hand delivered to the Appeals Board main office, or submitted electronically via a web form when available. An appeal form may be used to submit this information and is available on the Appeals Board website. ~~a communication indicating a desire to appeal the Division action is hand delivered, mailed to, or received by the Appeals Board in Sacramento, California, whichever is earlier. No particular format is necessary to institute the appeal. A Communications to the Division of Occupational Safety & Health indicating a desire an intent to appeal **is not an intent to file an appeal** are not deemed filed with the Appeals Board and do not initiate the appeal.~~

(b) An appeal is timely if the intent to appeal is mailed or received by the Appeals Board within 15 working days of the date the citation is received by the cited employer. The time for filing any appeal may be extended or a late filing permitted upon a written showing of good cause that contains sufficient facts to show or establish a reasonable basis for the late filing.

(c) A request to file a late appeal shall be accompanied by a declaration containing a statement that any facts therein are based upon the personal knowledge of the declarant.

(d) The current address and phone number of the Appeals Board main office is stated on the citation(s) and posted on the Appeals Board website.

(e) The Board may find good cause for a late appeal exists where:

(1) A settlement has been reached between the parties within 3 months of issuance of a citation; and

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(2) The appellant is able to demonstrate that settlement was actively pursued by the parties during the period prior to filing of the late appeal.

(f) Negotiations that do not result in an executed settlement agreement are not good cause for a late appeal under subsection (e). An employer must call the Appeals Board within 15 days of receipt of a citation to preserve its right of appeal.

(g) The Board may find good cause exists for a late appeal on the issue of abatement where:

(1) The employer submitted proof of abatement to the Division timely as required in the citation; and

(2) The Division does not accept the proof of abatement; or

(3) The Division fails to modify the penalty as required following submittal of proof of adequate abatement.

(h) Acceptance of a late appeal under subsection (g) does not appeal any other portion of the citation or notification of penalty.

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

359.1 Filing of Appeal-- Form Requirements **[3][1]**

(a) An appeal is perfected and may be docketed if it is timely, as required by section 391, and all required information is submitted to and Appeals Board in accordance with these regulations. ~~completed appeal form shall be filed for each contested Division action.~~

(b) If an appeal is initiated by telephone, or is in writing or by electronic submission but is incomplete, the additional information required shall be submitted by mail, hand delivery, or through the OASIS system accessible through the Board's website. Failure to submit the information required in Section 361.3, copies of all citations being appealed, and valid address, email address if any, and telephone number of the employer as required in Section 355.1 ~~file a completed appeal form~~ with the Appeals Board within 10 days of written or electronic acknowledgement by the Board of the receipt of an intent to appeal constitutes grounds for dismissal.

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

(d) After required information and documents are submitted either on paper or electronically through the OASIS system, and confirmed to be complete, the appeal will be docketed.

~~(de) Upon receipt of a timely completed appeal form, or all of the information required by this section, the Appeals Board shall ~~assign a docket number~~ the appeal. ~~and deliver or mail a copy of the docketed appeal to each party.~~~~

(ef) Upon docketing of an appeal, the Appeals Board shall serve on each party the appeal information or form, copies of documents required to perfect an appeal, and the docket number(s) assigned to the appeal.

NOTE: Authority cited: Section 148.7, Labor Code. Reference: Sections 148.7 and 6600 Labor Code.

361.3 Issues on Appeal **[2]**

The issues on appeal shall be limited to those arising out of the facts set forth in the Division action that is contested by a docketed appeal, and the facts set forth in appellant's or other party's statement of excuse or justification for each alleged violation, subject to the following additions and limitations:

(a) If the Division action appealed from is a citation, the employer must specify ~~on the appeal form which one or more~~ of the following ~~issues it is raising in~~ components of the Division citation it is challenging in its appeal;

- (1) The existence of the violation alleged in the underlying citation;
- (2) The classification of the violation;
- (3) The abatement period;
- (4) The reasonableness of the changes required by the Division to abate the violation; or
- (5) ~~Only~~ The reasonableness of the proposed penalty.

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(b) If the appellant contends there exists a justification or excuse for the facts and allegations contained in the appealed citation(s), a short, plain statement setting forth the facts or circumstances that, if true, would justify or excuse the alleged violation, must be submitted with the appeal in writing. A statement of excuse or justification is deemed submitted with the appeal if it accompanies the appeal submission, or is served on the Division office issuing the citation and the Appeals Board within 30 days of the date the appeal is docketed.

(c) An appellant **may** identify from the following list which affirmative defense(s) it contends arises out of the statement of justification or excuse required in subsection (b). **Other defenses may be asserted.**

(1) Independent employee action caused the violation.

(2) The safety order did not apply to the work activity that is the subject of the citation.

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

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

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

(d) If the appeal contests only the reasonableness of the proposed penalty, the issues on appeal shall be limited to the classification of the violation and the reasonableness of the proposed penalty. ~~unless a timely motion pursuant to Section 371 is granted to amend the appeal to contest the existence of the violation, the abatement period, or the reasonableness of the changes required by the Division to abate the violation.~~

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

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

(~~e~~g) If an employer files a timely appeal from a notification of failure to abate but did not file an

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appeal from the underlying citation, the existence of the alleged violation shall be an issue in the same hearing if the employer files a motion, in accordance with Section 371, demonstrating good cause for having not appealed the underlying citation.

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

NOTE: Authority cited: Section 148.7, Labor Code. Reference: Section 148.7, 6317, 6319.5 and 6601, Labor Code.

362 Stay of Abatement Period and Abatement Changes [4]

(a) Except as provided in subsection (b), ~~U~~unless otherwise provided by statute, all abatement periods and changes required by the Division are stayed upon the filing of a docketed appeal with the Appeals Board and remain stayed until withdrawal of the appeal or a final disposition of the proceeding by the Appeals Board.

(b) The filing of a petition for, or the pendency of, reconsideration of a final order or decision involving a citation classified as serious, repeat serious, or willful serious shall not stay or suspend the requirement to abate the hazards affirmed by the decision or order, unless the following conditions are met:

(1) The employer files a written petition to stay or suspend abatement within 10 days after the issuance of the decision or order of an Administrative Law Judge assigned by the Board.

(2) The employer's written petition is accompanied by supporting declarations that set forth the evidence demonstrating a stay or suspension of abatement will not adversely affect the health and safety of employees. The employer must demonstrate by a preponderance of the evidence that a stay or suspension of abatement will not adversely affect the health and safety of employees.

(3) A petition to stay or suspend abatement meeting all requirements of these regulations and the Labor Code shall be deemed filed on the date received by the Appeals Board. The petition shall be served on all parties who have been joined in the proceeding at the time of filing.

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(4) A petition to stay or suspend abatement that is not properly verified upon oath and/or not accompanied by a proof of service shall be considered filed in accordance with subsection (3) if the petitioner perfects the petition by filing the verification and/or proof of service within five days of the date of service of a letter from the Appeals Board noting the omission(s).

(5) Failure to perfect a petition to stay or suspend abatement in accordance with subsection (3) shall result in the dismissal of the petition.

(6) An opposing party may file an answer to the petition to stay or suspend abatement no later than seven [ALTERNATE LANGUAGE: 10 DAYS] days from the service of the petition.

(c) Staying of order or decision under appeal: proper and timely filing of a petition to stay or suspend abatement with the Board shall stay abatement during the pendency of the Board's review of the petition to stay or suspend abatement.

(d) The Board may issue an order or decision granting the petition to stay or suspend abatement within 30 days [ALTERNATE LANGUAGE: 40 DAYS] of filing. Should the Board fail to act within 30 days, the petition shall be deemed denied. [ALTERNATE LANGUAGE: Should the Board fail to act within 40 days, the petition shall be deemed denied.]

NOTE: Authority cited: Section 148.7, Labor Code. Reference: Sections 148.7 and 6625 Labor Code.

§364 Withdrawal of Appeal **[4]**

(a) An ~~appellant~~ employer or obligor may withdraw an appeal by written notification at any time before a decision is ~~issued~~ final or by oral motion before or during a hearing ~~on the hearing record~~. The Appeals Board shall ~~issue an order granting the withdrawal of the appeal and serve the order on the participants identified in the official address record.~~ ~~grant such withdrawal by letter, order or decision served on the parties.~~

(b) An appeal so dismissed shall be reinstated by the Appeals Board if the ~~employee or obligor~~ ~~appellant~~ files a written motion with sufficient facts to show that the withdrawal resulted from misrepresentation, ~~given by the Division or the Appeals Board,~~ or from fraud, ~~or coercion.~~

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undue influence, mutual mistake of fact, or violation of applicable law. A motion for reinstatement must be filed with the Appeals Board within ~~60~~ 30 days of service of the ~~letter,~~ order granting withdrawal of the appeal. ~~or decision or,~~ In the event of fraud which could not have been suspected or discovered with the exercise of reasonable diligence, within ~~60~~ 30 days of discovery of such fraud.

(c) The motion to reinstate the appeal shall be accompanied by a declaration containing a statement that any facts therein are based upon the personal knowledge of the declarant.

NOTE: Authority cited: Section 148.7, Labor Code. Reference: Section 148.7 and 3619(g), Labor Code.

364.1 Withdrawal of All or Part of Division Action **[4] [5]**

(a) The Division may withdraw its action by written motion at any time, ~~or by oral motion made on the hearing record-~~ in the presence of the Administrative Law Judge and all parties, or by issuing a Notice of Withdrawal of Citation, that requires service and posting in the manner prescribed in Labor Code Sections 6317 and 6318 and served on the Appeals Board. If no objection to the Notice of Withdrawal of Citation is received by the Appeals Board within 30 days of service of the Notice, the Notice will become a final order of the Appeals Board. An objection to a Notice of Withdrawal of Citation shall be in the form of a petition for reconsideration, the grounds for which shall be misrepresentation, fraud, undue influence, mutual mistake of fact, or violation of applicable law.

(b) If the Division makes a motion to withdraw a citation, and it is ~~the motion is~~ made prior to the hearing, the Division shall serve a copy of the motion to withdraw on each party and on any authorized employee representative if known to the Division to represent affected employees. Service shall be in the manner as prescribed in Section 355~~(e)~~3 and proof of such service meeting the requirements of Section 355~~(e)~~3 shall be filed with the Appeals Board.

(c) ~~Upon a showing of good cause, the Appeals Board shall grant such withdrawal by order or decision served on the parties.~~ The Division may withdraw part of its action by issuing an amended citation that removes an item or instance alleging a violation or reduces a proposed penalty. Upon issuance of such amended citation by service on all parties to the Appeals Board action, and service on the Appeals Board, the amended citation will be merged with the original appeal and will replace the citation already appealed. Any amendments that either remove

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items or penalties from the original citation, or grant an abatement credit not granted in the original citation, will become part of the Division action as if they were the original appealed citation unless an objection to partial withdrawal is filed within 30 days from the date the amended citation is served on all parties and the Appeals Board.

(d) The only grounds for an objection to an amended citation of an inspection that is already the subject of an appeal pending before the Appeals Board are misrepresentation, fraud, undue influence, mutual mistake of fact, or violation of applicable law. Employer need not file a new appeal to amendments made under this subsection. Employer's original appeal shall remain valid. If an objection to the amended citation is received, the Administrative Law Judge shall rule on the objection in the final order or decision.

(e) Withdrawal of part of a Division action allowed in subsection (c) is limited to withdrawals that do not affect the time period established for abatement in the original citation.

(df) The employer shall post for 15 working days a copy of the ~~order or decision granting the withdrawal. Posting shall be in a manner as prescribed in Section 356(a).~~ citation amended pursuant to Section 356 subsection (a).

NOTE: Authority cited: Section 148.7 and 6603(a), Labor Code. Reference: Sections 148.7, 6601, 6602, 6603, 6614 and 6625, Labor Code.

364.2 Disposition of Appeal Settlement Order

~~(a) Upon a showing of good cause, the Appeals Board may dispose of the issues on appeal by granting a written motion of the parties made at any time or an oral motion of the parties made on the hearing record or in the prehearing conference.~~

(a) The Division may dispose of an appeal by issuing a Settlement Order, bearing the signature of the Division and employer or obligor, at any time after the Appeals Board obtains jurisdiction of the appeal. Such Settlement Order shall be submitted to the Appeals Board for verification of compliance with this section. Upon administrative review and determination of compliance with this section, the Board shall issue a Notice of Acceptance of Settlement Order on all parties listed in the official address record maintained by the Board.

(b) The Employer shall post the Notice of Acceptance of Settlement Order and the full Settlement Order at its place of employment in accordance with subsection (f). Within 30 days of the date of the Notice of Acceptance of Settlement Order, any party aggrieved may file a petition for reconsideration of the Settlement Order on the basis of fraud, misrepresentation, mutual mistake of fact, or undue influence in the formation of the Settlement Order, or the

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Board may order reconsideration on its own motion consistent with Section 390.2. If no petition for reconsideration is timely filed, the Settlement Order is a final order of the Appeals Board.

(c) A Settlement Order shall contain the following items in addition to the signature(s) of all parties:

(1) Employer name;

(2) Employer address;

(3) Docket number(s);

(4) Citation and item number(s) appealed;

(5) Final penalty amounts for each citation and item number on appeal;

(6) Payment due date(s);

(7) The following paragraph: "This Settlement Order is a final Order of the Appeals Board and is effective 30 days from the date the Appeals Board issues a Notice of Acceptance of Settlement Order served on all parties, unless a petition for reconsideration is filed with the Appeals Board within those 30 days."

(d) Full settlements of all appealed matters associated with a specific inspection number may be concluded and resolved by the parties by entering into a Settlement Order as described in subsection (a) or by Order of Appeals Board. Partial settlements may be entered into by stipulation of the parties and are effective when approved by the assigned ALJ.

~~(b)~~ The Division shall serve a copy of the disposition on any authorized employee representative if known to the Division to represent affected employees. Service shall be in a manner as prescribed in Section 355.2~~(d)~~³ and proof of such service meeting the requirements of Section 355.2~~(e)~~ shall be filed with the Appeals Board.

~~(c) The Appeals Board shall grant such disposition by order or decision served on the parties.~~

~~(d)~~ The employer shall post for ~~15~~³⁰ working days a copy of the order or decision and a copy of the disposition, whether Settlement Order, or Order or Decision of the Appeals Board. Posting shall be in a manner as prescribed in Section 356(a).

~~(e) An appeal hearing will be taken off calendar if a disposition is received by the Appeals Board's Sacramento office before 10:00 a.m. on the working day preceding the first day of the hearing. If the terms of the disposition are given orally, confirmation by both the employer and~~

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~~the Division is required. The Appeals Board may allow up to 30 days for submission in writing of such oral dispositions.~~

Note: The Appeals Board will make available a recommended form for a Settlement Order. Although not mandated, the Appeals Board encourages its use.

NOTE: Authority cited: Sections 148.7 and 6603(a), Labor Code. Reference: Sections 148.7 and 6614, Labor Code

371. Prehearing Motions.

(a) Any motion or request for action, any opposition thereto, and any reply relating to any proceeding shall be in writing and directed to the Appeals Board. The caption of each motion or request shall contain the title and docket or petition number of the proceeding and a clear and plain statement of the relief sought, together with the grounds therefor.

(b) Any motion or request, any opposition thereto, and any reply shall be signed by the party filing or by the party's representative, and a copy shall be served on all parties. Service shall be in a manner as prescribed in Section 355~~(d)~~.3 and proof of such service meeting the requirements of Section 355~~(f)~~.3 shall be filed with the Appeals Board.

[...]

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

§371.1 Motions Concerning Hearing Dates. [5]

(a) Continuances are disfavored.

(b) A motion for a continuance shall be in writing and made promptly once the reason necessitating the continuance is ascertained. The motion shall be ~~directed to~~ filed with the Appeals Board as required in Section 355.4. Service shall be in a manner as prescribed in Section 355.3 and proof of such service meeting the requirements of Section 355.3 shall be filed with the Appeals Board. In the case of an emergency where the time for the hearing does not permit service as set forth above, service may be made upon a party by fax, email, or

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personal service. Motions to the Board, however, may not be made by email. The motion shall contain:

- (1) The date(s) presently assigned for hearing and the date(s) to which continuance is sought;
- (2) A declaration signed under penalty of perjury containing facts in support of the motion; and
- (3) An indication of whether the other parties to the appeal were contacted, and if so, their position on the motion. Absent exigent circumstances, the Appeals Board will not rule on the motion without notification of the other party's position or until the time to oppose the motion as provided in (c) has run, whichever comes first.

(c) Any opposition to a motion for continuance shall be filed with the Appeals Board immediately but no later than ten (10) days from service of the motion. Service shall be in a manner as prescribed in Section 355-~~2.3~~ and proof of such service meeting the requirements of Section 355-~~2(e).3~~ shall be filed with the Appeals Board.

(d) The motion shall be ruled on promptly and not delayed once the Board has received all information needed to rule on the motion.

(e) Each request for a continuance shall be considered on its own merits. The motion shall be granted on an affirmative showing of good cause. The following circumstances shall be considered when determining whether good cause exists for the granting of the continuance:

- (1) The unavailability of an essential witness, party, counsel or representative because an emergency arises, including, but not limited to, death or incapacitating illness.
- (2) The addition of a new party who has not had notice of the hearing date and an adequate opportunity to prepare for the hearing.
- (3) The age of the case and whether there were any previous continuances.
- (4) The ability of the parties to agree on at least three (3) alternative hearing dates in the immediate future and the Appeals Board's ability to calendar the case on one of the dates.
- (5) The prejudice that parties or witnesses will suffer as a result of the continuance being granted or denied.
- (6) Whether the party's counsel is calendared in another hearing which conflicts with the Appeals Board's scheduled hearing, including administrative, civil or criminal

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matters, the specific attempts made by counsel to continue the other matter, and the results of such attempts.

(7) Whether an alternative short of continuing the entire hearing, such as leaving the record open to allow testimony of an unavailable witness or witnesses at a later time, would accommodate the needs of the moving party while allowing the matter to proceed in the meantime.

(8) Whether the employer has abated the alleged unsafe condition or conditions.

(9) The status of any related criminal investigations or proceedings.

(10) Whether the conflict necessitating the continuance was either foreseeable or created by the party(ies) or the party(ies) representative(s).

(11) Any other fact or circumstance relevant to the fair determination of the motion.

(f) The following circumstances shall not constitute good cause:

(1) Failure to obtain representation, unless a substitution is required through no fault of the party.

(2) Failure of another party to comply with a request for discovery, unless the Appeals Board orders a continuance of the hearing after a motion to compel discovery has been filed pursuant to Section 372.6. A continuance of the hearing may be ordered only if:

(A) a motion to compel discovery was filed at a time which would not have foreseeably delayed the hearing, or good cause for such later filing is shown, and

(B) the matters sought to be discovered are of sufficient importance to warrant a continuance of the hearing.

Note: At-hearing sanctions for discovery abuses are specified in Section 372.7 of these regulations.

(g) Once a motion for continuance has been ruled on by the Appeals Board, a motion for continuance based on the same grounds shall not be entertained at the hearing. If the motion was denied without prejudice a party may renew the motion and submit additional information supporting the request including, but not limited to, changed circumstances or new information not formerly available.

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

371.2 Amendments

(a) Amendment of a citation or appeal is permitted in the following circumstances so long as any party opposing the amendment has an opportunity to demonstrate any prejudice that the requested amendment will create. In determining whether prejudice is shown by a party opposing an amendment, consideration shall be given to the specific evidence that the opponent of the amendment would be unable to present because of the timing of the request, if the amendment were granted.

(1) A request for an amendment that does not cause prejudice to any party may be made by a party or the Appeals Board at any time.

(2) A request for an amendment that causes prejudice to the opposing party shall be granted if one of the following circumstances apply:

(A) In the case of a request filed and served at least 20 days before the hearing:

(i) The amended citation or appeal arises out of the same general set of facts as the original citation or appeal such that the amended citation or appeal relates back to the original citation or appeal; and

(ii) The request for the amendment is in writing and directed to the Appeals Board; and

(iii) The request is filed and served pursuant to Sections 355.3 and 355.4;
and

(iv) The party opposing the amendment is provided ten days from the date of service of the request to file and serve written opposition pursuant to Sections 355.3 and 355.4.

(B) In the case of a request brought less than 20 days before the hearing or during a hearing:

(i) The amended citation or appeal arises out of the same general set of facts as the original citation or appeal such that the amended citation or appeal relates back to the original citation or appeal; and

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(ii) The party seeking the amendment shows good cause for the failure to bring such request at least 20 days before the hearing; and

(iii) Any prejudice created by granting such amendment can be remedied by a continuance or other order of the Administrative Law Judge.

(b) Amendment of a citation or an appeal is not permitted when:

(1) The amendment concerns a general set of facts sufficiently different from the facts contained in the citation or appeal that the proposed amendment does not relate back to the original citation or appeal; and

(2) The violation alleged in the original citation occurred more than six months prior to the date of the request to amend the citation.

Note: Authority cited: Section 148.7, Labor Code. Reference: Section 11507, Government Code; and Sections 6317 and 6603(a), Labor Code.

372.6 Proceeding to Compel Discovery **[2]**

(a) A party claiming that its request for discovery pursuant to Sections 372 and 372.1 has not been complied with may serve and file with the Administrative Law Judge or the Appeals Board, if the Appeals Board is hearing the case, a motion to compel discovery naming as respondent the party refusing to comply. The motion shall comply with Section 11507.7 of the Government Code and shall state:

(1) Facts showing that respondent refused or failed to comply with Section 372 or Section 372.1;

(2) A description of the matters sought to be discovered;

(3) The reason or reasons why such matter is discoverable under these rules; and

(4) A reasonable and good faith attempt to contact the respondent for an informal resolution of the issue has been made; and

(5) The ground or grounds of respondent's refusal so far as known.

(b) The motion to compel discovery shall be served upon respondent and filed within 15 days after respondent first evidenced a refusal or failure to comply with Sections 372 and 372.1, or

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within 30 days after the discovery request was made and respondent has failed to reply to the request ~~or within another time stipulated by the parties with the approval of the Administrative Law Judge or the Appeals Board, whichever period is longer. The motion shall comply with Section 371(a) and (b).~~ The 30 days may be extended by the Administrative Law Judge or the Appeals Board on a showing of good cause.

(c) ~~The hearing on the motion to compel discovery shall be held within 15 days after the motion is made, or a later time that the Administrative Law Judge or the Appeals Board may, on its own motion for good cause determine. Respondent shall have the right to serve and file a written answer or other response to the motion within 15 days of the date of service of the motion to compel, before or at the time of hearing. The answer must comply with Section 371(a) and (b). The hearing may be conducted by telephone or other electronic means as provided in Government Code Section 11140.30. The parties may stipulate, with the approval of the Administrative Law Judge or the Appeals Board, to waive a hearing on the motion to compel discovery, provided that the stipulation provides a date by which respondent shall file its response and requires that the order on the motion shall issue within 30 days of the date the motion was filed. Prior to ruling on the motion, the Administrative Law Judge shall hold a conference with the parties, which may be telephonic, and based on the moving papers and affidavits submitted therewith, if any, rule on the motion to compel. This ruling shall be in writing, and may be in the form of a signed minutes of hearing, or an Order. This Order or minutes of hearing shall be issued by the Administrative Law Judge within 15 days of the date the discovery conference occurred.~~

(d) Where the matter sought to be discovered is under the custody or control of respondent and respondent asserts that the matter is not a discoverable matter under the provisions of Section 372.1(a) through (d), or is privileged against disclosure under (f), the Administrative Law Judge or the Appeals Board may order that the matter be lodged with it and examined in accordance with the provisions of subdivision (b) of Section 915 of the Evidence Code. The Administrative Law Judge or the Appeals Board shall decide the motion based upon the matters examined in camera, the papers filed by the parties, and such oral argument and additional evidence as the Administrative Law Judge or the Appeals Board may allow.

(e) ~~Unless otherwise stipulated by the parties with the approval of the Administrative Law Judge or the Appeals Board, the Administrative Law Judge or the Appeals Board shall, no later than 15 days after the hearing, issue a written order denying or granting the motion. The Administrative Law Judge or the Appeals Board shall promptly serve a copy of the order to each party or representative. Where the order grants the motion, in whole or in part, the order shall set forth the matters the moving party is entitled to discover under Sections 372 and 372.1. The~~

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~~order shall not become effective until 10 days after the date the order is served. Where the order denies the motion in its entirety, the order shall be effective on the date it is served.~~

NOTE: Authority cited: Sections 148.7, 149.5 and 6603(a), Labor Code. Reference: Section 11507.7, Government Code; and Sections 148.7, 149.5 and 6603(a), Labor Code.

372.8 Discovery Completion and Conference [SEE ALSO SECTION 374] [2]

(a) Except for cases subject to Section 373, all discovery requests and responses described and authorized by Sections 372 through 372.7 inclusive are subject to the follow requirements:

(1) All discovery shall be completed within 150 days of the date the appeal is docketed, including motions to compel discovery, responses thereto, and requests for discovery dispute proceedings. Evidence requested in compliance with these rules that was not provided timely or completely may not be offered into evidence by the party who, in violation of these rules, withheld the requested discovery. Evidence improperly withheld from production or disclosure in violation of these rules shall be admissible if offered into evidence by the party who requested but did not receive the evidence. The issues upon which the withheld evidence is relevant shall be resolved against the party improperly withholding the evidence.

(2) After 150 days from the date an appeal is docketed, additional discovery is available if ordered by an Administrative Law Judge during an in-person discovery conference. To request an in-person discovery conference, the requesting party must submit the following in writing:

(A) Facts demonstrating the requester's good faith effort to make and comply with requests for written documents and witness information attested to in a declaration;

(B) Specific statement of additional items needed;

(C) Statement of reasons why items listed in subsection (2)(b) were unable to be obtained timely under Sections 372 through 372.7;

(D) A statement that the parties met and conferred regarding the evidence requested, and the result of that effort to resolve these matters informally in that conference.

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(3) if an appeal contains no contested citations that are classified as either serious, willful or repeat, the in-person discovery conference may be held telephonically.

(4) All discovery conferences shall be concluded with the issuance of the minutes of hearing which may be prepared and served by the Administrative Law Judge or may be assigned to a party to prepare and submit to the Administrative Law Judge for review and service. A Minutes of Discovery Conference signed and issued by an Administrative Law Judge is an order of the Administrative Law Judge. Errors in the issued minutes must be identified in a writing submitted to the Appeals Board within 10 days of the issuance of the minutes.

(b) Within 30 days of the conclusion of discovery, a pre-hearing conference will be set for cases that have at least one citation classified as serious, repeat or willful.

(c) A party may request that a pre-hearing conference or a hearing be set in any case. A statement affirming the completion of discovery will accompany such request if it is submitted prior to 150 days from the date the appeal was docketed.

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

372.9 Discovery; exclusive provisions [2]

The provisions of Sections 372, 372.1, 372.2, 372.3 provide the exclusive right to and method of discovery as to any proceeding within the jurisdiction of the Appeals Board.

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

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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 ALJ 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 ALJ on a showing of good cause for the omission. Additional sanctions may be ordered as allowed in Section 381.

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(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.

(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 Pre-hearing 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 pre-hearing conference shall be held in person. The written statement of issues, witnesses and non-testimonial evidence shall be submitted to the ALJ at the pre-hearing 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 pre-hearing 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;

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(ii) Identify each issue remaining to be resolved, and the witnesses and non-testimonial evidence to be presented to resolve each remaining issue.

(iii) 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 pre-hearing 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 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) The judge who conducted the prehearing conference shall not be the ALJ who conducts the evidentiary hearing unless all parties waive the requirements of this subsection and agree to both proceedings being conducted by the same ALJ. The prehearing ALJ is the assigned ALJ until the Notice of Hearing is issued designating the hearing ALJ.

(g) The 180-day deadline contain 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.

376. Time and Place of Hearing [2]

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(f) When determining whether to set a case for pre-hearing conference, settlement conference, hearing, or other proceeding, cases with no citations classified as serious, repeat or willful may be scheduled in a manner different from other cases.

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

§376.1. Conduct of Hearing **[5]**

(a) Testimony shall be taken only on oath, affirmation, or penalty of perjury.

(b) Each party shall have these rights: To call and examine witnesses; to introduce exhibits; to question opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examinations; to impeach any witness regardless of which party first called the witness to testify; and to rebut any opposing evidence. If a party does not testify on his or her behalf, the party may be called and examined as if under cross-examination.

(c) The Appeals Board may call and examine a party or witness and may, on its own motion, admit any relevant and material evidence.

(d) The taking of evidence in a hearing shall be controlled by the Appeals Board in the manner best suited to ascertain the facts and safeguard the rights of the parties. Prior to taking evidence, the Appeals Board shall define the issues and explain the order in which evidence will be received.

(e) Once a hearing has commenced and until a decision is issued, all motions or questions regarding the proceeding shall be referred to the assigned Administrative Law Judge. If written, the motion shall be served in a manner as prescribed in Section 355.23 and 355.4 and proof of service meeting the requirements of ~~those Sections~~ ~~Section 355.2(e)~~ shall be filed with the Appeals Board. An opposing party may respond in the manner and within such time as the Administrative Law Judge may direct.

(f) Continuance requests shall be entertained at the hearing only in cases of: (1) unforeseen emergencies, including, but not limited to, death or illness of a party, witness, or representative, or (2) non-appearance of a subpoenaed witness whose testimony is material to the outcome of the proceeding or (3) good cause.

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Note: Authority cited: Sections 148.7 and 6603(a), Labor Code. Reference: Section 11513, Government Code; and Sections 148.7, 149.5 and 6603(a), Labor Code.

§376.4. Return of Exhibit **[1]**

(a) During the pendency of any proceeding, ~~no an exhibit filed or~~ received in evidence ~~shall~~ may be released into the custody of a party or representative ~~except~~ upon stipulation of all parties or upon order of the Appeals Board or the Administrative Law Judge conducting the hearing.

(b) ~~At any time after a proceeding becomes final, the Appeals Board may, upon request or on its own motion, with or without notice, return to the owner or proponent, all exhibits of a physical, mechanical, or demonstrative character, unless the parties stipulate to some other disposition. The owner or proponent shall bear the cost of return of the exhibit. The following types of exhibits shall be released to a party or participant by stipulation or order for safe-keeping until the legal process results in a final determination:~~

(1) Oversized documents that cannot be scanned into an electronic case file;

(2) Demonstrative evidence that cannot be scanned into an electronic case file;

(3) Any other evidence that at the discretion of the Administrative Law Judge who is holding the hearing and accepting an exhibit as evidence, or the Appeals Board, determines is inappropriate for repository in an electronic case file.

(c) If the parties, intervenors, obligors or their representatives stipulate, and the Administrative Law Judge conducting the hearing concurs, a photograph of evidence unsuitable for scanning into an electronic case file may be substituted for the actual exhibit. The photograph may then be scanned into the electronic case file with the other exhibits in place of the actual exhibit.

(d) At any time after a proceeding becomes final, the Appeals Board may upon request or upon its own motion issue an order releasing an exhibit that is held for safe-keeping by a party or participant to be returned to the owner or proponent of that exhibit.

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

§376.7 Hearing ~~Record~~-Recording **[3]**

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~~The Appeals Board shall make~~ (a) The official recording for hearings shall be made by one of the two following methods:

- (1) ~~The record shall be made~~ By the Appeals Board by means of an electronic device; or
- (2) ~~By a certified court reporter. A party desiring the presence of a court reporter must make its own arrangements.~~ arrange for the presence of a certified court reporter to record the entire hearing. The court reporter's transcript of the hearing may be designated as the official recording of the hearing. A copy of the transcript of the entire hearing shall be provided to the Appeals Board at no cost to the Appeals Board whether or not the hearing participants request that the hearing be transcribed. Any costs associated with the use of a court reporter shall be paid by the party requesting the court reporter or other arrangement by stipulation among all of the parties, intervenors, or obligors participating in the hearing. Whether a certified court reporter shall be used to create the official record of the proceedings shall be determined by the Administrative Law Judge conducting the hearing before commencement of the hearing.

(b) If the hearing was recorded by the Appeals Board and the hearing participants wish to have the hearing recording transcribed by a certified court reporter and have the transcript become the official record, the parties, intervenors, or obligors shall make arrangements with a certified court reporter to have the record transcribed. The transcript shall not be the official record of the hearing proceedings unless all parties stipulate that the hearing recording may be used as the official record and an Administrative Law Judge or the Appeals Board issues an order making the transcript the official record of the hearing. A copy of the transcript must be provided to the Appeals Board at no cost to the Appeals Board. Any costs associated with the use of a court reporter to transcribe a hearing recording shall be paid by the party requesting the transcript or other arrangement by stipulation among all of the hearing participants.

(c) Notwithstanding the provisions of (a) and (b), as required in Labor Code Section 6628, the Board shall be responsible to certify the record introduced to the reviewing court.

NOTE: Authority cited: Section 148.7, Labor Code. Reference: Sections 6608, 6620, 6621 and 6629, Labor Code.

376.8 Administrative Law Judge Preparation of Hearing Record [3]

The Appeals Board or the Administrative Law Judge appointed by the Appeals Board to hold a hearing shall create a hearing record as defined by Section 347, subsection (o) and shall:

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(a) Mark the face of each documentary exhibit with the following designations:

1. Division exhibits shall be consecutively marked with numbers beginning with the Number "1."
2. Employer's exhibits shall be consecutively marked letters beginning with the letter "A". If every letter of the alphabet is used, then the lettering shall continue with the designation "AA" throughout the remaining alphabet.
3. Third-party exhibits shall be labeled "Third-party – 1" and consecutively thereafter.
4. If the parties agree that an exhibit or exhibits are joint exhibits, then they shall be marked as "joint-exhibit-1" and consecutively thereafter.
5. Physical, mechanical or demonstrative evidence returned to a party for storage during the pendency of the litigation pursuant to Section 376.4 shall be identified in both the recorded and written hearing record pursuant following the instructions in 1 through 4 above.
6. Sealed or confidential exhibits shall be identified and labeled in the recorded and written hearing record pursuant to Section 376.9(d)(3) and subsection (1) through subsection (4) above, with the ALJ selecting identifying labels that do not reveal the confidential nature of the sealed or confidential document.
7. Documents may be redacted by the Administrative Law Judge to conceal confidential information that is not relevant to the issues being heard.

(b) At the conclusion of the hearing and closure of the record to further evidence, transmit the paper exhibits entered into evidence to the scanning technician who shall within two working days of receipt scan the exhibits into the "hearing record" portion of the electronic case file.

(c) Attach to the decision a summary of the entire evidentiary record labeled "Addendum A". Addendum A shall contain a list of all exhibits entered into evidence and the proponent of that evidence, the identity of witnesses testifying at the hearing, any exhibits that were offered as evidence and marked as an exhibit but were excluded from the evidentiary record, whether the hearing was electronically recorded or recorded by a certified court reporter and the following certification:

I, _____ ALJ Name _____, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hear the above-entitled matter, hereby certify the proceedings therein were electronically recorded or recorded by a certified court reporter. If the proceedings were recorded electronically, the recording was periodically monitored during the hearing. Either the electronic recording or the

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recording made by a certified court reporter constitutes the official record of the proceedings, along with the documentary and other evidence presented and received into evidence during or after the hearing. To the best of my knowledge the recording equipment, if utilized, was functioning normally and exhibits listed in this Appendix are true and correct, and accurately represent the evidence received during or after the hearing.

NOTE: Authority cited: Section 148.7, Labor Code. Reference: Sections 6608, 6620, 6621 and 6629, Labor Code.

376.9 Procedures for Order Sealing the Record

(a) This regulation applies to records sealed or proposed to be sealed by order of an Administrative Law Judge or the Appeals Board.

(1) This regulation does not apply to records that are required to be kept confidential by law, nor does it apply to discovery motions and records filed or lodged in connection with discovery motions or proceedings.

(b) The following definitions are used in this regulation:

(1) "Record." Unless the context indicates otherwise, "record" means all or a portion of any document, paper, exhibit, transcript, or other thing filed or lodged with the Appeals Board or any of its Administrative Law Judges.

(2) "Sealed." A "sealed" record is a record that by order of an Administrative Law Judge or the Appeals Board is not open to inspection by the public.

(3) "Lodged." A "lodged" record is a record that is temporarily placed or deposited with the Appeals Board, but not entered into evidence.

(c) A record must not be entered into evidence under seal without an order of an Administrative Law Judge or the Appeals Board.

(1) The Appeals Board or an Administrative Law Judge may order that a record be filed under seal only if it expressly finds facts that establish:

(A) There exists an overriding interest that overcomes the right of public access to the record;

(B) The overriding interest supports sealing the record;

(C) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed;

(D) The proposed sealing is narrowly tailored; and

(E) No less restrictive means exist to achieve the overriding interest.

(2) An order sealing the record must:

(A) Specifically state the facts that support the findings; and

(B) Direct the sealing of only those documents and pages, or, if reasonably practicable, portions of those documents and pages, that contain the material that needs to be placed under seal. The order sealing the record must be

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narrowly tailored. All other portions of each document or page must be included in the public file.

(b) A party requesting that a record be entered into evidence under seal must file or make a motion or an application for an order sealing the record. This motion or request may be made orally at a pre-hearing or hearing, or prior to the hearing pursuant to Section 371.

(1) The party requesting that a record be entered into evidence under seal must lodge the record when the motion or application is made, unless good cause exists for not lodging it. Pending the determination of the motion or application, the lodged record will be conditionally under seal. Documents so lodged will be clearly marked as "conditionally under seal."

(A) If necessary to prevent disclosure, any motion or application, any opposition, and any supporting documents must be entered into evidence in a public redacted version and lodged in a complete version conditionally under seal.

(B) Records lodged conditionally under seal shall not be subject to public disclosure.

(2) If the motion or application to seal is denied, any lodged documents will be returned to the submitting party.

(3) If the motion or application is granted, the sealed document will be scanned into OASIS in a portion of the file designated as confidential and not subject to public disclosure. If subsequently admitted into evidence by the Administrative Law Judge at the hearing, the evidence shall be electronically filed in a section of the electronic case file not subject to public disclosure.

(c) A record filed publicly in the Appeals Board must not disclose material contained in a record that is sealed, conditionally under seal, or subject to a pending motion or an application to seal.

(d) Sealed documents shall not otherwise be available for public inspection except by order of the Administrative Law Judge or the Appeals Board.

(1) A party or member of the public may move, apply, or petition, or an Administrative Law Judge or the Appeals Board on its own motion may move, to unseal a record. The unsealing of the record shall only be ordered on a showing of good cause.

(e) If an Administrative Law Judge or the Appeals Board proposes to order a record sealed or unsealed on its own motion, it must afford the parties sufficient notice prior to issuing such an order, and provide the parties a reasonable opportunity to respond and address the proposed order.

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

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378 Representation at Hearing **[5]**

(a) A party may appear in person or through a representative, who is not required to be an attorney at law. A representative shall file a written notice of representation with the Sacramento Office of the Appeals Board and serve a copy on all parties as required by Sections 335.3 and 335.4. ~~Service shall be in a manner prescribed in Section 355.2 and proof of such service meeting the requirements of Section 355.2(e) shall be filed with the Appeals Board.~~

(b) A representative of a party shall be deemed to control all matters respecting the interest of such party in the proceeding.

(c) An employee who is represented by an authorized employee representative may appear through such authorized employee representative.

(d) A representative may withdraw its representation of a party by filing a written notice of withdrawal with the Appeals Board and by serving a copy on all parties as required by Sections 335.3 and 335.4. ~~Service shall be in a manner as prescribed in Section 355.2 and proof of such service meeting the requirements of Section 355.2(e) shall be filed with the Appeals Board.~~

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

380 Briefs **[3][5]**

(a) ~~A motion for leave to submit a written post-hearing brief shall be made prior to the close of the hearing and shall be granted in the discretion of the Administrative Law Judge or the Appeals Board.~~ Either by motion for leave to file a post-hearing brief made by a party or at the request of the Administrative Law Judge, upon a determination that the brief will be productive and will not unreasonably delay the disposition of the proceeding, a post-hearing brief may be filed. Post-hearing briefs shall be filed simultaneously on a date certain ordered by the Administrative Law Judge. The Administrative Law Judge may alternatively order a different briefing schedule for the filing of post-hearing briefs. ~~A party shall file its brief within 15 working days from the date of the hearing. Opposing parties may file an answer within 10 working days from service of the brief. The Administrative Law Judge or the Appeals Board, upon a showing of good cause, may extend or reduce the above filing dates for submission of a brief.~~ Service on a party of the post-hearing brief shall be in a manner as prescribed in Section 355(e).3 and proof of such service meeting the requirements of Section 355(e).3 shall be filed with the

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~~Administrative Law Judge or the Appeals Board~~ post-hearing brief. The original brief shall be filed with the Appeals Board pursuant to Section 355.4 on or before the date specified by the Administrative Law Judge. An original brief shall be filed with the Appeals Board in Sacramento, with a copy provided to the administrative law judge assigned to the hearing.

(b) Post-hearing briefs shall be limited to 15 pages and consistent with provisions of Sections 355.5 and 335.6 related to preparation of documents, unless larger documents are allowed by order of the Administrative Law Judge.

(c) Post-hearing briefs shall contain reference to definitive authorities in support of a party's contentions made at the hearing.

(d) An Administrative Law Judge has the discretion to require pre-hearing briefs when it would assist the Administrative Law Judge and the parties in identifying or clarifying issues for the hearing or other issues arising before the hearing.

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

§383 Failure to Appear **[1][2]**

(a) If after service of a notice of hearing, ~~notice of consolidated hearing,~~ prehearing conference, settlement conference, continuance, status conference, or another event scheduled and duly noticed by the Appeals Board, a party fails to appear at ~~a hearing at the noticed event,~~ either ~~in person~~ personally or by representative, the Appeals Board may take the proceeding off calendar; may, after notice, dismiss the proceeding; or may receive evidence from any party that appears.

(b) Before dismissing the proceeding, the assigned Administrative Law Judge shall prepare and serve a notice of intent to dismiss the appeal or citation(s) allowing the non-appearing party ten days, or some other time-frame to be determined appropriate by the assigned Administrative Law Judge but not less than ten days, to show good cause for missing the noticed event.

(c) A showing of good cause shall contain sufficient facts to establish a reasonable basis for the failure to appear at the scheduled event.

(d) A party opposing the reinstatement of any proceeding based on the non-appearing party's showing of good cause may file a response no later than ten days from service of the reinstatement request.

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(e) The request for reinstatement filed in response to the Notice of Intent and the opposition to the reinstatement request, if any, shall be accompanied by a declaration containing a statement that any facts therein are based upon the personal knowledge of the declarant and declared under penalty of perjury.

(f) Service of the request for reinstatement and any response shall be accomplished as prescribed in Section 355.3 and proof of service meeting the requirements of Section 355.3, subsection (e) shall be filed with the Appeals Board as required in Section 355.4.

~~(b) Any proceeding may be reinstated by the Appeals Board if the non-appearing party files a written motion, no later than ten (10) days after receipt of notification of intent to dismiss, that contains sufficient facts to establish a reasonable basis for the failure to appear at the hearing. A party opposing the reinstatement of any proceeding may file a response no later than ten (10) days from service of the reinstatement request. The motion and response shall be accompanied by a declaration containing a statement that any facts therein are based upon the personal knowledge of the declarant. Service shall be in a manner as prescribed in Section 355(c) and proof of such service meeting the requirements of Section 355(e) shall be filed with the Appeals Board.~~

NOTE: Authority cited: Section 148.7, Labor Code. Reference: Sections 148.7, 149.5 and 6611, Labor Code.

391.1 Reconsideration

(a) A petition meeting all requirements of these regulations and the Labor Code shall be deemed filed on the date indicated on the proof of service. If there is no proof of service, the date of filing shall be the date of **hand** delivery to the Sacramento Office of the Appeals Board **or the mailing date.**

(b) A petition that is not properly verified upon oath and/or not accompanied by a proof of service shall be considered filed in accordance with subsection (a) if the petitioner perfects the petition by filing the verification and/or proof of service within five days of the date of service of a letter from the Appeals Board noting the omission(s).

(c) Failure to perfect a petition in accordance with Subsection (b) shall result in the dismissal of the petition.

§392 Proof of Service During Reconsideration Process **[5]**

A petition for reconsideration, supplemental petition, answer, and supplemental answer shall be served on all parties who have been joined in the proceeding at the time of filing. Service shall be in a manner as prescribed in Sections 355.2.3 and 355.4 and proof of such service

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meeting the requirements of Section 355.2~~(e)~~3 subsection (e) shall be filed with the Appeals Board, pursuant to Section 355.4.

NOTE: Authority cited: Section 148.7, Labor Code. Reference: Sections 148.7, 149.5, and 6619, Labor Code.

§392.4 Motions During Reconsideration Process **[5]**

(a) Any motion or request for action, any opposition thereto, and any reply relating to any proceeding under reconsideration by the Appeals Board shall be in writing and directed to the Appeals Board's Sacramento office. The caption of each motion, request, opposition or reply shall contain the title and docket or petition number of the proceeding and a clear and plain statement of the relief sought, together with the grounds therefor.

(b) Any motion or request, or opposition thereto, and any reply shall be signed by the party filing or by the party's representative, and a copy shall be served on all parties. Service shall be in the manner prescribed in Sections 355.2.3 and 355.4 and proof of service meeting the requirements of Section 355.3 subsection (e) shall be filed with the Appeals Board.

(c) Unless otherwise ordered, a motion or request may be served and filed at any time after reconsideration has been granted, but no later than 45 days before the date set forth in subsection (1) below:

(1) The Appeals Board shall notify the parties at least 90 days prior to the last day for making motions or requests relating to any proceeding under reconsideration.

(2) A motion or request shall be served and filed no later than 45 days before the date specified by the Appeals Board in 292.4(c)(1).

(3) Any opposition to such motion or request shall be served and filed no later than 30 days from service of the motion or request.

(4) Any reply papers shall be served and filed no later than 15 days from service of the opposition papers.

(d) A request to file a motion, request, opposition or reply later than the times specified in 392.4(c) may be granted in the Appeals Board's discretion if accompanied by a declaration showing good cause for the late filing.

Note: Authority cited: Section 148.7, Labor Code. Reference: Sections 6617 and 6620, Labor

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§392.5 Availability of Recording Media **[3]**

(a) The Appeals Board shall promptly provide a copy of the recording of the hearing to any requesting party upon receipt of a written request. The request may be made in person, by mail, ~~or by facsimile.~~ by email at the email address published on the Appeals Board's public internet site, or electronically through the Appeals Board's public internet site.

(b) ~~A party may request that the recording copy be sent via overnight delivery.~~ The person or entity making the request shall provide an email address where the recording of the hearing may be sent.

(c) If a requesting person or entity does not possess an email address or does not wish to receive a hearing recording by email, that person or entity may request that the recording be sent by alternate means. The requesting person or entity ~~party~~ shall bear the cost of reproduction and delivery if the request is for delivery by alternate means.

Note: Authority cited: Section 148.7, Labor Code. Reference: Sections 149.5, 6621 and 6629, Labor Code.