

~~§401. Location of Principal Office. (Repealed)~~

NOTE

Authority cited: Section 143.2, Labor Code. Reference: Section 143.2, Labor Code.

HISTORY

- ~~1. New Chapter 3.5 (Sections 401-427, not consecutive) filed 1-24-74 as an emergency; effective upon filing (Register 74, No. 4).~~
- ~~2. Certificate of Compliance filed 4-26-74 (Register 74, No. 17).~~
- ~~3. Repealer of Chapter 3.5 (Sections 401-427, not consecutive) and adoption of Chapter 3.5 (Sections 401-428, not consecutive) filed 5-31-74; effective thirtieth day thereafter (Register 74, No. 22).~~
- ~~4. Repealer of Chapter 3.5 (Sections 401-427, not consecutive) and adoption of Chapter 3.5 (Sections 401-428, not consecutive) refiled 6-7-74; effective thirtieth day thereafter (Register 74, No. 23).~~
- ~~5. Repealer filed 7-19-82; effective thirtieth day thereafter (Register 82, No. 30).~~
- ~~6. Amendment of subchapter heading filed 1-9-2003; operative 2-8-2003 (Register 2003, No. 2).~~

~~§402. Tenses, Gender and Number. (Repealed)~~

NOTE: Authority cited: Section 143.2, Labor Code. Reference: Section 143.2, Labor Code.

HISTORY

- ~~1. New NOTE filed 7-19-82; effective thirtieth day thereafter (Register 82, No. 30).~~
- ~~2. Repealer filed 10-22-82 by OAL pursuant to Government Code Section 11349.7(j) (Register 82, No. 43).~~
- ~~3. Editorial correction of printing error in History 1 (Register 94, No. 2).~~

401. Scope and Application of Rules

These rules of practice and procedure of the Occupational Safety and Health Standards Board shall govern all applications, hearings, appeals, motions and proceedings before the Standards Board and a hearing officer of the Standards Board pursuant to Labor Code sections 143, 143.1, 143.2, 146, 6455, 6456 and 6457.

§403. Definitions.

For the purpose of these rules:

(a) "Standards Board" or "Board" means the Occupational Safety and Health Standards Board; except that wherever the words "Standards Board" or "Board" alone are used, the power to act may be delegated by the Board and whenever the words "Board itself" are used, the power will be exercised by the Board acting through a quorum of its members;

(b) "Chairperson" means the member of the Standards Board designated by the Governor to hold the office of chairperson;

(c) "Docketed" means the Standards Board has acknowledged receipt of all information required under these regulations to initiate and perfect an application for permanent variance or appeal of a temporary variance as required by Labor Code ~~S~~sections 411 and 412.

(d) "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;

~~(e)~~ (e) "Hearing Officer" means any person appointed by the Standards Board to preside over any variance or appeal from a temporary variance hearing or to hear and determine any such matter within the jurisdiction of the Standards Board;

~~(d)~~ "Department" means the Department of Industrial Relations;

~~(e)(f)~~ "Division" Cal/OSHA means the Division of Occupational Safety and Health;

(f) "Appeals Board" means the Occupational Safety and Health Appeals Board;

(g) "Code" means the Labor Code;

(h) "Rule" means any section set forth in this subchapter adopted by the Standards Board;

~~(i) All terms which are defined in the code shall be construed as defined therein.~~

(j) "Representative" means any person, including an authorized employee representative, authorized by a party or intervenor to represent the party or intervenor in a proceeding. Unless the context otherwise requires the term "representative" is included in the words "appellant," "party," "petitioner," "employer" or "employee."

(h) "Authorized employee representative" means a labor organization which has a collective bargaining relationship with an 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 employees of the public agency.

(i) "Affected Employee" means an employee of the employer seeking the variance who is exposed, as a result of his/her their assigned duties, to the condition or hazards covered by the standard from which the variance is sought.

(m) "Proceeding" means any proceeding before the Standards Board or before a hearing officer relating to a permanent or interim variance or appeal from a temporary variance.

(k) “Employer” means (1) the State and every State agency; (2) each county, city, district and all public and quasi-public agencies therein; (3) every person, including any public service corporation which has any natural person in service; (4) any Conveyance Owner as defined in subsection (o); and (5) any employer who employs “affected employees” as defined by ~~Rule~~ subsection (l).

(l) “Conveyance Owner” means a person or entity that has custody of a conveyance covered by the Elevator Safety Orders, or that owns property on or in which such a conveyance is to be installed.

NOTE

Authority cited: Section 143.2, Labor Code. Reference: Sections 143 and 143.2, Labor Code.

§404. Computation of Time.

In computing the time within which any act must be performed, “days” shall refer to calendar days. The first day shall be excluded and the last day shall be included. If the last day is a Saturday, Sunday or holiday, the required act must be performed by the following Monday, or if that Monday is a holiday, by the next day that is not a holiday.

NOTE

Authority cited: Section 143.2, Labor Code. Reference: Sections 143 and 143.2, Labor Code; and Sections 12 and 12(a), Code of Civil Procedure.

§404.1. Late Filing.

Unless otherwise specified in the code, the time for filing any application, appeal, petition, answer, pleading, brief, or other document to the Standards Board may be extended or a late filing permitted upon a showing of good cause.

NOTE: Authority cited: Section 143.2, Labor Code. Reference: Sections 143.2 and 6455, Labor Code.

§405. Hearing Officers.

All hearings of the Standards Board relating to permanent or temporary variances shall be conducted by hearing officers or Administrative Law Judges on the staff of the Occupational Safety and Health Appeals Board or appointed by the Standards Board.

NOTE: Authority cited: Section 143.2, Labor Code. Reference: Section 143.2, Labor Code.

§405.1. Authority of Hearing Officers.

(a) Every hearing in a variance or appeal from a temporary variance proceeding shall be presided over by a hearing officer.

(b) When the Standards Board or a hearing panel hears the matter, the hearing officer shall preside at the hearing, rule on the admission and exclusion of evidence, and advise the Board or panel on matters of law; the Board or panel shall exercise all other powers relating to the conduct of the hearing but may delegate all or any of them to the hearing officer. When the hearing officer alone hears a matter, the hearing officer shall exercise all powers relating to the conduct of the hearing.

(c) A hearing officer or Standards Board member shall voluntarily recuse themselves ~~disqualify himself/herself~~ and withdraw from any case in which ~~he/she~~ they cannot accord a fair and impartial hearing or consideration.

NOTE

Authority cited: Section 143.2, Labor Code. Reference: Sections 143, 143.1, 143.2 and 6457, Labor Code.

§405.2. Standards Board Records Not Subject to Subpoena. (Repealed)

NOTE: Authority cited: Section 143.2, Labor Code. Reference: Section 143.2, Labor Code.

§406. Party Status.

(a) Affected employees and/or an authorized employee representative may elect to participate as parties at any time before the commencement of the hearing, unless, for good cause shown, the Standards Board allows such election at a later time.

(b) ~~The Division Cal/OSHA~~ shall be deemed a party to all variance proceedings before the board, whether or not the ~~division Cal/OSHA~~ has appeared or participated in the proceeding and shall be entitled to receive the same service and notice as any other party.

NOTE

Authority cited: Section 143.2, Labor Code. Reference: Sections 143.1, 143.2 and 147, Labor Code.

§406.1. Intervention; Appearance by Nonparties.

(a) A petition for leave to intervene may be filed at any stage of a proceeding before commencement of the hearing.

(b) The petition shall set forth the interest of the petitioner in the proceeding and show that the participation of the petitioner will assist in the determination of the issues and questions, and that the intervention will not unnecessarily delay the proceeding.

(c) The Standards Board may grant a petition for intervention to such an extent and upon such terms as the board shall determine.

(d) Any person whose petition for intervention has been granted shall be entitled to all notices to which parties are entitled.

NOTE: Authority cited: Section 143.2, Labor Code. Reference: Section 143.2, Labor Code.

407. Service and Notice.

NOTE

Authority cited: Section 143.2, Labor Code. Reference: Sections 143.1 and 143.2, Labor Code.

§407.1. Proof of Service by Parties.

NOTE

Authority cited: Section 143.2, Labor Code. Reference: Sections 143.1 and 143.2, Labor Code.

§407.2. Responsibilities of Employers to Notify Employees of Proceedings.

NOTE

Authority cited: Section 143.2, Labor Code. Reference: Sections 143.1 and 143.2, Labor Code.

§407.3. Responsibilities of Employees to Notify Employers and Other Employees of Proceedings.

NOTE

Authority cited: Section 143.2, Labor Code. Reference: Section 6455, Labor Code.

§411. Applications for Permanent Variances.

(a) Any Employer desiring a permanent variance from an occupational safety or health standard, regulation or order contained in California Code of Regulations, Title 8 shall file an ~~an written~~ application for a variance, submitted under penalty of perjury, with the Standards Board.

(b) The application may be filed by mail, email, or via the Standards Board's online variance information management system (VIMS). While not required, online filing is preferred once VIMS becomes operative. All documents submitted to the Standards Board via email or mail will be uploaded into VIMS, except for those documents lodged with the Standards Board for in camera inspection.

NOTE: See Rule 403(n) for definition of Employer.

~~(b)-(c)~~One application for variance shall be submitted and shall include:

- (1) The name and address of the Employer;
- (2) The address(es) where the variance will be in effect;
- (3) A description of the conditions, practices, means, methods, operations, or processes used or proposed to be used by the Employer to provide health and safety equal or superior to that provided by the regulations;
- (4) A statement showing how the conditions, practices, means, methods, operations, or processes used or proposed to be used would provide health and safety equal or superior to that provided by the regulation from which a variance is sought;
- (5) A certification that the Employer will comply with the notification and posting requirements contained in ~~Rules~~ subsections 411.2 and 411.3 below;
- (6) A specification of the ~~Title~~ title 8 regulation from which the permanent variance is sought, including the appropriate subsections, if applicable;
- (7) A statement of whether or not an appeal has been filed or is pending with the Occupational Safety and Health Appeals Board relative to the same safety order, including the Occupational Safety and Health Appeals Board docket number; and
- (8) ~~A statement estimating the number of witnesses to be called by the Employer at the hearing and of the amount of time the Employer will require to present its case at the hearing; and~~
- (9) One copy of any photographs, blueprints or other illustrative materials submitted to document or clarify the application; 2

(c) Variance applications related to the elevator safety orders must also include:

- (1) number of conveyances;
- (2) number of landings; and
- (3) the type of development.

Note: Authority cited: Section 143.2, Labor Code. Reference: Sections 143, 143.1, 143.2 and 146, Labor Code.

§411.1. Denial of Defective Application for Permanent Variance.

An application for permanent variance that fails to comply with section ~~rule~~ 411 shall not be docketed or considered by the Board. Employers shall be advised of the application's defective areas and requested to correct or resubmit the application ~~in accordance with the Board Rules~~. Failure to correct or resubmit the application ~~in accordance with the Board Rules~~ within 60 days shall result in automatic denial of the application. A denial of the application pursuant to this subsection ~~Rule~~ shall be without prejudice to the filing of another application.

NOTE

Authority cited: Section 143.2, Labor Code. Reference: Section 143.2, Labor Code.

§411.2. Compliance with Notification and Posting Requirements Regarding Variance Proceedings and Temporary Variance Appeals.

The notification and posting requirements contained in ~~§~~sections 411.3 and 412.2 shall be satisfied as follows:

- (a) Notification to a party who has appeared through a representative shall be made through such representative. Notification to an authorized employee representative shall be in addition to providing notice to the affected employees.
- (b) Unless otherwise ~~ordered~~ requested by a party, notification may be provided by electronic methods. ~~Alternatively, a party may select first-class postage prepaid first class mail or by personal delivery.~~ Notification by first-class mail is deemed effective at the time of mailing ~~or personal delivery~~.
- (c) Proof of notification or posting by parties may be made by any of the following means:
 - (1) Affidavit of service;
 - (2) Written statement endorsed upon the document served and signed by the party making the statement; or
 - (3) Letter of transmittal.
- (d) Proof of notification or posting shall be submitted to the Board no later than the second working day following the posting or notification.

NOTE

Authority cited: Sections 143.2 and 6457, Labor Code. Reference: Sections 143, 143.2 and 6457, Labor Code.

§411.3. Employer Posting and Notification Responsibilities.

Regarding Variance Proceedings and Temporary Variance Appeals.

- (a) Employers shall post a copy of the following documents at the place(s) where notices to employees are usually posted. In lieu of posting, Conveyance Owners shall immediately provide copies of these documents to the building maintenance provider and to the maintenance provider for the conveyance.
 - (1) The docketed variance application or temporary variance appeal, or a statement giving a summary of the application or appeal that specifies where a copy may be examined. This posting shall occur immediately upon the Employer's receipt of the notice indicating that the variance application or appeal has been docketed.
 - (2) A notice contained in the application, or provided as a separate document but posted simultaneously with the application, informing affected employees of their right to:

- (A) party status and to participate in the variance proceedings;
 - (B) inspect and copy all pleadings at a reasonable time; and
 - (C) petition the Standards Board for a hearing.
- (3) A copy of the notice of hearing, which shall be posted immediately upon its receipt.

Exception: If the variance or appeal pertains to an elevator, escalator or other conveyance covered by the Elevator Safety Orders that is in a building that is under construction or otherwise unoccupied, and neither a maintenance provider for the conveyance nor a building maintenance provider has been retained or designated, the Conveyance Owner shall attest to these facts in its application. If a conveyance maintenance and/or building maintenance provider is retained or designated after the variance or appeal is requested, but before a hearing is held, the Conveyance Owner shall immediately comply with this section and shall inform the Board, in writing, of the actions taken to comply.

(b) In addition to complying with subsection (a), Employers shall provide any authorized employee representative with the following documents immediately upon their receipt:

- (1) a copy of the docketed variance application or temporary variance appeal;
- (2) a copy of the notice set forth in (a)(2);
- (3) a copy of the notice of hearing.

(c) Where posting is required, such posting shall be maintained until the commencement of the hearing or until earlier disposition of the variance request or appeal.

NOTE

Authority cited: Sections 143.2 and 6457, Labor Code. Reference: Sections 143, 143.2 and 6457, Labor Code.

§411.4. Notice of Denial of Interim Variance.

NOTE

Authority cited: Section 143.2, Labor Code. Reference: Section 143.2, Labor Code.

§412. Appeals from Temporary Variances.

(a) Any employer or other persons adversely affected by the granting or denial of a temporary variance by the Division Cal/OSHA may appeal the ~~Division's~~ decision to the Board.

(b) Such appeal from a temporary variance shall be in writing and shall include:

- (1) The name and address of the appellant;
- (2) The address of the place or places of employment involved;

(3) A specification of the temporary variance in question and of the standard or portion thereof from which the variance was allowed or denied and the grounds upon which it is based; and

(4) A statement of facts which shows that the appellant is either the affected employer or is a person adversely affected by the granting or denial of the temporary variance.

NOTE: Authority cited: Section 143.2, Labor Code. Reference: Section 6455, Labor Code.

§412.1. Correction of Defective Appeal from a Temporary Variance.

If any variance appeal fails to state the grounds upon which it is based, the appellant shall be notified ~~that it does not comply with the Standards Board rules and shall be granted fifteen days after the date of service mailing of such notice within which to file an amended appeal.~~ If within the time permitted the appellant fails to amend the appeal to conform with rule the requirements of section 412 the appeal shall be dismissed.

NOTE: Authority cited: Section 143.2, Labor Code. Reference: Section 143.2, Labor Code.

§412.2. Notification Requirements for Employees Appealing Temporary Variances.

(a) Where an affected employee or an authorized employee representative appeals the granting or denial of a temporary variance, the employee or representative shall provide the Employer with a copy of the appeal for posting in the manner prescribed in Rule section 411.3.

(b) An authorized employee representative who appeals the granting or denial of a temporary variance shall be responsible for serving any other authorized employee representative whose members are affected employees.

NOTE

Authority cited: Sections 143.2 and 6457, Labor Code. Reference: Sections 143, 143.2 and 6457, Labor Code.

§415. Referral of Variance Applications and Temporary Variance Appeals to ~~the Division~~ Cal/OSHA.

(a) Applications for variances and appeals from temporary variances relating to occupational safety and health standards filed with the Board in proper form will be promptly referred to Cal/OSHA ~~the Division~~ for evaluation.

(b) Hearings on applications for variances and appeals will be scheduled so ~~that the Division~~ Cal/OSHA's evaluation report will be available for presentation at the hearing.

NOTE

Authority cited: Section 143.2, Labor Code. Reference: Section 147, Labor Code.

§416. Publication of Variance Applications. (Repealed)

NOTE: Authority cited: Section 143.2, Labor Code. Reference: Section 143.1, Labor Code.

§417. Assignment to Hearing Panels.

(a) The chairperson may assign variance proceedings before the board to a hearing panel consisting of one or more Standards Board members for hearing and preparation of a proposed decision in such form that it may be adopted as the decision in the case. ~~Assignments by the chairperson of members on such hearing panels shall be rotated among the members with the composition of the members so assigned being varied and changed to assure that there shall never be a fixed and continued composition of members.~~

(b) A variance proceeding shall be heard and decided by the Standards Board itself at the request of any two members of the Standards Board, or the Board chairperson.

NOTE: Authority cited: Section 143.2, Labor Code. Reference: Section 143.2, Labor Code.

§417.1. Objection to Hearing Panel or Hearing Officer or Board Member.

(a) Any party may request, ~~in writing,~~ that a variance proceeding be heard by the Board itself rather than by a hearing panel. Such a request must be accompanied by a showing of good cause and may be granted or denied at the discretion of the chairperson. The request must be made prior to, or upon receipt of, the notice of hearing and at least ten working days prior to the scheduled hearing date. Failure to provide a timely request will be sufficient grounds for denying the request. The hearing shall not be held until a determination is made on the party's request.

(b) Disqualification of Hearing Officer or Standards Board Member.

(1) Any party may request the disqualification of any hearing officer and/or Standards Board member by filing an affidavit, at least ten working days prior to the scheduled hearing date, stating with particularity the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded.

(2) The name of the hearing officer and the hearing panel members shall be included in the notice of hearing served on all parties. If any change is made to the hearing panel and/or hearing officer assignments subsequent to service of the notice of hearing, the parties, whenever possible, shall be notified of such changes. ~~If the parties are notified of such changes less than ten working days before the scheduled hearing, a party wishing to request a disqualification must make the request as soon as it learns of the new assignment(s). Under such circumstances, the request initially may be made orally, including by telephone, and shall be made to the board before the hearing is convened whenever possible. The request shall then be submitted in writing, in accordance with subsection (b)(1), as soon as~~

~~possible, and no later than ten working days after the oral request is made. If the request to change the hearing panel and/or hearing officer assignments cannot be made prior to the beginning of the hearing because the parties were not notified of such assignments, or not notified in a timely manner, the request shall be made prior to the taking of evidence at the hearing. If an oral request is made on the record at the hearing and is fully explained at that time, a written request need not be submitted.~~

(3) The request to disqualify the hearing officer and/or a Standards Board member shall be determined by the Standards Board. In the case of a request to disqualify a Standards Board member, the individual member named in the request shall not participate in the disqualification decision ~~pertaining to him or her.~~

(4) If a request to disqualify is made prior to the hearing being convened, the hearing shall not begin until a determination has been made on the party's request. If a party is unable to make its request prior to the convening of the hearing because it was not timely notified of the hearing panel and/or hearing officer assignments, the hearing will be held for the sole purpose of allowing the party to state its request on the record. The remainder of the hearing will be postponed until a determination on the request has been made.

(5) Failure to make a request to disqualify in accordance with the time specifications in this subsection is sufficient grounds for denying the request.

NOTE

Authority cited: Section 143.2, Labor Code. Reference: Sections 143 and 143.2, Labor Code.

§417.2. Merger of Successive Variance Applications or Appeals.

If, at the time any variance application or appeal is filed, one or more prior applications or appeals by or involving the same employer and involving the same or similar issues have not been decided by the board or a hearing officer, such prior applications or appeals may, upon notice to the parties, be consolidated into one hearing ~~deemed merged into the last application or appeal filed~~, and the Standards Board may issue a single decision.

NOTE: Authority cited: Section 143.2, Labor Code. Reference: Section 143.2, Labor Code.

§417.4. Dismissal of Late Appeals.

If any appeal is not filed within the time permitted by the Labor Code or these rules-regulations, the board shall issue a decision dismissing the appeal unless the appellant shows good cause for late filing. If good cause is shown, the appeal shall be decided on the merits.

NOTE: Authority cited: Section 143.2, Labor Code. Reference: Sections 143.2 and 6455, Labor Code.

§417.5. Dismissal of Variance Applications.

If an Employer fails to pursue its variance application after the application is docketed, or causes significant delay in the processing of its application, the Board will provide the Employer with written notice of the Board's intent to dismiss the application. Unless the Employer responds to the notice within 30 days from the date of service, and subsequently assists in the processing of the variance application, the Board may dismiss the application without prejudice.

Note: Authority cited: Section 143.2, Labor Code. Reference: Sections 143 and 143.2, Labor Code.

§418. Pre-Hearing Requests for Action.

All requests for action by the Standards Board relating to any proceeding pending before the Board shall be made in writing and directed to the hearing officer assigned to the matter, or to the Chief Counsel ~~executive officer~~ if a hearing officer has not been assigned. Each written request shall contain the variance docket number and shall indicate the type of relief sought. ~~If a hearing officer has been assigned, the hearing officer may resolve such requests without the Board's involvement.~~

Note: Authority cited: Section 143.2, Labor Code. Reference: Sections 143 and 143.2, Labor Code.

§419. Consolidation of Proceedings.

Any number of proceedings may be consolidated for hearing or decision when the facts and circumstances are similar and no substantial right of any party will be prejudiced.

NOTE: Authority cited: Section 143.2, Labor Code. Reference: Section 143.2, Labor Code.

§420. Prehearing Conference.

(a) At any time before a hearing, the Standards Board or the hearing officer may, on its own initiative, or at the request of a party, direct the parties or their representatives to exchange information or to participate in a pre-hearing conference for the purpose of considering matters which will tend to simplify the issues or expedite the proceedings. ~~If a hearing officer has been assigned, the hearing officer may resolve such requests without the Board's involvement.~~

(b) The Standards Board or the hearing officer may issue a prehearing order which includes the agreements reached by the parties. Such order shall be served on all parties and shall be a part of the record.

NOTE

Authority cited: Section 143.2, Labor Code. Reference: Sections 143 and 143.2, Labor Code.

§421. Time and Place of Hearing.

~~(a) Variance appeals from temporary variances shall be given scheduling priority over variance applications.~~

(b) Applications for variances shall be scheduled for hearing as soon as practicable after receipt.

(b) A hearing may be conducted by videoconference as provided in Government Code section 11440.30 of the Administrative Procedure Act, if each participant in the hearing has an opportunity to participate in and to hear the entire proceeding while it is taking place, to observe the exhibits, and to observe the hearing participants to the extent feasible.

~~(c) Except as hereinafter provided, the Standards Board may set the time and place of hearing at its principal office or at another location designated by the Board that is more convenient for the applicant.~~

~~(d) Where, because of the distance involved or for other reasons, it is impractical for parties and their witnesses to appear at the same place of hearing, a videoconference hearing may be scheduled.~~

(c) For each hearing, the Standards Board shall determine, and include in any notice of hearing, the following information: the date(s) and time(s) of hearing; the format for conducting the hearing, whether in-person, by videoconference, teleconference, or combination thereof; the name of the hearing officer and any hearing panel members, as required by section 417; information on requesting an interpreter, as required by section 423; and the physical location of the hearing if the hearing includes an in-person format. If a videoconference hearing is selected, the notice of hearing shall provide instruction on how to participate in the videoconference, including the web link or other pertinent information.

NOTE

Authority cited: Section 143.2, Labor Code. Reference: Sections 143.2, 147 and 6457, Labor Code.

HISTORY

1. Amendment filed 7-19-82; effective thirtieth day thereafter (Register 82, No. 30).
2. Amendment of subsections (c) and (d) filed 6-26-2003; operative 7-26-2003 (Register 2003, No. 26).

§422. Witnesses and Subpoenas.

(a) A party shall arrange for the presence of his/her witnesses at a hearing in a variance proceeding.

(b) A subpoena may be issued by the Standards Board or a hearing officer on the Board's or hearing officer's own motion.

(c) A subpoena to compel the attendance of a witness shall be issued by the hearing officer upon request made by a party and a showing of the need therefor.

(d) An application for subpoena duces tecum for the production by a witness of books, papers, correspondence, memoranda, or other records, including records of Cal/OSHA ~~the Division~~, shall be made by affidavit to the hearing officer and shall give the name and address of the person to be subpoenaed, shall describe the matters or things desired to be produced and show the materiality

thereof to the issues involved in the proceeding and that, to the best of the applicant's knowledge, the witness has such matters or things in ~~his/her~~ their possession or under ~~his/her~~ their control.

(e) If the hearing officer finds that the affidavit is complete and supports the application for the subpoena duces tecum, the hearing officer shall issue the requested subpoena.

(f) Each party shall arrange for the service of all subpoenas, including subpoenas duces tecum, issued to the party. A copy of the affidavit for subpoenas duces tecum shall be served with such subpoena.

NOTE

Authority cited: Section 143.2, Labor Code; and Section 11400.20, Government Code. Reference: Sections 143.2 and 6457, Labor Code; and Section 11450.20, Government Code.

§ 422.1. Confidential Evidence.

(a) Any exhibit or evidence that contains, or that might reveal, a trade secret as defined in Civil Code Section 3426.1 shall be considered confidential. The Board shall take such appropriate action that is within its control to protect the confidentiality of trade secrets.

Credits

Note: Authority cited: Section 143.2, Labor Code; and Section 6254(k), Government Code. Reference: Sections 143.2 and 6457, Labor Code.

§423. Conduct of Hearing.

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

(b) Each party shall have these rights: To call and examine parties and witnesses; to introduce exhibits; to question opposing witnesses and parties on any matter relevant to the issues even though that matter was not covered in the direct examination; to impeach any witness regardless of which party first called ~~them~~ him/her to testify; and to rebut ~~the evidence against him/her~~.

(c) The Standards Board members or hearing officer may question any party or witness and may admit any relevant and material evidence.

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

(e) The hearing shall be conducted in the English language. On the notice of hearing the Board shall notify each party of the right to an interpreter. A party or a party's witness who does not proficiently speak the English language shall be provided an interpreter if a request for language assistance is provided to the Board at least ten working days prior to the date of the hearing. A party may provide its own interpreter, if the interpreter is approved by the hearing officer as proficient in the English language and the language in which the witness will testify. ~~The hearing officer shall approve any person whose~~

~~name appears on the current list of interpreters published by the State Personnel Board.~~ The interpreter shall not have any involvement in the issues of the case prior to the hearing.

(f) The cost of the interpreter shall be paid by the Standards Board if the hearing officer so directs, otherwise by the party requiring the interpreter. This determination shall be made consistent with Government Code Section 11435.25(b).

NOTE

Authority cited: Section 143.2, Labor Code; and Section 11400.20, Government Code. Reference: Sections 143.2 and 6457, Labor Code; and Sections 11425.10, 11435.15, 11435.20, 11435.25, 11435.30, 11435.55, 11435.60 and 11435.65, Government Code.

§424. Evidence Rules.

The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. Hearsay evidence may be used for purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. The rules of privilege shall be effective to the extent that they are otherwise required by statute to be recognized at the hearing, and irrelevant and unduly repetitious evidence shall be excluded.

NOTE: Authority cited: Section 143.2, Labor Code. Reference: Sections 146 and 6457, Labor Code.

§424.1. Official and Judicial Notice.

(a) In reaching a decision, official notice may be taken, either before or after submission of the case for decision, of any generally accepted technical or scientific matter within the field of occupational safety and health, and determinations, rulings, orders, findings and decisions, required by law to be made by Cal/OSHA the Division, the Appeals and the Standards Board.

(b) The Standards Board shall take official notice of those matters set forth in sSections 451 and 452 of the Evidence Code.

(c) Each party shall be given reasonable opportunity to present information relevant to (1) the propriety of taking official notice, and (2) the tenor of matters to be noticed.

NOTE

Authority cited: Section 143.2, Labor Code. Reference: Sections 451 and 452, Evidence Code; and Sections 143.2 and 6457, Labor Code.

§424.2. Continuance of Hearings and Further Hearings.

(a) The Standards Board may continue a hearing to another time or place on its own motion or may order further hearing on a matter at any time prior to the issuance of the Board's decision. Written notice of the time and place of the continued hearing shall be in accordance with ~~Rule~~ section 411.2.

(b) Any party may request a continuance or further hearing, but such requests are disfavored and shall only be granted upon a clear showing of good cause. The parties are expected to submit for decision all matters in controversy and all necessary evidence at a single hearing.

NOTE

Authority cited: Section 143.2, Labor Code. Reference: Sections 143.2 and 6457, Labor Code.

§424.3. Representation at Hearing.

(a) Employers must attend the variance hearing, either in person or through a representative. The representative does not need to be an attorney-at-law.

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

(c) Affected employees who are represented by an authorized employee representative may appear through such authorized employee representative.

(d) Withdrawal of appearance of any representative may be effected by filing a written notice of withdrawal with the Board.

(e) The Standards Board or hearing officer may refuse to allow any person to represent a party in any hearing when such person engages in unethical conduct or intentionally fails to observe the provisions of the code, proper instructions or orders of the Standards Board or these rules.

NOTE

Authority cited: Section 143.2, Labor Code. Reference: Sections 143, 143.1, 143.2, 146 and 6457, Labor Code.

§424.4. Exclusion of Witnesses.

Upon a demonstration of good cause by any party, the Standards Board, in its discretion, may exclude from the hearing room any witnesses not under examination at this time; but a party to the proceeding, and the party's counsel or representative cannot be excluded.

NOTE

Authority cited: Section 143.2, Labor Code. Reference: Sections 143.2 and 6457, Labor Code.

§424.5. Oral Arguments and Briefs.

NOTE

Authority cited: Section 143.2, Labor Code. Reference: Sections 143.2 and 6457, Labor Code.

§425. Judicial Enforcement.

(a) If any witness refuses to attend or testify or produce any papers required by a subpoena issued by the Standards Board, any party may file with the Board a petition for judicial enforcement. The petition shall be verified and shall set forth that due notice of time and place of attendance of the person or the production of the papers has been given, that the person has been subpoenaed in the manner prescribed by law or these rules and that he/she has failed and refused to attend or produce the papers required by subpoena before the officer in the case or proceeding named in the subpoena, or has refused to answer questions propounded to him/her in the course of the hearing.

(b) If the Standards Board determines that judicial enforcement is appropriate it will petition the superior court in the county in which the hearing is pending for an order compelling the person to attend and testify or produce the papers pursuant to Government Code Sections 11186 through 11188, inclusive.

NOTE: Authority cited: Section 143.2, Labor Code. Reference: Sections 143.2 and 6457, Labor Code; and Sections 11186-11188, Government Code.

§425.1. Witness Fees.

Witnesses subpoenaed for any hearing are entitled to fees and mileage as set forth in Sections 11450.40 and 68093 of the Government Code.

NOTE

Authority cited: Section 143.2, Labor Code; and Section 11400.20, Government Code. Reference: Sections 143.2 and 6457, Labor Code; and Sections 11450.40 and 68093, Government Code.

§425.2. Default.

(a) Where it appears on record that a party was served with notice of hearing, but fails to appear at such hearing, either in person or by representative, the Standards Board may take the proceeding off calendar; may, after notice, dismiss the proceeding; or may hear the evidence from any party that attends the hearing and, after notice, make such decision as is just and proper.

(b) Any proceeding may be reinstated by the Board, at its discretion, if a non-appearing Employer submits to the Board, in writing, a reasonable explanation for the Employer's failure to appear at the

hearing. The explanation must be submitted within ten days after service of the notification of intent to dismiss.

NOTE

Authority cited: Section 143.2, Labor Code. Reference: Sections 143.2 and 6457, Labor Code.

§426. Decision; Action on Proposed Decision.

(a) A variance hearing may be held before the Standards Board itself, a hearing panel or a hearing officer. If a proceeding is heard before the Standards Board itself or a hearing panel, the hearing officer, if requested, shall assist and advise them. Where a proceeding is heard before the Standards Board itself, no member of the Board who did not hear the evidence shall vote on the decision.

(b) If a proceeding is heard by a hearing panel or a hearing officer, the panel or hearing officer shall prepare a proposed decision in such form that it may be adopted by the Board as the decision in the proceeding. The proposed decision shall be a public record and a copy of the proposed decision shall be served by the Standards Board on each party. The Board may adopt the proposed decision or decide the case itself as provided in subdivision (c) below.

(c) If the proposed decision is not adopted as provided in subdivision (b), the Standards Board itself may decide the case upon the record, with or without taking additional evidence, or may refer the case to a hearing panel or hearing officer to take additional evidence.

(1) If the case is assigned to a hearing panel or hearing officer, the hearing panel or hearing officer shall prepare a proposed decision as provided in subdivision (b) based on the additional evidence and the record of the prior hearing. A copy of the proposed decision shall be furnished to each party as prescribed in subdivision (b).

(2) If the case is heard by the Standards Board itself, and the Board chooses to take additional evidence, the parties shall be afforded the opportunity to present either oral or written argument before the Board itself. If additional oral evidence is introduced before the Board itself, no Board member may vote unless the member heard the additional oral evidence.

NOTE

Authority cited: Section 143.2, Labor Code; and Section 11400.20, Government Code. Reference: Sections 143, 143.2 and 6457, Labor Code; and 11425.10, Government Code.

§426.1. Form of Decision.

(a) The decision shall be in writing and shall contain findings of fact, the reasons for decision, and the decision. A copy of the decision shall be mailed to or served on each party or his/her representative.

(b) Any decision in a variance proceeding may be made subject to any reasonable conditions.

(c) After a decision or proposed decision has been mailed or served it shall not be changed except to correct clerical errors, in which case a corrected decision or proposed decision shall be prepared and mailed or served.

NOTE: Authority cited: Section 143.2, Labor Code. Reference: Sections 143, 143.2, 146 and 6457, Labor Code.

§426.2. Notice of the Granting of a Permanent Variance or Variance Appeal. (Repealed)

NOTE: Authority cited: Section 143.2, Labor Code. Reference: Sections 143, 143.2 and 6457, Labor Code.

§427. Petitions for Re-Hearing.

(a) Petition for re-hearing may be filed by any party with the Standards Board within twenty (20) days after service of the decision upon the following grounds and no other:

- (1) that the Standards Board acted without or in excess of its power;
- (2) that the decision was not supported by substantial evidence; or,
- (3) that the decision was contrary to law.

(b) Failure to file a petition for re-hearing within twenty days shall constitute valid grounds for denying the petition.

Note: Authority cited: Section 143.2, Labor Code. Reference: Sections 143.1, 143.2 and 6457, Labor Code.

§427.1. Form of Petition for Re-Hearing.

(a) The petition for re-hearing shall state in detail the factual or legal basis for granting the petition for re-hearing.

(b) The petition for re-hearing shall be denied if it only ~~states~~ is stated the permissible grounds for re-hearing contained in Rule 427 is stated, unsupported by specific references to the record and an explanation of the petitioner's position.

NOTE

Authority cited: Section 143.2, Labor Code. Reference: Sections 143.1, 143.2 and 6457, Labor Code.

§427.2. Proof of Service for Petition for Re-Hearing.

The Board shall serve copies of the petition for re-hearing on all parties and interveners who have joined in the proceeding at the time that the petition is filed with the Standards Board.

NOTE

Authority cited: Section 143.2, Labor Code. Reference: Sections 143.1, 143.2 and 6457, Labor Code.

§427.3. Re-Hearing.

- (a) If a petition for re-hearing is submitted to the Board in a timely fashion, the Board may;
 - (1) grant the petition;
 - (2) affirm the Board initial decision on the variance;
 - (3) take no action on the petition, in which case it is deemed denied 30 days after receipt by the Board; or
 - (4) deny the petition and explain its basis for doing so.
- (b) If the Board acts under subsection (a)(3), the Board shall notify the Employer of the denial after the 30 days have passed.
- (c) If a re-hearing is granted, the Board may review the petition itself, or refer it to a hearing panel or hearing officer.
- (d) The re-hearing may be based on the existing record, or the Board, hearing panel or hearing officer that hears the matter may request that additional testimony and/or written evidence be submitted.
 - (1) If further hearing is ordered, the Board shall issue a notice of hearing, and the Employer shall comply with the notification requirements contained in Rules 411.2(a)(3) and (b)(3).
 - (2) If the decision is to be based on the existing record, the Board may decide the matter without notice and without affording the parties further opportunity to testify or submit information.

NOTE

Authority cited: Section 143.2, Labor Code. Reference: Sections 143.1, 143.2 and 6457, Labor Code.

§427.4. Decision on Petition for Re-Hearing.

A decision issued on a re-hearing petition, shall be in the same manner and form as prescribed in Rule 426.1.

NOTE

Authority cited: Section 143.2, Labor Code. Reference: Sections 143.1, 143.2 and 6457, Labor Code.

HISTORY

1. New NOTE filed 7-19-82; effective thirtieth day thereafter (Register 82, No. 30).

2. Amendment filed 6-26-2003; operative 7-26-2003 (Register 2003, No. 26).

§428. Modifications to a Permanent Variance.

(a) A variance is valid only for the Employer to whom it is issued and only for the locations specified in the variance. If an Employer transfers ownership of the business to a different entity, the variance does not transfer to the new Employer.

(b) An Employer must seek to modify a variance if:

- (1) the Employer wants to change the terms or conditions of an existing variance;
- (2) the Employer wants to acquire the variance from the Employer to whom it was issued; or
- (3) the Employer wants to add to or change the locations listed in the existing variance.

(c) Employers seeking to modify a permanent variance must comply with Rules 411-411.2 and must include the docket number of the variance to be modified in the application. An Employer may satisfy 411(b)(3) and (4) by stating that it will comply with the conditions contained in the existing permanent variance that is subject to modification.

Note: Authority cited: Section 143.2, Labor Code. Reference: Sections 143(d), 143.2 and 6457, Labor Code.