

# Risk Management Bulletin

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## Overview of Appeal Process

*[Note: This overview is intended to provide general information about presenting an appeal before the Occupational Safety and Health Appeals Board. It is not intended as a substitute for legal or other expert advice regarding a specific appeal. The information may be rendered inaccurate due to changes in the law. If you have a question concerning any part of the appeal process, please call or write the board.]*

The federal Occupational Safety and Health Act of 1970 permits a state to manage its own occupational safety and health program if it meets certain requirements. The California Occupational Safety and Health Act was enacted in 1973 to ensure safe and healthful working conditions for California workers. California has been approved as a “state plan” state. As such, Cal/OSHA is monitored by the United States Department of Labor and receives part of its funding from the federal government. The Cal/OSHA program is within the California Department of Industrial Relations.

### THE CAL/OSHA PROGRAM CONSISTS OF FOUR INDEPENDENT UNITS:

1. The Occupational Safety and Health Standards Board (standards board) adopts, amends, or repeals occupational safety and health standards and acts on applications for permanent variances from these standards;
2. The Division of Occupational Safety and Health (DOSH or division) enforces the occupational safety and health standards by issuing citations, orders, and notices; by proposing civil penalties; and by specifying the abatement changes that must be made to correct an unsafe condition;
3. The Occupational Safety and Health Appeals Board (appeals board) hears appeals from citations and orders issued by DOSH; and
4. The DOSH Consultation Service provides free on-site consultations to employers as well as advice and information regarding occupational safety and health to employers and employee groups.



### 2015 Heat Illness Prevention Program Regulation Amendments

*On February 19, 2015, the Occupational Safety and Health Standards Board approved proposed amendments of Title 8, CCR § 3395, “Heat Illness Prevention.” The amendments became effective and enforceable on May 1, 2015. (A link to the full text of the amended standard is set forth below.)*

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## THE APPEALS BOARD

The appeals board consists of three members appointed by the governor for staggered four-year terms. By statute, one member is selected from the field of management, one from the field of labor, and one from the general public. The chairman is selected by and serves at the pleasure of the governor.

The appeals board employs experienced attorneys as administrative law judges who are under the guidance of a presiding judge. The executive officer manages the board staff and may serve as a deputy member of the board in certain circumstances.

## FILING AN APPEAL

Employers may appeal a citation and notification of penalty, notification of failure to abate, special order, or order to take special action. An employer has 15 working days from receipt of one of these documents within which to appeal.

If an appeal is filed after the deadline of 15 working days, the appeals board may accept the appeal only upon a showing of good cause for the late filing. Good cause generally means circumstances beyond one's control which could not have been reasonably anticipated.

An employer may contest the existence of the violation alleged in a citation, the reasonableness of the abatement date, the reasonableness of the changes required by DOSH, and the amount of any proposed civil penalty.

Employees have the right to participate as third parties in an appeal filed by an employer.

An appeal may be started by calling the appeals board in Sacramento or mailing an appeal form stating the statutory grounds upon which the appeal is based, the reasons for the appeal, and the issues to be raised. If the appeal is initiated by phone or fax, a completed appeal form must be sent within 10 days in order to perfect the appeal.

When the appeals board receives a completed appeal form, it is reviewed for timeliness and assigned a docket number. Thereafter, the docket number must appear on all communications with the appeals board. Dates will then be set for a telephonic prehearing conference and an appeal hearing.

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*The amended Heat Illness Prevention standard includes, (but is not limited to), the following requirements:*

- *Water must be “fresh, pure, suitably cool, and provided to employees free of charge.”*
- *Water and shade shall be located “as close as practicable” to the areas where employees are working.”*
- *Shade must be available – so that timely access to shade may be provided upon an employee’s request – when the outdoor temperature “does not exceed 80 degrees Fahrenheit”; and must actually be present for employees to use “when the temperature exceeds 80 degrees.”*
- *Employees who request preventative cool-down rest periods in the shade “(A) shall be monitored and asked if he or she is experiencing symptoms of heat illness; (B) shall be encouraged to remain in the shade; and (C) shall not be ordered back to work until any signs or symptoms of heat illness have abated, but in no event less than 5 minutes in addition to the time needed to access the shade.”*
- *Workers who are “employed in agriculture” [undefined] shall be provided a “minimum ten minute net preventative cool-down rest period every two hours” when the temperature reaches 95 degrees Fahrenheit.*
- *“An employee who has been newly assigned to a high heat area [undefined] shall be closely observed by a supervisor or designee for the first 14 days of the employee’s employment.”*
- *High-heat procedures, which shall be implemented when the temperature reaches 95 degrees Fahrenheit, must include preshift meetings “to review high-heat procedures, encourage employees to drink plenty of water, and remind employees of their right to take a cool-down rest when necessary.”*

*The full text of § 3395, as amended, may be viewed at: [http://www.dir.ca.gov/oshsb/documents/Heat\\_illness\\_prevention\\_txtbrdconsider.pdf](http://www.dir.ca.gov/oshsb/documents/Heat_illness_prevention_txtbrdconsider.pdf)*



## **MANDATORY PARTICIPATION NOTICE**

An employer must notify employees of an appeal and of the employees' right to participate in the appeal. The participation notice and a copy of the docketed appeal form must be posted at or near the site of the alleged violation or other conspicuous place where it will be readily observed and easily read by employees. Following posting, an employer must file with DOSH proof of certification of posting of the participation notice and docketed appeal. The employer must serve these documents on any employee who suffered a serious injury and on the representative of union employees or on the representative of any employee who was killed.

## **COMMUNICATIONS WITH THE APPEALS BOARD**

After an appeal is docketed, communications with the appeals board by a party is prohibited unless all other parties to the appeal (e.g., DOSH, the employer, and any third parties) are notified of the communication. Service of a document on another party to an appeal may be made by personal delivery, by first class mail, or by overnight delivery. Proof of service on the other party may be made by a declaration, by a written statement, or by a letter of transmittal. A proof of service must accompany all documents or writings filed with the appeals board.

## **WITHDRAWAL AND SETTLEMENT**

An employer may withdraw its appeal and terminate the proceedings. DOSH may also withdraw its enforcement actions. An employer may agree to settle the case with DOSH. Settlement agreements must be submitted to the appeals board for its approval.

## **DISCOVERY**

A party to a proceeding has the right to obtain the names and addresses of witnesses known to an opposing party, including the names of those intended to be called to testify at a hearing. A party to a proceeding also has the right to review and copy records including photographs held by an opposing party. DOSH will cooperate and make records and documents available. DOSH also has the same right to discover names and addresses of witnesses and records and documents held by an employer or other party.

## **SUBPOENAS**

A subpoena is used to ensure the attendance of necessary witnesses, and a subpoena duces tecum is used to secure the documents and evidence that a party needs from other persons or entities. Subpoenas are available from the appeals board. An

application must be filed to obtain a subpoena duces tecum. A witness appearing pursuant to a subpoena is entitled to witness fees to be paid by the party calling the witness. Witnesses are entitled to reasonable advance notice that their attendance at the hearing is required.

## INTRODUCING EVIDENCE BY DECLARATION

Any witness who cannot attend a hearing may have his or her testimony submitted in the form of a written declaration, if the opposing party agrees at least 10 days before the hearing.

## NOTICE OF HEARING

At least 30 days prior to a hearing, the appeals board will send the parties a notice of hearing, advising them of the location, date, and time of the hearing before an administrative law judge. An employer has the responsibility of notifying employees of the pending hearing by posting the notice near the site of the alleged violation, in a conspicuous place, or where employees report or carry out their duties. The notice also must be served on any employee who suffered a serious injury and on the representative of union employees or on the representative of any employee who was killed.

Also, the rules of the appeals board allow for a pre-hearing conference, which may be conducted at any time before a hearing. A pre-hearing conference may be scheduled upon motion of a party; or, upon its own motion, the appeals board may send a notice to the parties and order that a pre-hearing conference be held. The purpose of a pre-hearing conference is to simplify the issues, and afford parties an opportunity to participate in the disposition of the appeal. The pre-hearing conference may be conducted by a telephone conference call and all parties must be prepared to discuss the issues and other such things that may aid the disposition of the appeal proceeding.

## CONTINUANCE OF A HEARING

Continuances are disfavored. A hearing will only be postponed if an emergency arises or a party, its representative, or a witness has a preexisting scheduling conflict. Failure to notify

the appeals board of the need for a continuance at the earliest possible time will result in its denial.

## FAILURE TO APPEAR

If a party fails to appear for a regularly scheduled hearing, the appeals board will notice an intent to dismiss. Then, to reinstate the matter, the absent party must within 10 days establish good cause for the failure to appear. If good cause is established, the matter will be reinstated and reset for hearing.

## IMPORTANT AFFIRMATIVE DEFENSES

The following defenses may apply to the facts of an appeal under certain limited circumstances. The employer must raise them or they are considered waived.

### I. INDEPENDENT EMPLOYEE ACTION DEFENSE

This affirmative defense applies when an employee acts against the best safety efforts of the employer in causing a violation. The employer must prove each of the following elements by a preponderance of the evidence:

1. The employee was experienced in the job being performed;
2. The employer has a well-devised safety program which includes training employees in matters of safety respective to their particular job assignments;
3. The employer effectively enforces the safety program;
4. The employer has a policy of sanctions against employees who violate the safety program; and
5. The employee caused a safety infraction which he or she knew was contra to the employer's safety requirements.

*(Mercury Service, Inc., 77-1133, Dec. After Recon. at p. 3 (10/16/80).)*

### II. "LOGICAL TIME" DEFENSE

An employer does not have to comply with a safety order until the logical time for compliance has arrived. Worker safety is the focus of the defense, not what is most convenient for

the employer from an engineering or cost point of view. For example, an employer need not place guardrails around the perimeter of a building until the flooring is in place, because it would be dangerous for the worker installing the guardrails. (See *Nicholson-Brown, Inc.*, 77-024, Dec. After Recon. (12/20/79).) The employer has the burden of proof to establish the defense.

### III. THE STATUTE OF LIMITATIONS

“No citation or notice shall be issued by the Division for a given violation or violations after six months have elapsed since the occurrence of the violation.” (Labor Code § 6317.) This affirmative defense must be pleaded by the employer. The six months normally will begin to run at the time of the inspection of the worksite by the division.

### IV. ABSENCE OF EMPLOYER KNOWLEDGE OF SERIOUS VIOLATION

To establish a serious violation, the division must show that there is a substantial probability that death or serious physical harm could result from the violation. A serious violation will not be found if the employer can prove that it did not, and could not with the exercise of reasonable diligence, know of the presence of the violation. (Labor Code Section 6432.) The employer, therefore, has the burden of proving that it did not know and could not have known of the presence of the violation.

### THE HEARING

The appeals board recognizes that few employers or employees have ever attended or participated in an administrative law proceeding. Therefore, the appeals board attempts to keep the proceedings as simple and informal as possible. The administrative law judge will explain the rules of the procedures. The hearing will not be conducted according to technical rules relating to evidence and witnesses. Hearsay evidence is

admissible but is not sufficient to support a finding of fact unless it falls within a recognized exception. A party should have available at the hearing all witnesses, documentary evidence or other proof needed to support its position. Each party should produce witnesses with first-hand knowledge of the key events. If documents, photographs, or business records are to be introduced, there must be a witness who can authenticate and explain them and their relevance to the proceedings.

Because DOSH is the party with the burden of proof, it will proceed first by calling witnesses and presenting evidence to substantiate its actions. Any document issued by DOSH is viewed at the hearing merely as an allegation. DOSH must provide solid, credible evidence to substantiate its allegations. Each party has the right to cross-examine witnesses called by an opposing party. After DOSH has completed its case, then the employer has the right to present its case.

If a party or witness does not speak or understand English, arrangements should be made with the appeals board to obtain an interpreter.

A hearing will be recorded by a tape recorder. Because the appeals board uses this type of equipment, anyone appearing at a hearing must speak loudly, enunciate clearly, and avoid any overlapping conversation.

### THE DECISION

The administrative law judge will file a written decision usually within 35 days after the hearing ends. The decision will summarize the evidence received and relied upon, make findings of fact for all the issues involved in the appeal, and give the reasons or grounds for the decision. The decision will be mailed to each party or the representative appearing for each party.

### RECONSIDERATION

Any party to an appeal has the right to petition the appeals board to reconsider an order or decision of an administrative law judge. A petition for reconsideration must be filed with the appeals board within 35 days of the date on the proof of service attached to the order or decision. A petition for reconsideration



must be based upon one or more of these grounds:

1. That by the order or decision the appeals board acted without or in excess of its powers;
2. That the order or decision was procured by fraud;
3. That the evidence does not justify the finding of fact;
4. That the petition has just discovered new material evidence that could not with reasonable diligence have been produced at the hearing; and/or
5. That the findings of fact do not support the decision.

A petition for reconsideration must set forth at least one of these grounds and every issue to be considered by the appeals board on reconsideration. Any objection not set forth in the petition is waived and will not be considered. A petition for reconsideration must be supported by specific references to the record and to the principles of law involved. A petition for reconsideration must be signed by the party requesting reconsideration and verified. A petition for reconsideration must be served on all parties to an appeal. Please contact the appeals board if you need assistance in verifying or serving a petition for reconsideration.

Opposing parties may file an answer to the petition within 30 days of service of a petition for reconsideration. An answer must be signed and verified, and served on all parties to an appeal.

The appeals board may agree to grant the petition and reconsider the decision of an administrative law judge, or it may deny the petition and let the decision of the administrative law judge stand without further review. The appeals board does not usually request oral argument.

## JUDICIAL REVIEW

Any party to an appeal who disagrees with a decision after reconsideration or the denial of a petition for reconsideration may apply to the California Superior Court for a writ of mandate pursuant to Code of Civil Procedure section 1094.5. A petition for a writ of mandate must be filed with the superior court within 30 days following the appeals board's decision after reconsideration or denial of a petition for reconsideration.

## EMPLOYER'S COST RECOVERY

An employer may petition the appeals board to recover its costs for an appeal, up to \$5,000 per citation, if:

1. The employer's appeal is upheld or DOSH withdraws the citation, and
2. Issuance of the citation was the result of arbitrary or capricious action or conduct by DOSH. An employer has the burden of proof.

A petition for costs must be filed not more than 60 days after the filing of a final decision granting an appeal for the order granting DOSH's motion to withdraw.

The appeals board will review the petition for costs and may:

1. Summarily dismiss it if insufficient grounds or facts are alleged, or
2. Set the proceeding for hearing. If a hearing is held, the board may deny the petition or order that costs be awarded.

 **Leavitt Group**

*Leavitt Pacific Insurance Brokers*