

98-11: Appeals of CAL-OSHA Citations

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INFORMATION

Hopefully no one will get a Cal OSHA violation, however if you do, and you think that it is unjust or incorrect, there are procedures to appeal it. The procedures outline rules and times that must be followed to perfect the appeal. This Safety Bulletin is written with the intent to give an over view of the procedures and critical time limits that must be followed. It was written in conjunction with Cal-OSHA Regional Office in Los Angeles and District Office in Long Beach/South Bay.

CAL OSHA Organization

The Cal OSHA program consists of four independent units:

The *Standards Board* adopts amends or repeals Cal-OSHA standards and acts on variances.

The *Division of OSH (DOSH)* enforces the OSH standards by issuing citations orders and notices; by proposing civil penalties and by specifying abatement changes.

The *OSH Appeals Board* hears appeals from citations and orders that are issued by DOSH; and

The *Consultation Service* provides free on-site consultations to employers as well as advice and information regarding OSH to employers and employee groups.

Thus the *Appeals Board* that will be hearing the appeal is totally separate from the *Division* that wrote the citation. The Appeals Board consists of three members appointed by the Governor for staggered four year terms. The Appeals Board employs experienced Administrative Law Judges (ALJs) who are under the guidance of a presiding judge.

Filing an Appeal

Notice of the intent to appeal MUST be made within 15 days of the receipt of a citation, notice to abate, special order, or order to take special action otherwise the citation received will be considered the final order from OSHA and not subject to any further review. The notification must be made to Sacramento not to the local District (remember these are separate entities.) The appeal may be made verbally or by fax but a completed appeal form must be sent within 10 days to perfect the appeal. These appeal rights are listed on the reverse of the citation along with the Appeals Board address and phone number. *NOTE: A request for an informal conference with DOSH does not constitute an appeal and does not stay the 15 day period in which to appeal.*

Basis for the Appeal

The employer may contest the *existence of the violation* alleged in the citation, the *reasonableness of the abatement date*, the *reasonableness of the changes required* by DOSH, and the *amount* of any proposed civil penalty. Any grounds for the appeal that may be a factor should be checked to give the broadest possible basis for the appeal. A copy of the citation being appealed must be attached to the Appeal form.

Participation Notice:

Employees have the right to participate as third parties in an appeal filed by an employer. An Employer must notify employees of an appeal and of the employee's right to participate in an appeal. The Appeals Board will provide a participation notice and posting information along with the notice of the docketed 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 place where it can be read and easily observed by the employees.* This is very similar to the requirement to post the citation itself near each place that the violation occurred. The employer must file proof of certification of posting with DOSH.

Communications with the Appeals Board:

After an appeal is docketed

Once docketed, communications with the Appeals Board is prohibited unless all other parties to the appeal agree (e.g. DOSH, the employer, and any third parties) and are notified of the communication. A "proof of service" must accompany all documents sent to the appeals board showing that a copy was provided to the other parties.

Discovery

A party to an appeal has the right to obtain the names and addresses known to an opposing party, including those intended to be called to testify at a hearing. A party also has the right to review and copy records including photographs held by the opposing party. DOSH will cooperate to 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

Subpoenas are available from the Appeals Board to ensure the attendance of necessary witnesses. A Subpoena Duces Tecum is available to secure the documents and evidence that a party needs from other persons or entities. Subpoenaed witnesses are entitled to witness fees paid for by the party calling the witness.

Notice of Hearing

At least 30 days prior to a hearing, the appeals Board will send the parties a notice of a hearing advising them of the location, date and time of the hearing before an ALJ. The employer has the responsibility of notifying the employees of the impending hearing by posting the notice near the site of the alleged violation or in a conspicuous place or where the employees report or carry out their duties. The notice must also be served on any employee who suffered serious injury and on the representative of union employees or any employee who was killed. If there is a conflict with the proposed date of the hearing, the Appeals Board must be notified within 20 days *from receipt of* the notice of the hearing to attempt to gain a continuance.

Pre-Hearing Telephone Conference

After the appeal is docketed, a pre hearing ALJ will be assigned to the case. He will initiate a pre-hearing telephone conference in an attempt to settle the appeal either partially or totally, prior to a hearing. The conference will include the judge, the employer, and a representative from the Division issuing the citation. The pre-hearing judge will not be the same judge who hears the formal appeal.

Informal Conference with District Manager

Even as the formal appeal process is proceeding, there is another optional avenue for case discussion and resolution. That is the Informal Conference with the District Manager where the citations were written. This conference can be requested anytime before the formal hearing resolution. This conference does not replace the formal hearing. The scheduling of an informal conference does not stop or affect any of the timelines for filing action under the formal process. *They proceed simultaneously and independently.* The employee must be afforded an opportunity to attend the informal conference. The informal conference may provide the opportunity to bring up new evidence or resolve misunderstandings regarding a citation. The ALJ holding the pre-hearing telephone conference may suggest that the parties hold an informal conference in order to attempt to work out a resolution to the case. See also: www.dir.ca.gov/DIR/OS&H/DOSH/Policy_Procedure/P&PC-20.htm Policy and procedures guidance for Informal Conferences.

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 evidence.

The employee was experienced in the job being performed.

The employer has a well devised safety program which includes training employees in matters of safety respective to their job assignments;

The employer effectively enforces the safety program;

The employer has a policy of sanctions against employees who violate the safety program; and

the employee caused a safety infraction which he or she knew was contra to the employer's safety requirements.

Note: This defense is not available if a Supervisor or Manager caused the violation.

II. *The logical time defense.* The employer does not have to comply with a safety order until the logical time for compliance has arrived.

III. *The statute of limitations defense.* No citation shall be issued by the Division for a given violation or violations after six months have elapsed since the occurrence of the event. (The six months starts at the time of the worksite inspection.)

Withdrawal and Settlement

There are many ways that a case may be finally settled. An employer may withdraw their appeal. DOSH may also withdraw its enforcement actions. An employer may agree to settle the case with DOSH. At this point, any settlements must be approved by the appeals board. The case could also be settled at the pre-hearing telephone conference...or go to the formal hearing.

There are two additional levels of appeal after the formal hearing. First, the decision of the ALJ may be appealed directly to the Appeals Board for reconsideration, and second, the appeal of the Appeals Board decision may be made to the California Superior Court for judicial review.

Reconsideration

Any party to an appeal has the right to petition the Appeals Board to reconsider the order or decision of an ALJ. The petition for reconsideration must be filed within 35 days of the date of proof of service attached to the order or decision of the ALJ. One of the following reasons must be the basis for reconsideration.

That by the order, the appeals board acted in excess of its powers.

That the order or decision was procured by fraud.

That the evidence does not justify the findings of fact.

That the petitioner has just discovered new evidence that could not with reasonable diligence have been produced at the hearing and/or,

That the findings of fact do not support the decision.

Opposing parties have 30 days from service of the petition to file an answer. The Appeals Board may agree to grant the petition and reconsider the decision of the ALJ, or may deny the petition and let the decision stand without further review. The Appeals Board does not usually request oral argument. (Their decision is usually based on the written hearing record on file.)

Judicial Review

A final avenue of appeal is to the California Superior Court for a writ of mandate. An appeal to the California Superior Court must be filed within 30 days following an Appeals Board decision after reconsideration or denial of a petition for reconsideration.

Employer Cost Recovery

An employer may petition the Appeals Board to recover his costs for an appeal, up to \$5000 per citation, if:

The employer's appeal is upheld or DOSH withdraws the citation, and

The issuance or if the citation was a result of arbitrary and capricious action or conduct by DOSH.

The employer has the burden of proof.

ACTION

Employers should consider the various paths for citation discussion, evidence presentation and settlement. Employers should be aware of and take advantage of the informal conference at the district level, however they should realize that the informal conference is independent of and proceeds separately from the formal appeals process. If a formal appeal is considered, then specific filing timelines must be observed. The informal process may still proceed and if fruitful, settle the case.

If a formal hearing is sought, then both parties have the right of discovery. Employers should avail themselves of this right to ensure they have a complete file that Cal OSHA holds on their case. Employers should follow the broadest basis for the appeal, and should state and prepare for any affirmative defenses claimed.

In preparation for any appeal or hearing employers should review the guidance in:

APPEAL INFORMATION published by the Occupational Safety and Health Appeals Board, April 1993. This booklet gives the overview of the appeals process, and includes the California regulations that are applicable. It contains the detailed section of the California Code Title 8, Article 4, Sections 333-336 that explain how penalty assessments are determined. Most of this information is on line at: www.dir.ca.gov/DIR/OS&H/OSHAB/mission.htm

THE CAL/OSHA SOURCE by Robert D. Peterson and Joel M Cohen published by the California Safety Services Group, 1998.