VERMONT OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

RULES OF PROCEDURE

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GLOSSARY

SUBPART A - GENERAL PROVISIONS

AUTHORITY: The provisions of this part are issued under 21 VSA Section 230.

2200.1 Definitions.

As used in the rules in this part:

(a) The term VOSHA Code means the Vermont Occupational Safety and Health Act, 21 VSA, Chapter 3, Subchapters 4 and 5.

(b) The terms "Review Board," "person," "employer," "employee," "Act," "Commissioner," "Department," "Director," "Division," "Place of Employment," "Premises," "Rule" and "Secretary of Labor" have the meanings set forth in 21 VSA Section 203.

(c) The term "citation" means a written communication from the Commissioner issued pursuant to 21 VSA Section 225(a) and describing the nature of the alleged violation of the VOSHA Code together with the date by which the alleged violation is to be corrected.

(d) The terms "notification of proposed penalty" and "notification of failure to correct a violation" mean written communications from the Commissioner issued pursuant to 21 VSA Section 226(a) or 226(b).

(e) The term "authorized employee representative" or "representative of employees" means a certified labor organization as the bargaining representative for the affected employees. In the absence of certification, it shall be the organization which the affected employees have designated and which has a collective bargaining relationship with the employer. If no labor organization has been certified or has such a collective bargaining relationship, the term "authorized employee representative" or "representative of employees" shall mean any person or persons designated by the affected employees to represent them for the purpose of proceeding under the VOSHA Code.

(f) The term "proceeding" means any proceeding before the Board or its hearing officer initiated under 21 VSA Section 226.

(g) The term "commissioner" means the Commissioner of Labor and Industry including the duly authorized agent of the Commissioner.

(h) The term "day" means a calendar day.

(i) The term "working day" means all days except Saturdays, Sundays or State holidays.

(j) The term "clerk" shall mean Clerk of the Review Board.

(k) The term "party" shall mean any department, employer and employee affected by a citation(s) issued by the Dept. of Labor and Industry and any authorized representative who has entered an appearance in the matter.

(l) The term "intervenor" shall mean anyone with an interest in a given board of proceeding who is not a party and has been granted intervenor status.

2200.2a Scope of rules; applicability of Vermont Rules of Civil Procedure and Administrative Procedures Act; representation in Board proceedings.

The proceedings before the Board or its hearing officer shall be governed by the rules in this part. In the absence of a specific provision, all procedures at such proceedings shall then be in conformity with the provisions of the Vermont Rules of Civil Procedure and the Administrative Procedures Act. Parties or intervenors are not required to be represented by an attorney in any proceedings by these rules.

2200.2b The Board.

(a) The Occupational Safety and Health Review Board is an establishment of the executive branch of the Vermont State Government created by the VOSHA Code, consisting of three members appointed by the Governor, by and with the advice and consent of the Senate, one of whom is designated by the Governor to serve as Chair. The Chair has the administrative authority and responsibilities set forth in 21 VSA Section 230. The Board will, in case of a vacancy in the office of the Chair or in the absence or inability of the Chair to serve, designate one of its members Acting Chair to serve during the period of vacancy, absence or inability.

(b) The Clerk is selected by the Chair and reports to the Board. Principal duties and responsibilites are:

(1) Receives, dockets and processes notices of contest from the Commissioner and notifies all parties or intervenors of the docket number. Reviews all submissions for compliance with the Board's Rules of Procedure and serves required notices and orders upon all parties or intervenors.

(2) Schedules hearings, setting the time in accordance with Section 2200.7, and designating places as convenient as possible for the employers and employees.

(3) Prepares agenda and dockets of matters subject to action by the Board and is responsible for the preparation of minutes with respect to such actions.

(4) Processes all formal submissions to the Board.

(5) Serves as the legal custodian of the Board's seal, property and records.

(6) Processes and certifies all decisions, orders, decrees and records of the Board to the appropriate Superior Court when cases are appealed.

(c) The principal office of the Board is at 13 Baldwin Street in Montpelier, Vermont. All correspondence with the Board should be sent to their mailing address:

Vermont Occupational Safety and Health Review Board
State Administration Building Post Office
133 State Street
Montpelier, Vermont 05633-6701

2200.3 Use of gender and number.

(a) Words importing the singular number may extend and be applied to the pural and vice versa.

(b) Words importing the masculine gender may be applied to the feminine gender and vice versa.

2200.4 Computation of time.

(a) In computing any period of time prescribed or allowed in these rules, the day from which the designated period begins to run shall not be included. The last day of the period so computed shall be included unless it is a Saturday, Sunday or State holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday or State holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays and State holidays shall be excluded in the computation.

(b) Where service of a pleading or document is by mail pursuant to Section 2200.7 of this subpart, 3 days shall be added to the time allowed by these rules for the filing of a responsive pleading.

2200.5 Record address.

The initial pleading filed by any person shall contain that person's name, address and telephone number. Any change in such information must be communicated promptly in writing to the Board or its hearing officer and to all other parties or intervenors. A party or intervenor who fails to furnish such information shall be deemed to have waived their right to notice and service under these rules.

2200.6 Service of pleadings and documents.

(a) At the time of filing pleadings or other documents, a copy of any such pleading or document shall be served by the filing party or intervenor upon every other party or intervenor. If a party or intervenor appears by a representative, service shall be made upon that representative in the same manner as for a party or intervenor.

(b) Service shall be accomplished by personal delivery or postage prepaid first class mail. Service shall be deemed accomplished at the time of delivery (if service is by personal delivery), or mailing (if service is by mail). Proof of service shall be provided by the filing of a written statement filed at the time the pleadings or documents are filed. The statement shall state the manner of service, the day of service and, if service is personal, the time of service.

2200.7 Service of notices from Clerk.

(a) Notices from the Clerk pertaining to procedural matters shall be served on all parties, intervenors or their authorized representatives. These notices include, but are not necessarily limited to, the Notice of Contest,* Petition for Modification of Abatement Period and the Notice of Hearing. These notices shall be served as soon as possible by the Clerk following completion or receipt, whichever is appropriate. If a party, intervenor or an authorized representative knows that one or more employees are unrepresented or are represented by another authorized representative, that person shall provide the Clerk with sufficient information to permit the Clerk to serve any such people.

(b) In the event that one or more affected employee(s) are not known to be represented by an authorized representative or no representative has entered an appearance in the matter, any notice covered by this section shall be served upon the employer and posted by the employer in the place where the citation(s) is required to be posted. The notice will remain posted until the commencement of the hearing or disposition of the matter, whichever occurs first.

2200.8 Filing.

(a) All papers shall be filed with the Clerk of the Board except in the event the Board assigns the case to one of its hearing officers. Subsequent to said assignment, and prior to the issuance of the hearing officer's decision, all papers shall be filed with the hearing officer at the address given in the notice of such assignment. Subsequent to the issuance of the hearing officer's decision, all papers shall be filed with the Clerk.

(b) Unless otherwise ordered, all filing may be accomplished by first class mail or personal delivery.

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(c) Filing is deemed effected at the time of mailing.

2200.9 Protection of trade secrets; other confidential information.

Upon application by any person, in a proceeding where trade secrets or other matters may be divulged, the confidentiality of which is protected by 21 VSA Section 207, the Board or its hearing officer shall issue orders as may be appropriate to protect the confidentiality of such matters.

SUBPART B - PARTIES AND REPRESENTATIVES

2200.20 Party status.

(a) Affected employees may elect to participate as parties at any time before the commencement of the hearing before the Board or its hearing officer unless, for good cause shown, the Board or its hearing officer allows such election at a later time. See Section 2200.21.

(b) Where a notice of contest is filed by an employee or by an authorized employee representative with respect to the reasonableness of the period for abatement of a violation, the employer charged with the responsibility of abating the violation may elect party status at any time before the commencement of the hearing before the Board or its hearing officer. See Section 2200.21.

2200.21 Intervention; appearance by non-parties.

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

(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 in question, and that the intervention will not unnecessarily delay the proceeding.

(c) The Board or its hearing officer may grant a petition for intervention to such an extent and upon such terms as the Board or its hearing officer shall determine.

2200.22 Representatives of parties or intervenors.

(a) Any party or intervenor may appear in person or through a representative.

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

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

(d) Withdrawal of appearance of any representative may be affected by filing a written notice of withdrawal and by serving a copy thereof on all parties or intervenors.

SUBPART C - PLEADINGS AND MOTIONS

2200.30 Form.

(a) A pleading is required to contain at a minimum, a caption sufficient to identify the parties or intervenors in accordance with Section 2200.31, which shall include the Board's docket number, if assigned, and a clear and plain statement of the relief that is sought, together with the grounds.

(b) Pleadings and other documents (other than exhibits) shall be typewritten, double-spaced, on letter size paper and fastened at the upper left corner.

(c) Pleadings shall be signed by the party or intervenor filing or by their representative. Such signing constitutes a representation that the signer has read the document or pleading, that to the best of that person's knowledge, information and belief, the statements made therein are true and it is not being filed for frivolous reasons.

(d) When a court decision is cited in which the first-listed parties or intervenors on each side are the Secretary of Labor (or the name of a particular Secretary of Labor), or the Commissioner of Labor and Industry (or the name of a particular Commissioner of Labor and Industry) and the Review Board, the citation(s) shall include in parenthesis, the name of the Respondent in the Board proceeding.

2200.31 Contest proceedings.

(a) If an employer contests a citation, the employer must file a notice of contest with the Commissioner within the time period set by the citation. The Commissioner shall, within 7 days of receipt of a notice of contest, transmit the original to the Board, together with copies of all relevant documents.

(b) Complaint:*

(1) If the Commissioner decides to pursue the matter with the Board, the Commissioner shall file a complaint with the Board no later than 20 days after receipt of the notice of contest. The complaint shall set forth all alleged violations and proposed penalties which are contested, stating with particularity:

(i) The basis for jurisdiction;

(ii) The time, location, place and circumstances of each such alleged violation; and

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(iii) The considerations upon which the period for abatement and the proposed penalty on each such alleged violation is based.

(2) Where the Commissioner seeks in the complaint to amend the citation or proposed penalty, the Commissioner shall set forth the reasons for amendment and shall state with particularity the change sought.

(c) Answer:*

(1) Within 15 days after service of the complaint, the party or intervenor against whom the complaint was issued shall file an answer with the Board.

(2) The answer shall contain a short and plain statement denying those allegations in the complaint which the party or intervenor intends to contest. Any allegation not denied shall be deemed admitted.

(d) Employee contests to abatement period:

(1) Where an affected employee or authorized employee representative files a notice of contest with respect to the abatement period, the Commissioner shall, within 10 days from receipt of the notice of contest, file a clear and concise statement of the reasons the abatement period prescribed is not unreasonable.

(2) Not later than 10 days after receipt of the statement referred to in paragraph (1) of this section, the contestant shall file a response.

(3) All contests under this section shall be handled as expedited proceedings as provided for in Section 2200.101.

2200.32 Petitions for modification of abatement period.

(a) An employer may file a petition for modification of abatement date when such employer has made a good faith effort to comply with the abatement requirements of a citation, but such abatement has not been completed because of factors beyond the employer's reasonable control.

(b) A petition for modification of abatement date shall be in writing and shall include the following information:

(1) All steps taken by the employer, and the dates of such action, in an effort to achieve compliance during the prescribed abatement period.

(2) The specific additional abatement time necessary in order to achieve compliance.

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(3) The reasons such additional time is necessary, including the unavailability of professional or technical personnel or of materials and equipment, or because necessary construction or alteration of facilities cannot be completed by the original abatement date.

(4) All available interim steps being taken to safeguard the employees against the cited hazard during the abatement period.

(c) A petition for modification of abatement date shall be filed with the Commissioner of Labor and Industry who issued the citation no later than the close of the next working day following the date on which abatement was originally required. A later-filed petition shall be accompanied by the employer's statement of exceptional circumstances explaining the delay.

(1) A copy of such petition shall be posted in a conspicuous place where all affected employees will have notice or near each location where the violation occurred. The petition shall remain posted for a period of 10 days. The posting shall include a notice stating that any affected employee or a representative shall have 10 days to object by filing an objection in writing with the Commissioner.

(2) Affected employees or their representatives may file an objection in writing to such petition with the aforesaid Commissioner. Failure to file such objection within 10 working days of the date of posting of such petition shall constitute a waiver of any further right to object to said petition.

(3) The Commissioner, or the duly authorized agent of the Commissioner, shall have the authority to approve any petition for modification of abatement date filed pursuant to subparagraphs (b) and (c). Such uncontested petitions shall become final orders pursuant to 21 VSA, Sections (226(a) and (c).

(4) The Commissioner, or the duly authorized agent of the Commissioner, shall not exercise approval power until the expiration of 15 working days from the date the petition was posted pursuant to paragraphs (c)(1) and (2) by the employer.

(d) Where any petition is objected to by the Commissioner or affected employees, such petition shall be processed as follows:

(1) The petition, citation and any objections shall be forwarded to the Board within 3 working days after the expiration of the 15 day period set out in paragraph (c)(4).

(2) The Board shall docket and process such petitions as expedited proceedings as provided for in Section 2200.101.

(3) An employer petitioning for a modification of abatement period shall have the burden of proving, by a preponderance of the evidence, that such employer has made a good faith effort to comply with the abatement requirements of the citation and that abatement has not been completed because of factors beyond the employer's control.

(4) Within 10 working days after the receipt of notice of the docketing by the Board of any petition for modification of abatement date, each objecting party or intervenor shall file a response setting forth the reasons for opposing the granting of a modification date different from that requested in the petition.

2200.33 Motions, consolidation, severance; other statements.

(a) Statement of position:

(1) At any time prior to the commencement of the hearing before the Board or its hearing officer, any person entitled to appear as a party or intervenor may file a statement of position with respect to any or all issues to be heard.

(b) Motions:

(1) Any party or intervenor may file motions with respect to any matter under consideration. Any such motion must be served on any other party, intervenor or authorized representative according to Rule 2200.76. Any party or intervenor upon whom a motion is served shall have 10 days from service of the motion to file a response.

(c) Consolidation:

(1) Cases may be consolidated on the motion of any party or intervenor, on the Board or its hearing officer's own motion, where there exist common parties, common questions of law or fact, or both, or in such other circumstances as justice and the administration of the VOSHA Code require.

(d) Severance:

(1) Upon its own motion, or upon motion of any party or intervenor, the Board or its hearing officer may, for good cause, order any proceeding severed with with respect to some or all issues, or parties or intervenors.

2200.34 Failure to file.

Failure to file any pleading pursuant to these rules when due may, in the discretion of the Board or its hearing officer, constitute a waiver of the right to further participation in the proceedings.

SUBPART D - PREHEARING PROCEDURES AND DISCOVERY

2200.51 Prehearing conference.

(a) At any time before a hearing, the Board or its hearing officer, on its own motion or on motion of a party or intervenor, may direct the parties, intervenors or their representatives to exchange information or to participate in a prehearing conference to consider settlement of matters that will tend to simplify the issues or expedite the hearing.

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

2200.52 Requests for admissions.

(a) At any time after the filing of responsive pleadings, any party or intervenor may request of any other party or intervenor admissions of facts to be made under oath. Each admission requested shall be set forth separately. The matter shall be deemed admitted unless, within 15 days after service of the request, or within such shorter or longer time as the Board or its hearing officer may prescribe, the party or intervenor to whom the request is directed serves a specific written response upon the party or intervenor requesting the admission.

(b) Copies of all requests and responses shall be served on all parties or intervenors in accordance with the provisions of Section 2200.7(a) and filed with the Board or its hearing officer within the time allotted and shall be a part of the record.

2200.53 Discovery depositions; interrogatories.

(a) Except by special order of the Board or its hearing officer, discovery depositions of parties, intervenors or witnesses, and interrogatories directed to parties, intervenors or witnesses, shall not be allowed.

(b) In the event the Board or its hearing officer grants an application for the conduct of such discovery proceedings, the order granting the same shall set forth appropriate time limits governing the discovery.

2200.54 Failure to comply with orders for discovery.

If any party or intervenor fails to comply with an order of the Board or its hearing officer to permit discovery in accordance with the provisions of these rules, the Board or its hearing officer may issue appropriate orders.

2200.55 Issuance of subpoenas; petitions to revoke or modify subpoenas; right to inspect or copy data.

(a) Any member of the Board shall, on the application of any party or intervenor directed to the Board, issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence, including relevant books, records, correspondence or documents in their possession or under their control. Applications for subpoenas, if filed subsequent to the assignment of the case to a hearing officer shall be filed with the hearing officer. A hearing officer shall grant the application on behalf of any member of the Board. Applications for subpoenas may be made by one party or intervenor without knowledge of the other. The subpoena shall show on its face the name and address of the party or intervenor at whose request the subpoena was issued.

(b) Any person served with a subpoena shall, within 5 days after the date of service of the subpoena, move in writing to revoke or modify the subpoena if that person does not intend to comply. All motions to revoke or modify shall be served on the party or intervenor at whose request the subpoena was issued. The Board or its hearing officer shall revoke or modify the subpoena, if in its opinion the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings, or the subpoena does not describe with sufficient particularity the evidence whose production is required, or if for any other reason sufficient in law, the subpoena is otherwise invalid. The Board or its hearing officer shall make a simple statement of procedural or other grounds for the ruling on the motion to revoke or modify. Any motion, answer to or ruling on a motion to revoke or modify shall become a part of the record.

(c) Persons compelled to submit data or evidence at a public proceeding are entitled to retain, or on payment of lawfully prescribed costs, to procure copies of records of the data or evidence submitted by them.

(d) Upon the failure of any person to comply with a subpoena issued upon the request of a party or intervenor, the Board, by the Attorney General, shall initiate proceedings in the appropriate court for the enforcement thereof, if in its judgment, the enforcement of such subpoena would be consistent with the law and with policies of the Code. Neither the Board nor the Attorney General shall be deemed to have assumed responsibility for the effective prosecution of the same before the court.

SUBPART E - HEARINGS

2200.60 Notice of hearing.

Notice of the time, place and nature of a hearing shall be given to the parties or intervenors at least 10 days in advance of such hearing, except as otherwise provided in Section 2200.101.

2200.61 Postponement of hearing.

(a) Postponement of a hearing may be allowed at the discretion of the Board provided such request is received in writing at least 3 days in advance of the time set for the hearing. Requests for postponement may be granted at the Board's discretion for good cause only and could result in the assessment of costs to the party or intervenor making the request.

(b) No postponement in excess of 30 days shall be allowed without Board approval.

2200.62 Failure to appear.

(a) Subject to the provisions of paragraph (c) of this section, the failure of a party or intervenor to appear at a hearing shall be deemed to be a waiver of all rights except the right to be served with a copy of the decision of the Board or its hearing officer, and to request Board review pursuant to Section 2200.91, in the case of a hearing officer's decision.

(b) Requests for reinstatement of rights waived under (a) must be made, in the absence of extraordinary circumstances, within 5 days after the scheduled hearing date.

(c) The Board or its hearing officer, upon showing of good cause, may excuse such failure to appear. In such event, the hearing will be scheduled.

2200.63 Payment of witness fees and mileage; fees of persons taking depositions.

Witnesses summoned before the Board or its hearing officer shall be paid the same fees and mileage that are paid witnesses in the courts of the State of Vermont, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the State of Vermont. Witness fees and mileage shall be paid by the party or intervenor at whose instance the witness appears and the person taking a deposition shall be paid by the party or intervenor at whose instance the deposition is taken.

2200.64 Reporter's and hearing officer's fees.

Reporter's and hearing officer's fees shall be borne by the Board.

2200.65 Record of testimony.

(a) A record of the hearing shall be made by the reporter. That record shall be retained by the reporter for a period of 6 months from the date of the hearing. Transcripts shall be prepared upon request of either party, intervenor or the hearing officer. Costs shall be borne by the party or intervenor requesting the transcript, or if the request is made by the Board or its hearing officer, the cost shall be borne by the Board. A copy of the record of testimony taken at the hearing, duly certified by the reporter, shall be filed with the hearing officer. The hearing officer shall promptly serve notice upon each of the parties or intervenors of such filing.

(b) When the hearing has been before the Board, rather than before a hearing officer of the Board, the requirements pertaining to the record shall not apply.

2200.66 Duties and powers of the Board or its hearing officer.

It shall be the duty of the Board or its hearing officer to conduct a fair and impartial hearing, to assure that the facts are fully elicited, to adjudicate all issues and avoid delay. The Board or its hearing officer (with respect to cases assigned to a hearing officer between the time one is designated and the time a hearing officer issues a decision, subject to the rules and regulations of the Board) shall have the authority to:

(a) Administer oaths and affirmations;

(b) Issue authorized subpoenas;

(c) Rule upon petitions to revoke subpoenas;

(d) Rule upon offers of proof and receive relevant evidence;

(e) Take or cause depositions to be taken whenever the needs of justice would be served;

(f) Regulate the course of the hearing and, if appropriate or necessary, exclude persons or counsel from the hearing for contemptuous conduct and strike all related testimony of witnesses refusing to answer any proper questions;

(g) Hold conferences for the settlement or simplication of the issues;

(h) Dispose of procedural requests or similar matters, including motions referred to the hearing officer by the Board and motions to amend pleadings; also to dismiss complaints or portions thereof, and to order hearings reopened, or upon motion, consolidated prior to issuance of a decision;

(i) Make decisions in accordance with the Rules of Civil Procedure;

(j) Call and examine witnesses to introduce into the record documentary or other evidence;

(k) Request the parties or intervenors at any time during the hearing to state their respective positions concerning any issue in the case or theory in support thereof;

(l) Adjourn the hearing as the needs of justice and good administration require; and

(m) Take any other action necessary under the foregoing and authorized by the published rules and regulations of the Board.

2200.67 Disqualification of Board members or a Board hearing officer.

(a) A Board member or hearing officer may withdraw from a proceeding whenever they deem themselves disqualified.

(b) Any party or intervenor may request a Board member or hearing officer, at any time following the hearing officer's designation and before the filing of the decision, to withdraw on grounds of personal bias or disqualification, by filing with the Board or its hearing officer, promptly upon the discovery of the alleged facts, an affidavit setting forth in detail the matters alleged to constitute grounds for disqualification.

(c) If, in the opinion of the Board or its hearing officer, the affidavit referred to in paragraph (b) of this section is filed with due diligence and is sufficient on its face, a Board member or hearing officer shall disqualify themselves and withdraw from the proceeding.

(d) If a Board member or hearing officer does not disqualify themselves and withdraw from the proceeding, they shall so rule upon the record, stating the grounds for their ruling and shall proceed with the hearing, or if the hearing has closed, shall proceed in the issuance of a decision, and the provisions of Section 2200.90 shall apply.

2200.68 Examination of witnesses.

Witnesses shall be examined orally under oath. Opposing parties or intervenors shall have the right to cross-examine any witness whose testimony is introduced by an adverse party or intervenor.

2200.69 Affidavits.

An affidavit may be admitted as evidence in lieu of oral testimony, if the matters therein contained are otherwise admissible and the parties or intervenors agree to its admission.

2200.70 Deposition in lieu of oral testimony; application; procedures; form; rulings.

(a) An application to take the deposition of a witness in lieu of oral testimony shall be in writing and shall set forth the reasons such deposition should be taken, the name and address of the witness, the matters concerning which it is expected the witness will testify, and the time and place proposed for the taking of the deposition, together with the name and address of the person before whom it is desired that the deposition be taken (for purposes of this section, hereinafter referred to as "the officer"). Such application shall be filed with the Board or its hearing officer and shall be served on all other parties or intervenors not less than 7 days (when the deposition is to be taken within the continental United States) and not less than 15 days (if the deposition is to be taken elsewhere) prior to the time when it is desired that the deposition be taken. Where good cause has been shown, the Board or its hearing officer shall make and serve on the parties or intervenors an order which specifies the name of the witness whose deposition is to be taken and the time, place and designation of the officer before whom the witness is to testify. Such officer may or may not be the officer specified in the application.

(b) At the time and place specified in the order, the officer designated to take such deposition shall permit the witness to be examined and cross-examined under oath by all parties or intervenors appearing, and the testimony of the witness shall be reduced to typewriting by the officer or under the officer's direction. All objections to questions or evidence shall be deemed waived unless made at the examination. The officer shall not have power to rule upon any objection, but shall note them upon the deposition. The testimony shall be subscribed by the witness in the presence of the officer who shall attach a certificate stating that the witness was duly sworn by said officer, that the deposition is a true record of the testimony and exhibits given by the witness, and that the officer is not of counsel or attorney to any of the parties or intervenors nor interested in the proceeding. If the deposition is not signed by the witness because of illness, death, disappearance or refusal to sign, such fact shall be included in the certificate of the officer and the deposition may be used as fully as though signed. The officer shall immediately deliver an original and 4 copies of the transcript, together with the certificate, in person or by registered mail, to the Clerk of the Review Board.

(c) The Board or its hearing officer shall rule upon the admissibility of the deposition or any part thereof.

(d) All errors or irregularities in compliance with the provision of this section shall be deemed waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defeat is, or with due deligence might have been, discovered.

(e) If the parties or intervenors so stipulate in writing, depositions may be taken before any person, at any time or place, upon any notice and in any manner, and when so taken may be used as other depositions.

2200.71 Exhibits.

(a) All exhibits offered in evidence shall be numbered and marked with a designation identifying the party or intervenor by whom the exhibit is offered.

(b) In the absence of objection by another party or intervenor, exhibits shall be admitted into evidence as a part of the record, unless excluded by the Board or its hearing officer pursuant to Section 2200.72.

(c) Unless the Board or its hearing officer finds it impractical, a copy of each such exhibit shall be given to the other parties or intervenors.

2200.72 Rules of evidence.

Hearings before the Board or its hearing officer shall be in accordance with the Vermont Rules of Civil Procedure insofar as practicable.

2200.73 Burden of proof.

(a) In all proceedings commenced by the filing of a notice of contest, the burden of proof shall rest with the Commissioner.

(b) In proceedings commenced by a petition for modification of the abatement period, the burden of establishing the necessity for such modification shall rest with the petitioner.

2200.74 Objections.

(a) Any objection with respect to the conduct of the hearing, including any objection to the introduction of evidence or a ruling by the Board or its hearing officer, may be stated orally or in writing, accompanied by a short statement of the grounds for the objection, and shall be included in the record. No such objection shall be deemed waived by further participation in the hearing.

(b) Whenever evidence is excluded from the record, the party or intervenor offering such evidence may make an offer of proof which shall be included in the record of the proceeding.

2200.75 Interlocutory appeals.

(a) Generally:

(1) A hearing officer's interlocutory ruling may be appealed to the Board only in the manner prescribed by this rule.

(b) Certification:

(1) A party or intervenor desiring to appeal from an interlocutory ruling shall file with the hearing officer a written request for certification of the appeal. The request and supporting documents shall be filed within 5 days after receipt of the hearing officer's ruling from which appeal is sought. Responses to the request, if any, shall be filed within 5 days after service of the request. The hearing officer shall certify an interlocutory appeal when the ruling involves an important question of law or policy where there is substantial grounds for difference of opinion and an immediate appeal of the ruling may materially expedite the proceedings.

(i) Procedure after certification: Following certification, the hearing officer shall forward to the Clerk the request for certification and supporting documents, responses filed by the other parties or intervenors, the ruling from which appeal is taken, a copy of relevant portions of the record and the hearing officer's order certifying the appeal.

(ii) Acceptance of certification, discretionary: The Board at any time may decline to accept a certification.

(c) Petition for interlocutory appeal:

(1) Within 5 days following the receipt of a hearing officer's order denying certification, a party or intervenor may file with the Board a petition for interlocutory appeal. Responses to the petition, if any, shall be filed within 5 days following service of the petition. The Board shall grant a petition for interlocutory appeal only in exceptional circumstances where it finds: a) that the appeal satisfies the criteria for certification of an appeal set forth in paragraph (b) of this section; and b) that there is a substantial probability of reversal.

(d) Denial without prejudice:

(1) The Board's action in declining to accept a certification or denying a petition for interlocutory appeal shall not preclude a party or intervenor from raising an objection to the hearing officer's interlocutory ruling in a petition for discretionary review. A party or intervenor whose request for certification of an interlocutory appeal is denied by a hearing officer, and who elects not to file a petition for interlocutory appeal with the Board, shall not be precluded from raising in a petition for discretionary review an objection to the ruling from which interlocutory appeal was sought.

(e) Stay:

(1) Trade secret matters:

(i) The filing with a hearing officer of a request to certify an interlocutory appeal of a ruling concerning an alleged trade secret shall stay the effect of the ruling: a) until the hearing officer denies the request; or b) if the request is granted, until the Board rules on the appeal or declines to accept the certification. In the event such a request is denied, the hearing officer, upon motion of the requesting party or intervenor, shall stay for a period of 5 days the effect of the ruling from which appeal was sought in order to allow the party or intervenor to petition the Board for interlocutory appeal of the ruling. The filing with the Board of a ruling concerning an alleged trade secret shall stay the effect of the ruling until the Board denies the petition or rules on the appeal.

(2) Other cases:

(i) In all other cases, the filing or granting of a request to certify an interlocutory appeal, or the filing or granting of a petition for interlocutory appeal, shall not stay a proceeding or the effect of a ruling unless otherwise ordered.

(f) Briefs:

(1) Should the Board desire briefs on the issues raised by an interlocutory appeal, it shall give notice to the parties or intervenors. See Section 2200.93.

2200.76 <u>Filing of briefs and proposed findings with the Board or its hearing officer; oral argument at the hearing.</u>

Any party or intervenor shall be entitled, upon request, to a reasonable period at the close of the hearing, to oral argument, which shall be included in the stenographic report of the hearing. Any party or intervenor shall be entitled, upon request made before the close of the hearing, to file a brief proposed findings of fact and conclusions of law, or both, with the Board or its hearing officer. The Board or its hearing officer may fix a reasonable period of time for such filing, but such initial period may not exceed 20 days from the receipt by the party or intervenor of the record of the hearing.

20(a) 3/26/15 ccd

SUBPART F - POST HEARING PROCEDURES

2200.90 Decisions of the Board or its hearing officer.

(a) In the event the hearing on the merits has been held before the Board, the Board's decision shall:

(1) Include findings of fact, conclusions of law and an order.

(2) Be signed and dated. Copies of the decision shall be mailed to all parties or intervenors. All motions, petitions and other pleadings filed subsequent to such issuance shall be addressed to the Board.

(b) In the event the hearing on the merits is before a hearing officer of the Board:

(1) The hearing officer shall prepare a decision* upon completion of the proceeding. When a hearing is held, the decision shall comply with 3 VSA Section 812. Copies of the decision shall be mailed to the Board and to all parties or intervenors. Thereafter, the hearing officer shall file with the Clerk a report consisting of the decision, the record in support thereof and any petitions for discretionary review of the decision or statements in opposition to such petitions that may be filed in accordance with Section 2200.91. The hearing officer shall file the report no later than 21 days following the date of the mailing of the decision to the parties or intervenors.

(i) Promptly upon receipt of the hearing officer's report, the Clerk shall docket the case and notify all parties or intervenors of that fact. The date of docketing shall be the date the hearing officer's report is made for purposes of 21 VSA Section 230(b).

(ii) On or after the date of docketing of the case, all pleadings or other documents that may be filed in the case shall be addressed to the Clerk.

(iii) In the event no Board member directs review of a decision on or before the 30th day following the date of docketing of the hearing officer's report, the decision of the hearing officer shall become a final order of the Board.

2200.91 Discretionary review; petitions for; statements in opposition.

(a) A party or intervenor aggrieved by the decision of a hearing officer may submit a Petition for Discretionary Review.*

*APPENDIX 4 & 5

An aggrieved party or intervenor that fails to file a petition for such review by the Board may be foreclosed from court review of any objection to the hearing officer's decision.

(1) Except as provided in paragraphs (2) and (3) of this section, any petition must be received by the hearing officer on or before the 20th day following the mailing of a copy of the decision to the parties or intervenors.

(2) If an expedited proceeding has been directed pursuant to Section 2200.101 and no party or intervenor objects or good cause is shown, the hearing officer is empowered to prescribe a shorter time for filing petitions for discretionary review following the mailing of the decision.

(3) Petitions for review of a hearing officer's decision may be filed directly with the Clerk subsequent to the filing of the hearing officer's report. Such petitions will be considered to the extent that time and resources permit. Parties or intervenors filing such petitions should be aware that any action by the Board directing review must be taken within 30 days following the filing of the hearing officer's report.

(4) In the case of proposed settlements or other proposed dispositions by consent of all parties or intervenors, petitions for discretionary review shall not be allowed except for good cause shown.

(b) A petition should contain a concise statement of each portion of the decision and order to which exception is taken and may be accompanied by a brief of points and authorities relied upon.

(c) Failure to act on such petition within the review period shall be deemed a denial.

(d) Statements in opposition to petitions for discretionary review may be filed at the times and places specified in this section for the filing of petitions for discretionary review. Any statement shall contain a concise statement on each portion of the petition to which it is addressed.

(e) An original and 3 copies of any petition or statement shall be filed with the Board.

2200.92 <u>Review by the Board.*</u>

(a) Review is a matter of sound discretion of the Board.

(b) In exercising direction, the Board will consider assertions of the following:

*APPENDIX 6A & 6B

(1) A finding of material fact is not supported by a preponderance of the evidence.

(2) The decision is contrary to law or to the duly promulgated rules or decisions of the Board.

(3) A substantial question of law, abuse of discretion or policy is involved.

(4) A prejudicial error of procedure was committed.

(c) When a petition for discretionary review is granted, review shall be limited to the issues specified in the petition, unless the order for review expressly provides differently.

(d) At any time within 30 days after the filing of a decision of a hearing officer, a case may also be directed for review by a Board member's own motion upon any ground that could be raised by a party or intervenor, but the issues would normally be limited to novel questions of law or policy or direction for review shall state the issues with particularity. Except in extra-ordinary circumstances, the Board's power to review is limited to issues of law or fact raised by the parties or intervenors in the proceedings below. (21 VSA Sections 230(c) and (d)).

2200.93 Briefs before the Board.

(a) Requests for briefs:

(1) The Board ordinarily will request the parties or intervenors to file briefs on issues before the Board. When briefs are requested, a party or intervenor may file a letter setting forth its arguments instead of filing a brief. The provisions of this rule shall apply to such letters.

(b) Time for filing briefs:

(1) When briefs are requested under paragraph (a), a briefing notice shall be issued to the parties or intervenors at a time reasonably in advance of the date when the case is scheduled for disposition. Unless the briefing notice provides otherwise, the time for filing of briefs shall be as follows:

(i) Appeal by one party or intervenor: A party or intervenor whose petition for review or for interlocutory appeal is granted, or whose interlocutory appeal is certified, shall file a brief within 40 days after the date of the briefing notice. All other parties or intervenors shall file briefs within 30 days after the brief of the petitioning or appealing party or intervenor is served.

(ii) Appeals by two or more parties or intervenors: When petitions of two or more parties or intervenors are directed for review, each such party or intervenor shall file an initial brief addressing the issues on which it appeals within 40 days after the date of the briefing notice, and may file a brief responding to the initial brief of the other party or intervenor within 30 days after the initial brief is served. This sequence of briefing shall be followed in the event that two or more parties' or intervenors' petitions for interlocutory appeal are granted or certified.

(iii) Direction for review on the motion of the Board: When no petition for discretionary review is granted and the Board directs review of a hearing officer's decision, all briefs shall be filed within 40 days after the date of the briefing notice.

(iv) Additional briefs: Additional briefs shall not be allowed except by leave of the Board.

(c) Motion for extension of time for filing briefs:

(1) Any extension of time to file a brief shall not be granted except in extra-ordinary circumstances. A motion for extension of time to file a brief shall be filed within the time limit prescribed in paragraph (b) of this section and shall include the following information: When the brief is due; the number and duration of extensions of time that have been granted to each party or intervenor; the length of extension being requested; the specific reasons for the extension being requested; and an assurance that the brief will be filed within the time extension requested.

(d) Consequences of late filing of briefs:

(1) The Board shall decline to accept a brief that is not filed on time.

(e) Length of briefs:

(1) Except by permission of the Board, a brief shall contain no more than 35 pages of text.

(f) Table of contents:

(1) A brief in excess of 15 pages shall include a table of contents.

(g) Failure to meet requirements:

(1) The Board shall return briefs that do not meet the requirements of paragraphs (e) and (f) of this section.

(h) Number of copies:

(1) Five copies of a brief shall be filed.

2200.94 Stay of final order.

(a) Any party or intervenor aggrieved by a final order of the Board may, while the matter is within the jurisdiction of the Board, file a motion for a stay.

(b) Such motion shall set forth the reasons a stay is sought and the length of the stay requested.

(c) The Board may order such stay for the period requested or for such longer or shorter period as it deems appropriate.

2200.95 Oral argument before the Board.

(a) Oral argument before the Board will be granted upon request of a party or intervenor.

(b) When oral argument is requested, the Board shall advise all parties or intervenors to the proceeding of the date, hour, place, time allotted and scope of such argument at least 10 days prior to the date set.

SUBPART G - MISCELLANEOUS PROVISIONS

2200.100 Settlement.

(a) Policy:

(1) Settlement is permitted at any stage of the proceedings and is subject to the approval of the Board. A settlement proposal shall be approved when it is consistent with the provisions and objections of the Code.

(b) Requirements:

(1) Every settlement proposal submitted to the Board or its hearing officer shall include, where applicable, the following:

(i) A motion to amend or withdraw a citation, notification of proposed penalty, notice of contest or petition for modification of abatement.

(ii) A statement that payment of the penalty has been tendered or a statement of a promise to pay, and when a penalty is reduced, a statement of explanation for the basis of the reduction.

(iii) A statement that the cited condition has been abated or a statement of the date by which abatement will be accomplished.

(iv) The Board may attach such additional requirements and conditions as are consistent with 2200.100(a).

(c) Filing; service; notice:

(1) When a settlement proposal is filed with the Board or its hearing officer, it shall also be served upon represented and unrepresented affected employees in the manner prescribed for notices of contest in Section 2200.7. Proof of service shall accompany the settlement proposal. A settlement proposal shall not be approved until at least 10 days following service of the settlement proposal on affected employees.

2200.100a Withdrawal of notice of contest.

At any time of the proceedings, a party or intervenor may move to withdraw its notice of contest or any portion thereof. The motion shall include a statement that a promise of another party or intervenor has not led to the motion to withdraw the notice of contest. The rule on settlements, Section 2200.100, shall apply whenever a promise of another party or intervenor has led to the party's or intervenor's motion to withdraw.

2200.101 Expedited proceeding.

(a) Upon application of any party or intervenor, or upon its own motion, the Board may order an expedited proceeding. Contests arising under Sections 2200.32 and 2200.33 shall be placed on a special docket and treated as expedited proceedings before the Board or its hearing officer. Cases arising under these sections, which are directed for review before the Board, shall also be placed on a special docket for review and treated as expedited proceedings under this section.

(b) When such proceeding is ordered, the Clerk shall notify all parties or intervenors.

(c) The Board or its hearing officer shall make necessary rulings with respect to time for filing of pleadings and all other matters, without reference to times set forth in these rules, shall order a record of the hearing, and shall do all other things necessary to complete the proceeding in the minimum time consistent with fairness.

2200.102 Standards of conduct.

All persons appearing in any proceeding shall conform to the standards of ethical conduct required in the courts of the State of Vermont.

2200.103 Ex parte communication.

(a) There shall be no communication with respect to the merits of any case not concluded between the Board, including any member, officer, employee or agent of the Board who is employed in the decisional process, and any of the parties or intervenors, unless all other parties or intervenors have the opportunity to participate.

(b) In the event such communication occurs, the Board or its hearing officer may make such orders or take such action as fairness requires. Upon notice and hearing, the Board or its hearing officer may take such disciplinary action as is appropriate in the circumstances against any person who knowingly and willfully makes or solicits the making of a prohibited communication.

2200.104 Restrictions as to participation by the Commissioner or the duly authorized agent of the Commissioner.

In any proceeding noticed pursuant to the rules in this part, the Commissioner or the duly authorized agent of the Commissioner shall not participate or advise with respect to the report of the Board's or its hearing officer's decision.

2200.105 Inspection and reproduction of documents.

(a) Subject to the provisions of law restricting public disclosure of information, any person may, at the office of the Board, inspect and copy any document filed in any proceeding.

(b) Costs shall be borne by such person.

2200.106 Restrictions with respect to former employees.

No former employee of the Board or the Commissioner (including a member of the Board or the Commissioner) shall appear before the Board as an attorney or other representative for any party or intervenor in any proceeding or other matter, formal or informal, in which that person participated personally and substantially during the period of employment, or was personally responsible during the period of employment, unless one year has elapsed since the termination of such employment.

2200.107 Amendments to rules.

The Board may at any time upon its own motion or initiative, or upon written suggestion of any interested person setting forth reasonable grounds therefore, amend or revoke any of the rules contained herein in accordance with the Administrative Procedures Act. Such suggestions should be addressed to the Board at its mailing address.

2200.108 Special circumstances; waiver of rules.

In special circumstances not contemplated by the provisions of these rules, or for good cause shown, the Board may, upon application by any party or intervenor, or on its own motion, after 3 days notice to all parties or intervenors, waive any rule or make such orders as justice or the administration of the Code requires.

2200.109 Penalties.

(a) All penalties assessed by the Board are civil.

(b) The Board has no jurisdiction under Section 210(b)(1), (2), (3) or (4) of the Code and will conduct no proceeding thereunder.

2200.110 Offical Seal - Vermont Occupational Safety and Health Review Board.

The seal of the Review Board shall consist of: a landscape in the foreground or base; high mountains above extending into the sky; a pine tree extending near the base, nearly to the top; three sheaves of grain placed diagonally on the right side; a cow standing on the left side of the field; the whole encircled by a shield further encircled by a band inscribed "STATE OF VERMONT + VOSHA REVIEW BOARD."

SUBPART M - SIMPLIFIED PROCEEDINGS

INTRODUCTION

"I just received a citation from the Vemont Department of Labor and Industry and I want to fight it. But the time and expense of going to court is going to cost more than either the penalty or abatement. What should I do?"

or

"My employer just posted a citation received from VOSHA and we want to object to the abatement date set in the citation. But our local union can't afford all of the time and expense of a full-blown hearing. What should we do?"

These are common concerns heard by members of the Vermont Occupational Safety and Health Review Board. In an effort to solve these problems, the Board has adopted federally instituted "Simplified Proceedings" to help make it easier for those concerned to "have their day in court." These simplified proceedings are designed to make the resolution of cases faster, to make it easier for those appearing before the Board or its hearing officer to proceed without an attorney, and to reduce paperwork and the expense of litigation.

As its name implies, cases handled under simplified proceedings will not be subject to many of the rules generally found in conventional proceedings. However, simplified proceedings are not appropriate for all cases; because the procedure has been streamlined, certain legal "tools" used to litigate or "fight" a case are not available. Also, because much of the discussion in simplified proceedings takes place "off the record," your case may be more difficult to review at the Board or Superior Court level, should it go that far. Therefore, the decision to use simplified proceedings should not be taken lightly. Since the procedure is quite different, read this entire explanation and make sure you understand it before proceeding.

Briefly, let's take a look at the "differences" under simplified proceedings. Under simplified proceedings, the pleadings or initial documents are generally not permitted. Therefore, the Commissioner of Labor and Industry will not file a complaint and the employer will not have to respond by filing an answer. These functions will now be served by the citation and the notice of contest. Also, discovery of factual material before the hearing is generally restricted. Interlocutory appeals of the Board or its hearing officer's early rulings are prohibited, and, if the case goes to a hearing, the parties or intervenors will not be required to follow formal rules of evidence.

Simplified proceedings are designed to provide a simple and inexpensive "day in court" for those affected by VOSHA citations. Before that happens, there are a number of procedures designed specifically to provide the opportunity for an early settlement of the matters in dispute between the parties or intervenors. For example, if simplified proceedings are elected, the parties or intervenors are required to engage in an informal discussion to either settle the case or narrow the factual and legal issues to be decided by the Board or its hearing officer. If the case is not settled during the informal discussion between the parties or intervenors, there will be a

conference presided over by the Board or its hearing officer before the actual hearing to attempt to resolve all remaining issues, or if that should fail, to narrow those issues that will be taken up at the hearing.

Almost all cases are eligible for simplified proceedings. Only cases involving certain health regulations (which will be discussed later) and Section 223(a) of the Act (the "general duty clause") are ineligible because of their inherent complexity. Just because a case is eligible for simplified proceedings does not necessarily mean that the case is appropriate for such treatment. As previously mentioned, a decision to request simplified proceedings will result in the loss or curtailment of many rules and procedures that are otherwise available. Therefore, when deciding to elect simplified proceedings, it is important to decide whether the loss of these rules and procedures will interfere with your ability to present your case.

2200.200 Purpose.

(a) The purpose of this subpart is to provide simplified procedures for resolving contests under the Vermont Occupational Safety and Health Act so that parties or intervenors before the Board or its hearing officer may save time and expense while preserving fundamental procedural fairness. The rules shall be construed and applied to accomplish these ends.

(b) Procedures under this subpart are simplified in a number of ways. The major differences between these procedures and those provided in Subparts A through G of the Board's Rules of Procedure are the following:

(1) Pleadings generally are not permitted or required. Early discussions among the parties or intervenors will include legal and factual matters in dispute and narrow the issues to the extent possible.

(2) Discovery is generally not permitted.

(3) The Rules of Evidence as applied in the Superior Courts of the State of Vermont shall not apply.

(4) Interlocutory appeals are not permitted.

2200.201 Application.

The rules in this subpart shall govern proceedings before the Board or its hearing officer when (a) the case is eligible for simplified proceedings under Section 2200.202, (b) any party or intervenor requests simplified proceedings and (c) no party or intervenor files an objection to the request.

2200.202 Eligibility for simplified proceedings.

A case is eligible for simplified proceedings unless it concerns an alleged violation of any of the following:

(a) Section 1910.94 (Ventilation)
(b) Section 1910.95 (Occupational noise exposure)
(c) Section 1910.96 (Ionizing radiation)
(d) Section 1910.97 (Non-ionizing radiation)
(e) Section 1910.1000 - Section 1910.1045 and any future standard that might be published under Subpart Z of Section 1910 involving "Toxic and Hazardous Substances"
(f) Section 1926.52 (Occupational noise exposure)
(g) Section 1916.53 (Ionizing radiation)
(i) Section 1926.55 (Gases, vapors, funes, dusts and mists)
(j) Section 1926.57 (Ventilation)
(k) Section 1926.800(c) (Tunnels and shorings - air quality and ventilation)

2200.203 Commencing simplified proceedings.

(a) Requesting simplified proceedings:

(1) Who may request:

(i) Any party or intervenor may request simplified proceedings.

(2) When to request:

(i) After the Board receives an employer's or employee's notice of contest or petition for modification of abatement, the Clerk shall issue a notice indicating that the case has been docketed. A request for simplified proceedings, if any, shall be filed within 10 days after the notice of docketing is received, unless the notice of docketing states otherwise.

(3) How to request:

(i) A simple statement is all that is necessary. For example, "I request simplified proceedings" will suffice. The request shall be filed with the Clerk and served in the manner prescribed for notices of contest in Section 2200.7.

(4) Effect of the request:

(i) For those cases eligible under Section 2200.202, simplified proceedings are in effect when any party or intervenor requests simplified proceedings and no party or intervenor files a timely objection to the request.

(b) Objecting to simplified proceedings:

(1) Who may object:

(i) Any party or intervenor may object to a request for simplified proceedings.

(2) When to object:

(i) An objection shall be filed within 15 days after the request for simplified proceedings is served.

(3) How to object:

(i) A simple statement is all that is necessary. For example, "I object to simplified proceedings" will suffice. An objection shall be filed with the Clerk and served in the manner prescribed for notices of contest in Section 2200.7.

(4) Effect of the objections:

(i) The filing of a timely objection shall preclude the institution of simplified proceedings.

(c) Notice:

(1) When the period for objecting to simplified proceedings expires and no objection has been filed, the Board shall notify all parties or intervenors that simplified proceedings are in effect.

(2) When a party or intervenor files a timely objection to a request for simplified proceedings, the Board shall notify all parties or intervenors that the case shall continue under conventional procedures (Subparts A through G).

2200.204 Filing of pleadings.

(a) Complaint and answer:

(1) No formal pleadings are required in simplified proceedings. The citation served on the employer serves as the "complaint" and the employer's Notice of Contest and request for simplified proceedings serves as the "answer."

(b) Motions:

(1) Formal motions are discouraged because a primary purpose of simplified proceedings is to eliminate, as much as possible, motions and similar documents. A motion will not be viewed favorably if the subject of the motion has not been first discussed among the parties or intervenors prior to the conference/hearing.

2200.205 Conferences; hearings.

(a) Within a reasonable time before the conference/hearing described in (b), the parties or intervenors shall meet, or confer by telephone, and discuss the following: Settlement of the case; the narrowing of issues; an agreed statement of issues and facts; defenses; witnesses and exhibits; motions; and any other pertinent matter.

(b) The Board or its hearing officer shall schedule and preside over a conference/hearing.

(1) Conference:

(i) The purpose of the conference is to resolve as many disputed issues as possible prior to hearing. At the beginning of the conference, the Board or its hearing officer shall enter into the record all agreements reached by the parties or intervenors, as well as defenses raised during the

discussion set forth in Section 2200.205. The parties or intervenors and the Board or its hearing officer shall attempt to resolve or narrow the remaining issues. At the conclusion of the conference, the Board or its hearing officer shall enter into the record any further agreements reached by the parties or intervenors.

(2) Hearing:

(i) The Board or its hearing officer shall hold a hearing on any issue that remains in dispute at the conclusion of the conference. The hearing shall be in accordance with 3 VSA Section 809.

(3) Evidence:

(i) Oral or documentary evidence shall be received, but the Board or its hearing officer may exclude irrelevant or unduly repetitious evidence. Testimony shall be given under oath. The Rules of Evidence as applied in the Superior Courts of the State of Vermont shall not apply.

(4) Oral and written argument:

(i) Each party or intervenor may present oral argument at the close of the hearing. Parties or intervenors wishing to present written argument shall notify the Board or its hearing officer at the conference/hearing so a reasonable period for the prompt filing of written argument may be set.

2200.206 Reporter present; records.

A reporter shall be present at the conference/hearing. An official verbatim record of the hearing shall be prepared and filed with the hearing officer. Parties or intervenors may request the preparation of a record from the reporter at their own expense. When the hearing has been before the Board, rather than its hearing officer, the requirements pertaining to records shall not apply.

2200.207 Decision of the Board or its hearing officer.

(a) The Board or its hearing officer shall issue a written decision in accordance with Section 2200.90.

(b) After the issuance of the Board or its hearing officer's decision, the case shall proceed in the conventional manner (Subparts A through G).

2200.208 Discovery.

Discovery, including requests for admissions, shall not be allowed except by order of the Board or its hearing officer.

2200.209 Interlocutory appeals not permitted.

Appeals to the Board of a ruling made by a hearing officer which is not the hearing officer's final disposition of the case are not permitted.

Sample

APPENDIX 1A

NOTICE OF CONTEST TO CITATION AND PROPOSED PENALTIES

Chandler Concrete Corporation
211 Valley Road
Passumpsic, VT 05861

March 1, 1993

Mr. ABC, Manager/VOSHA
Dept. of Labor and Industry
120 State Street
Montpelier, VT 05620-3401

Dear Mr. ABC:

This is to notify you that Chandler Concrete Corporation contests all of the items and penalties alleged in the Citation and Proposed Penalty we received February 20, 1993, which was dated February 18, 1993 (copy attached).

Sincerely,

CHANDLER CONCRETE CORPORATION

N.B. Chandler
President

SAMPLE

APPENDIX 1B

NOTICE OF CONTEST TO PROPOSED PENALTIES ONLY

Chandler Concrete Corporation
211 Valley Road
Passumpsic, VT 05861

March 1, 1993

Mr. ABC, Manager/VOSHA
Dept. of Labor and Industry
120 State Street
Montpelier, VT 05620-3401

Dear Mr. ABC:

I wish to contest the Proposed Penalties of $1,200 issued February 18, 1993, based on the alleged violations cited during a recent inspection. I believe they are unreasonable for a number of reasons.

Sincerely,

CHANDLER CONCRETE CORPORATION

N.B. Chandler
President

Sample

APPENDIX 1C

NOTICE OF CONTEST BY EMPLOYEE REPRESENTATIVE

Metal Workers International Union
589 22nd Street, NW
Washington, D.C. 20006

March 1, 1993

Mr. ABC, Manager/VOSHA
Dept. of Labor and Industry
120 State Street
Montpelier, VT 05620-3401

Dear Mr. ABC:

We have been authorized by the employee representative, Local 15 of the Metal Workers International Union, to file this notice of contest of the VOSHA citations issued on February 18, 1993 against the employer, Chandler Concrete Corporation of Passumpsic, Vermont.

The abatement dates of February 27, 1994 for Items No. 1 and No. 3 of the non-serious citation and January 5, 1994 for Item No. 1 of the serious citation are unreasonable.

Furthermore, because of the danger to which employees are exposed due to these violations, we seek a hearing and ruling on our contest as soon as possible. Such urgency is necessary to minimize irreversible damage to the health of the employees.

Sincerely,

W. T. Metz, Director
Safety Department

Sample

APPENDIX 1D

NOTICE OF CONTEST BY EMPLOYER

(A notice in the following form shall be deemed to comply with Section 2200.7(g):)

Metal Workers International Union
589 22nd Street, NW
Washington, D.C. 20006

Your employer has been cited by the Commissioner of Labor and Industry for violation of the Vermont Occupational Safety and Health Code. The citation has been contested and will be the subject of a hearing before the Vermont Occupational Safety and Health Review Board. Affected employees are entitled to participate in this hearing as parties or intervenors under terms and conditions established by the Review Board in its Rules of Procedure. Notice of intent to participate should be sent to:

Vermont Occupational Safety and Health Review Board
State Administration Building Post Office
133 State Street
Montpelier, Vermont 05633-6701

All papers relevant to this matter may be inspected at:

(Place reasonably convenient to employees, preferably at or near the workplace.)

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

The reasonableness of the period prescribed by the Commissioner of Labor and Industry for abatement of the violation has been contested and will be the subject of a hearing before the Vermont Occupational Safety and Health Review Board.

Sample

APPENDIX 2

COMPLAINT

STATE OF VERMONT

OCCUPATIONAL SAFETY AND
HEALTH REVIEW BOARD
DOCKET NO. 000

COMMISSIONER OF LABOR AND INDUSTRY,
Complainant

vs.

CHANDLER CONCRETE CORPORATION,
Respondent

COMPLAINT

JURISDICTION

1. Jurisdictional basis for this complaint is in Chapter 3 of Title 21, Vermont Statutes Annotated (Supp. 1973).

PARTIES

2. Complainant, Commissioner of Labor and Industry for the State of Vermont, is empowered to enforce the Vermont Occupational Safety and Health Act, Chapter 3, Title 21 V.S.A.

3. Respondent, Chandler Concrete Corporation, a corporation registered in Vermont, is engaged in business as a concrete construction firm. Respondent maintains its home office in Passumpsic, Vermont.

CLAIM

4. Respondent maintained a worksite at 8th and East Avenues, Passumpsic, Vermont. At this site, Respondent, through its employees, was engaged in repairing a concrete wall using supplies and equipment received from sources outside the State of Vermont.

5. Respondent, as a result of the aforesaid activities, is an employer engaged in a business affecting commerce, engages employees and is subject to the requirements of the Act and the regulations issued or promulgated thereunder.

6. An inspection of Respondent's worksite was conducted by a Safety Compliance Officer of the VOSHA Division of the Dept. of Labor and Industry on February 12, 1993.

7. As a result of this inspection, Respondent was issued on February 18, 1993, one Citation and a Proposed Penalty of $000.

8. The Citation and Proposed Penalty attached hereto, made a part hereof, and marked Exhibit A, identifies the specific standard violation, the said violation, specifies the abatement date established for the contested item and sets forth the penalties proposed for the said Citation.

9. Respondent employs approximately two employees at its aforesaid worksite, one or both of whom are affected by the above violation.

10. Respondent submitted a Notice of Contest dated February 26, 1993, signed by N.B. Chandler, President, informing Complainant of its intention to contest the citation and penalty. The Notice of Contest was received by the Manager/VOSHA of the Dept. of Labor and Industry on February 28, 1993.

11. The proposed penalties for the contested items, as set forth in Exhibit A, give due consideration to the gravity of the violation, the size of Respondent's business, Respondent's good faith and its history of previous violations.

12. The abatement date for the contested items, as set forth in Exhibit A, has been fixed to secure abatement within the shortest period of time within which Respondent can reasonably be expected to correct said violations, giving due consideration to the gravity of the violation, the number of employees exposed, the availability of needed equipmet, and/or where appropriate, the estimated time required for delivery and installation.

WHEREFORE, cause having been shown, Complainant demands that the VOSHA Review Board affirm the citation and assess a penalty for the aforesiad violation in an amount not less than that assessed by the VOSHA Division of the Dept. of Labor and Industry.

_____
XYZ
Special Ass't. Attorney General

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Complaint has been served upon Respondent by mailing a copy of the above document on this 8th day of March 1993, to N.B. Chandler, Chandler Concrete Corporation, 211 Valley Road, Passumpsic, Vermont.

_____
XYZ
Special Ass't. Attorney General

Sample

APPENDIX 3

ANSWER

STATE OF VERMONT

OCCUPATIONAL SAFETY AND
HEALTH REVIEW BOARD
DOCKET NO. 000

COMMISSIONER OF LABOR AND INDUSTRY,
Complainant

vs.

CHANDLER CONCRETE CORPORATION,
Respondent

ANSWER

Respondent, by its President, N.B. Chandler, makes answer to the Complaint filed in the above-captioned matter, as follows, to wit:

1. Admitted.
2. Admitted.
3. Admitted.
4. Admitted.
5. Admitted.
6. Admitted.
7. Admitted.
8. It is admitted. Citation is attached.
9. Respondent admits that two employees were engaged at the worksite mentioned but were not affected by any alleged violations.
10. Admitted.
11. Respondent maintains that no violation in fact existed and that therefore no penalty is reasonable.
12. Respondent is unable to reply to this paragraph as it constitutes a conclusion and a motivation for the penalty which is within the complete control of the Commission.

It is respectfully requested that the Citation be dismissed.

N.B. Chandler, President
Chandler Concrete Corporation

I certify that on March 15, 1993, I sent, by mail, a true copy of this Answer to the VOSHA Division of the Dept. of Labor and Industry, 120 State Street, Montpelier, Vermont 05620-3401.

N.B. Chandler, President
Chandler Concrete Corproation

SAMPLE

APPENDIX 4

NOTICE OF DECISION

STATE OF VERMONT

OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

Commissioner of Labor and Industry vs. _____

Docket No. RB____

1. Enclosed herewith is my decision in the above-entitled case. It will be filed on _____, 1994, and will become a final order of the Board pursuant to 21 V.S.A. Section 226(d) on _____ _____, 1994, unless a member of the Board directs that it be reviewed. Parties or intervenors will not receive any further communication from the Board unless it is directed for review (see Paragraph 4 below).

2. You may petition for review of this decision by the Board. An original and (3) copies of such a petition must be submitted in accordance with Section 2200.91a of the Board's Rules of Procedure. In order to assure careful consideration thereof, it should be sent to me so that it can be incorporated with my decision and filed with it on _____ _____, 1994, Petitions will be accepted after that filing date, but there is no guarantee that there will be sufficient time to fully consider them. The final order date is statutory and cannot be extended under any circumstances.

3. Petitions for review submitted prior to the above-noted filing date should be sent to me. Those submitted after the filing date should be mailed to the VOSHA Review Board at the following address: State Administration Building Post Office, 133 State Street, Montpelier, Vermont 05633-6701.

4. Should review be granted by a member of the Board, each party or intervenor to this case will be notified and each will be given an opportunity to submit a brief to the Board, prior to its final disposition of the case.

5. It would be appreciated if you would execute the enclosed postcard and mail it at once so that your present intention on seeking review of this decision may be known. It does not bind you in any way, but is used only to project future workload.

Dated:

Sample

APPENDIX 5

PETITION FOR DISCRETIONARY REVIEW

STATE OF VERMONT

OCCUPATIONAL SAFETY AND
HEALTH REVIEW BOARD
DOCKET NO. 000

COMMISSIONER OF LABOR AND INDUSTRY,
Complainant

vs.

CHANDLER CONCRETE CORPORATION,
Respondent

PETITION FOR DISCRETIONARY REVIEW

Respondent, Chandler Concrete Corporation, in disagreement with the Decision and Order of the hearing officer in the above matter, hereby submits this Petition for Discretionary Review pursuant to Section 2200.91 of the VOSHA Review Board's Rules of Procedure.

STATEMENT OF PORTIONS OF THE DECISION
AND ORDER TO WHICH EXCEPTION IS TAKEN

Chandler Concrete Corporation takes exception to the hearing officer's finding on page 6 of the Decision, that the concrete wall collapsed due to failure to take proper safety precautions.

STATEMENT OF REASONS FOR WHICH EXCEPTIONS ARE TAKEN

It is the position of the Chandler Concrete Corporation that the violation was indeed proven not to be the fault of the Respondent by the evidence presented at the hearing and by statements made by expert witnesses. See pages 101-132 of the record.

For the reasons set forth above, the Respondent requests that this case be directed for review.

Respectfully submitted,

_____
N.B. Chandler, President
Chandler Concrete Corporation

March 30, 1993

Sample

APPENDIX 6A

ORDER GRANTING REQUEST FOR DISCRETIONARY REVIEW

STATE OF VERMONT

OCCUPATIONAL SAFETY AND
HEALTH REVIEW BOARD
DOCKET NO. 000

COMMISSIONER OF LABOR AND INDUSTRY,
Complainant

vs.

CHANDLER CONCRETE CORPORATION,
Respondent

ORDER GRANTING REQUEST FOR DISCRETIONARY REVIEW

Pursuant to Section 2200.92 of the VOSHA Review Board's Rules of Procedure (hereinafter "The Rules"), the petition for discretionary review filed by the (Complainant/Respondent) is granted. The issues raised by the petition, a copy of which is attached, include:

> Whether the Hearing Officer erred in concluding that the alleged failure to comply with the standard 1926.451 (a)(8) was a violation of Section 224 of the Act.

Briefs shall be submitted by the parties or intervenors pursuant to the provisions of Section 2200.93(b) of The Rules.

(Optional) The Board hereby agrees to allow oral argument and will advise all parties or intervenors of the date, hour, place, time allotted and scope of such argument after all briefs have been filed, but no less than 10 days prior to the date of argument.

Dated at Montpelier, Vermont this ____ day of _____, 199__.

_____
XYZ
Chair of the Board

GLOSSARY

Pleadings ..... These are the documents in which the parties or intervenors set out their allegations or defenses. The most common type of pleadings are the Complaint and Answer.

Pleadings are prohibited in simplified proceedings.

Complaint and Answer ..... Under conventional procedures, after an employer files its notice of contest to a citation, the Commissioner of Labor and Industry files a "Complaint" with the Board that sets forth in detail the nature of the allegations against the employer.

The employer must respond to the complaint by filing an "Answer." In the answer, the employer must either admit, deny or express lack of knowledge of the allegations contained in the complaint. The employer should also assert any defenses relevant to the citation.

The Board has eliminated these documents for cases under simplified proceedings.

Discovery ..... This is a procedure that enables a party or intervenor to obtain information necessary to its case, but in the possession of another party, intervenor or witness. Common discovery techniques include: interrogatories (written questions), depositions (oral statements under oath), production of documents or things, requests for admissions, etc.

Interlocutory Appeals ..... These are the appeals by a party or intervenor taken from rulings by the hearing officer made either before or during the hearing. The hearing officer's ruling is the type that does not dispose of the case, but may generally affect a party or intervenor's rights and obligations.

Interlocutory appeals are prohibited in simplified proceedings. However, the ruling in question can be appealed to the Board after the hearing officer issues a final decision in the case.

Motions ..... A motion is an application made to a hearing officer to obtain an order directing some act to be done in favor of the person making the motion.

Sample

APPENDIX 6B

ORDER DENYING REQUEST FOR DISCRETIONARY REVIEW

STATE OF VERMONT

OCCUPATIONAL SAFETY AND
HEALTH REVIEW BOARD
DOCKET NO. 000

COMMISSIONER OF LABOR AND INDUSTRY,
Complainant

vs.

CHANDLER CONCRETE CORPORATION,
Respondent

ORDER DENYING REQUEST FOR DISCRETIONARY REVIEW

The petition for discretionary review filed by (Complainant/Respondent) on _____, 19__ is hereby denied. The Review Board has determined that not enough information was presented in the petition that would affect the Hearing Officer's decision. The Board affirms that the evidence presented to the Hearing Officer supports the findings in conclusions of the Hearing Officer and affirms that decision as written.

Therefore, the decision of the Hearing Officer in this matter dated _____, 19__ becomes a final order of the Board, as of the date set forth below.

The penalty assessed in the amount of _____ dollars should be sent directly to the VOSHA Administration, Department of Labor and Industry, 120 State Street, Montpelier, Vermont 05620-3401, within the next 30 days.

Pursuant to 21 VSA Section 227(a), any person adversely affected or aggrieved by an order of the Board may file an appeal in any Superior Court for the county in which the violation occurred or where their principal office is located, by sending a written petition within 60 days following the issuance of this order and asking that it be set aside or modified. The cost of having a transcript prepared for such an appeal shall be paid by the party or intervenor filing the appeal.

Dated at Montpelier, Vermont this ____ day of _____, 199__.

_____
XYZ
Chair of the Board