VOSHA Review Board

Rules of Procedure

CVR 24 050 002
SOS Rule Number 21-022

Adopted 8/2/21
Effective 8/17/21

Table of Contents

SUBPART A— GENERAL PROVISIONS

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

§ 2200.1 Definitions.

(a) ***Act*** means the Occupational Safety and Health Act of 1970, 29 U. S. C. 651-678.

(b) ***Affected Employee*** means an employee of a cited employer who is exposed to or has access to the hazard arising out of the allegedly violative circumstances, conditions, practices, or operations.

(c) ***Authorized Employee Representative*** means a labor organization that has a collective bargaining relationship with the cited employer and that represents affected employees who are members of the collective bargaining unit.

(d) ***Citation*** means a written communication issued by the Commissioner of Labor to an employer pursuant to 21 VSA Section 225(a) describing the nature of the alleged violation of the VOSHA Code together with the date by which the alleged violation is to be abated.

(e) ***Clerk*** means the Clerk of the Review Board.

(f) ***Commissioner*** means the Commissioner of Labor or designee.

(g) ***Day*** means a calendar day.

(h) "***Electronic transmission***" or "electronically transmitted" means a process of communication not directly involving the physical transfer of paper that is suitable for the retention, retrieval, and reproduction of information by the recipients. Facsimile transmission is not considered an electronic transmission.

(i) ***Employee, Employer,*** **and** ***Person*** have meanings set forth in 21 VSA §203.

(j) ***Hearing Officer*** means a Hearing Officer appointed by the Review Board set forth in 21 VSA §230.

(k) ***Intervenor*** means anyone with an interest in a given Review Board proceeding who is not a party and has been granted intervenor status.

(l) ***Notification of proposed penalty*** and ***Notification of failure to correct a violation*** mean written communications from the Commissioner issued pursuant to 21 VSA Section 225(a) and 226(b).

(m) ***Party*** means any department, employer and employee affected by a citation(s) issued by the Commissioner of Labor and any authorized representative who has entered an appearance in the matter.

(n) ***Pleadings*** are complaints and answers filed under § 2200.34, statements of reasons and employers' responses filed under § 2200.38, and petitions for modification of abatement and objecting parties' responses filed under § 2200.37. A motion is not a pleading within the meaning of these rules.

(o) ***Proceeding*** means any proceeding before the Review Board or its Hearing Officer initiated under 21 VSA Section 226.

(p) ***Pro Se*** means any party representing themselves.

(q) ***Representative*** means any person, including an authorized employee representative, authorized by a party or intervenor to represent it in a proceeding.

(r) ***Review Board*** means the Occupational Safety and Health Review Board as created under 21 VSA 230.

(s) ***Rule*** means a rule or regulation.

(t) ***VOSHA Code*** means the Vermont Occupational Safety and Health Act, 21 VSA, Chapter 3, Subchapters 4 and 5, and 18 V.S.A. chapter 28, and the rules adopted thereunder.

§ 2200.2 Scope of Rules; Applicability of Vermont Rules of Civil Procedure and Vermont Administrative Procedures Act; and Construction.

(a) ***Scope.*** These rules shall govern all proceedings before the Review Board and its Hearing Officers.

(b) ***Applicability of Vermont Rules of Civil Procedure and Vermont Administrative Procedures Act***. In the absence of a specific provision, procedure shall be in accordance with the Vermont Rules of Civil Procedure and Vermont Administrative Procedures Act.

(c) ***Construction***. These rules shall be construed to secure an expeditious, just, and inexpensive determination of every case.

§ 2200.3 Use of Gender and Number.

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

(b) ***Gender***. Words importing the masculine, feminine or neutral gender may be applied equally to all genders.

§ 2200.4 Computing Time.

(a) ***Computation.*** The following rules apply in computing any time period specified in these rules or by any order that does not specify a method of computing time.

(1) ***Period stated in days or longer unit***. When the period is stated in days or a longer unit of time.

(i) Exclude the day of the event that triggers the period;

(ii) Count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(iii) Include the last day of the period, but if the last day is a Saturday, Sunday, or l e g a l holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(2) ***Inaccessibility of the Review Board Office.*** Unless ordered otherwise if the Review Board office is closed, or otherwise inaccessible on the last day for filing due to inclement weather or other circumstance, then the time for filing is extended to the first day the office is open that is not a Saturday, Sunday, or legal holiday.

(3) ***"Last day" defined***. Unless a different time is set by a rule or order, the last day ends:

(i) Filings through electronic transmission: 11:59 p.m. Eastern Standard Time; and

(ii) Filing by other means when the Review Board office is scheduled to close.

(4) ***"Next day" defined.*** The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(5) ***"Legal holiday" defined.*** "Legal holiday" means:

(i) Any day declared a holiday by the President or Congress of the United States; and

(ii) Any day declared a holiday by the State of Vermont.

(b) ***Additional time after service by U.S. Mail.*** When a party may or must act within a specified time after service and service is made by U.S. Mail under § 2200.7, three (3) days are added after the period would otherwise expire under § 2200.4(a). *Provided, however,* that this provision does not apply to computing the time for filing a petition for discretionary review under § 2200.91(b).

§ 2200.5 Extension of Time.

The Review Board or the Hearing Officer, after being assigned to a case, on their own initiative or, upon motion of a party, for good cause shown, may enlarge or shorten any time prescribed by these rules or prescribed by an order. All such motions shall be in writing and shall conform with § 2200.40, but, in exigent circumstances in a case pending before a Hearing Officer, an oral request may be made and shall be followed by a written motion filed with the Hearing Officer within such time as the Hearing Officer prescribes. A request for an extension of time should be received in advance of the date on which the pleading or document is due to be filed. However, in exigent circumstances, an extension of time may be granted even though the request was filed after the designated time for filing has expired. In such circumstances, the party requesting the extension must show, in writing, the reasons for the party's failure to make the request before the time prescribed for the filing had expired. The motion may be acted upon before the time for response has expired.

§ 2200.6 Record Address.

(a) Every pleading or document filed by any party or intervenor shall contain the name, current address, telephone number, and e-mail address of the party or intervenor's representative or, if there is no representative, the party or intervenor's own name, current address, telephone number, and e-mail address. Any change in such information must be communicated promptly in writing to the Clerk and to all other parties and 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 until such time as the required information is provided to the Clerk.

(b) Representatives, Parties, and Intervenors who file case documents electronically pursuant to § 2200.8(d) are responsible for both maintaining a valid email address and regularly monitoring that email address.

§ 2200.7 Service, Notice, and Posting.

(a) ***When service is required.*** At the time of filing pleadings or other documents, the filer shall serve a copy on every other party or intervenor. Every order required by its terms to be served shall be served on all parties and intervenors.

(b) ***Service on represented parties or intervenors.*** Service upon either a party or intervenor, who has appeared through a representative, shall be made upon such representative unless the Review Board or the Hearing Officer, after being assigned to a case, orders service on the party or intervenor.

(c) ***How accomplished.*** Unless otherwise ordered, service may be accomplished by the following methods:

(1) ***U.S. Mail.*** Service shall be deemed accomplished upon depositing the item in the U.S. Mail with first-class or higher class (such as priority mail) postage pre-paid addressed to the recipient's record address provided pursuant to § 2200.6.

(2) ***Commercial or other personal delivery.*** Service shall be deemed accomplished upon delivery to the recipient's record address provided pursuant to § 2200.6.

(3) ***Facsimile transmission.*** Service by facsimile transmission shall be deemed accomplished upon delivery to the receiving facsimile machine. The party serving a document by facsimile is responsible for the successful transmission and legibility of documents intended to be served.

(4) ***State of Vermont Interoffice Mail.*** Service by any interoffice mail system used by the State of Vermont shall be deemed accomplished by receipt by the Review Board Office.

(5) ***Electronic Transmission.*** Documents may be served by electronic transmission (Examples include but are not limited to e-mail) if the sending and receiving parties agree to it in a writing, filed with the Review Board and specifies the type of electronic transmission to be used. For documents filed by electronic transmission, service shall be deemed accomplished by the simultaneous service of the document through electronic transmission on all other parties and intervenors in the case, together with proof of service pursuant to paragraph (d) of this section.

(d) ***Proof of service.*** Service shall be documented by a written certificate of service setting forth the date and manner of service. The certificate of service shall be filed with the pleading or document.

(e) ***Proof of posting.*** Where service is accomplished by posting set forth in paragraph (g) and (i) of this section, proof of such posting shall be filed with the Review Board Clerk not later than the first working day following the posting.

(f) ***Service on represented employees.*** Service and notice to employees represented by an authorized employee representative shall be deemed accomplished by serving the representative in a manner prescribed in paragraph (c) of this section.

(g) ***Service on unrepresented employees.*** In the event there are affected employees who are not represented by an authorized employee representative, the employer shall post, immediately upon receipt, the docketing notice for the notice of contest or petition for modification of the abatement period. The posting shall be at or near where the citation is required to be posted pursuant to 21 VSA 225(b) and 29 CFR § 1903.16. The employer shall post:

(1) A copy of the notice of contest or petition for modification of the abatement period;

(2) A notice informing the affected employees of their right to party status; and

(3) A notice informing the affected employees of the availability of all pleadings for inspection and copying at reasonable times.

(4) A notice in the following form shall be deemed to comply with this paragraph:

(i) (Name of Employer)

Your employer has been cited by the Vermont Commissioner of Labor for violation of the Vermont Occupational Safety and Health Act. The citation has been contested and will be the subject of a hearing before the VOSHA Review Board (Review Board). Affected employees are entitled to participate in this hearing as parties under terms and conditions established by the Review Board in its Rules of Procedure. Notice of intent to participate must be filed no later than 14 days before the hearing. Any notice of intent to participate should be sent to the current VOSHA Review Board mailing address or delivery to the current VOSHA Review Board physical address. All pleadings relevant to this matter may be inspected at: (Place reasonably convenient to employees, preferably at or near workplace.)

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

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

(h) ***Special service requirements; Authorized employee representatives.*** The authorized employee representative, if any, shall be served with the notice set forth in paragraph (f) of this section and with a copy of the notice of contest or petition for modification of the abatement period.

(i) ***Notice of hearing to unrepresented employees.*** Immediately upon receipt, a copy of the notice of the hearing to be held before the Hearing Officer shall be served by the employer on affected employees who are not represented by an authorized employee representative by posting a copy of the notice of such hearing at or near the place where the citation is required to be posted pursuant to 21 VSA 225(b) and 29 CFR § 1903.16.

(j) ***Notice of hearing to represented employees.*** Immediately upon receipt of the notice of the hearing to be held before the Hearing Officer, the employer shall serve a copy of the notice on the authorized employee representative of affected employees in the manner prescribed in paragraph (c) of this section. The employer need not serve the notice of hearing, as stated above, if on or before the date the hearing notice is received, the authorized employee representative has entered an appearance in conformance with § 2200.22 and § 2200.23.

(k) ***Employee contest; Service on other employees.***

(1) Where a notice of contest with respect to the reasonableness of the abatement period is filed under § 2200.38(a) by an affected employee who is not represented by an authorized employee representative and there are other affected employees who are represented by an authorized employee representative, the unrepresented affected employee shall serve the following documents on the authorized employee representative:

(i) The notice of contest with respect to the reasonableness of the abatement period; and

(ii) A copy of the Commissioner's statement of reasons, filed in conformance with § 2200.38(b).

(2) Service on the authorized employee representative shall be in the manner prescribed in paragraph (c) of this section. The unrepresented affected employee shall file proof of such service.

(l) ***Employee contest; Service on employer.*** Where a notice of contest with respect to the reasonableness of the abatement period is filed by an affected employee or an authorized employee representative, a copy of the notice of contest and response filed in support of the notice of contest shall be provided to the employer for posting in the manner prescribed in paragraph (g) and (i) of this section.

(m) ***Employee contest; Service on other authorized employee representatives.*** An authorized employee representative who files a notice of contest with respect to the reasonableness of the abatement period shall be responsible for serving any other authorized employee representative whose members are affected employees in the manner prescribed in paragraph (c) of this section.

(n) ***Duration of posting.*** Where posting is required by this section, such posting shall be maintained until the commencement of the hearing or until earlier disposition.

(o) ***Service of show cause orders.***

(1) *Service on parties and intervenors through electronic transmission (if elected).* Service of show cause orders shall be deemed completed by service through electronic transmission on a representative who has entered an appearance for a party or intervenor under § 2200.23 or on a self-represented party or intervenor who has elected service through electronic transmission. *See also § 2200.101*(a).

(2) *Service on self-represented parties or intervenors not using electronic transmission*. In addition to the service methods permitted by § 2200.7(c), the Review Board or the Hearing Officer shall serve a show cause order on a party or intervenor who is self-

represented and is not using electronic transmission by certified mail or by any other method (including commercial delivery service) that provides confirmation of delivery to the addressee's record address provided under § 2200.6.

§ 2200.8 Filing.

(a) ***What to file:***

(1) ***General.*** All documents required to be served on a party or intervenor shall be filed either before service or within a reasonable time after service.

(2) ***Discovery documents.*** Discovery documents generated pursuant to § 2200.52 through 2200.54 shall not be filed with the Review Board. Filing and retention of such discovery documents shall comply with § 2200.52(i) and (j).

(b) ***Where to file.*** Unless provided otherwise, all documents shall be filed with the Review Board Clerk either by First Class Mail to the current Review Board's mailing address, by delivery to the current Review Board's physical address, through electronic transmission to the current Review Board Clerk's email address, or by facsimile transmission to the current Review Board's facsimile number. After the assignment of a Hearing Officer, all documents and pleadings will be forwarded immediately to the Hearing Officer by the Clerk.

(c) ***Filing Methods:***

(1) ***How to file.*** Documents may be filed by postage-prepaid first class or higher class U.S. Mail, commercial delivery service, personal delivery, electronic transmission as set forth in (d) of this section, State of Vermont Interoffice Mail, or facsimile transmission.

(2) ***Number of copies.*** Unless otherwise ordered or stated in this part, only the original of a document shall be filed.

(3) ***Filing date.***

(i) Except for the documents listed in paragraph (c)(3)(ii) of this section, if filing is by U.S. first class mail or higher class mail, then filing is deemed completed upon depositing the material in the U.S. Mail. If filing is by any other means (e.g., personal delivery, commercial delivery service, electronic or facsimile transmission or State of Vermont interoffice mail) then filing is deemed completed upon receipt by the Review Board.

(ii) Filing is completed upon receipt by the Review Board for petitions for interlocutory review (§ 2200.73), and petitions for discretionary review § 2200.91.

(iii) Representatives and self-represented parties and intervenors bear the sole responsibility for ensuring that a filing is timely made.

(4) ***Certificate of service.*** A certificate of service shall accompany each document filed. The certificate shall set forth the dates and manner of filing and service.

(5) ***Sensitive information.*** Unless the Review Board or the Hearing Officer orders otherwise, in any filing with the Review Board, information that is sensitive (e.g., Social Security numbers, driver's license numbers, passport numbers, taxpayer-identification numbers, birthdates, mother's maiden names, names of minors, an individual's physical personal address, financial account numbers) but not privileged shall be redacted. Parties shall exercise caution when filing medical records, medical treatment records, medical diagnosis records, employment history, and individual financial information, and shall redact or exclude materials unnecessary to the case.

(6) ***Privileged information.*** Claims regarding privileged information shall comply with § 2200.52(d).

(d) ***Electronic Filing With the Review Board.***

(1) Documents may be filed with the Review Board by electronic transmission, including but are not limited to e-mail.

(2) If technical difficulties prevent the successful submission of electronically transmitted documents, the filer should contact the Review Board Clerk.

(3) Documents filed through electronic transmission may contain an electronic signature of the filer which will have the same legal effect, validity, and enforceability as if signed manually. The term "electronic signature" means an electronic symbol or process attached to or logically associated with a contact or other record and executed or adopted by a person with the intent to sign the document.

(4) ***Confidential and privileged documents.*** The following documents must not be filed through electronic transmission:

(i) Documents that may not be released to the public because the information is covered by a protective order or has been placed "under seal" pursuant to § 2200.52(d) and (e).

(ii) Documents submitted for *in camera* inspection by the Review Board or the Hearing Officer, including material for which a privilege is claimed. Claims regarding privileged information must comply with § 2200.52(d).

(iii) Confidential settlement documents filed with the Hearing Officer pursuant to settlement procedures pursuant to § 2200.120.

(iv) Applications for subpoenas made *ex parte* pursuant to § 2200.65.

(5) ***Sensitive information.*** Unless the Review Board or the Hearing Officer orders otherwise, all sensitive information in documents filed through electronic transmission must be redacted pursuant to paragraph (c)(5) of this section.

(6) ***Date of filing.*** The date of filing for documents filed through electronic transmission is the day that the complete document is successfully received by the Review Board.

(7) ***Timeliness.*** Representatives and self-represented parties and intervenors bear the sole responsibility for ensuring that a filing is timely made.

(8) ***Certificate of service.*** Proof of service shall accompany each document filed through electronic transmission. The certificate of service shall certify simultaneous service of the document by email on all other parties and intervenors in the case. It is the responsibility of the filing party to retain records showing the date of transmission, including receipts.

§ 2200.9 Consolidation.

Cases may be consolidated on the motion of any party conforming to § 2200.40, on the Hearing Officer's own motion after being assigned the case, or on the Review Board's own motion, where there exist common parties, common questions of law or facts or in such other circumstances as justice or the administration of the VOSHA Code require.

§ 2200.10 Severance.

Upon its own motion, or upon motion of any party or intervenor conforming to § 2200.40, where a showing of good cause has been made by the party or intervenor, the Review Board or the Hearing Officer, after being assigned the case, may order any proceeding severed with respect to some or all claims or parties.

§ 2200.11 [Reserved]

§ 2200.12 References to Cases.

(a) ***Citing decisions by the Review Board and Hearing Officers, Administrative Law Judges and Occupational Safety and Health Review Commission (OSHRC):***

(1) ***Generally.*** Parties citing decisions by the Review Board and OSHRC cases should include in the citation the name of the employer, the docket number, the year of the decision.

(i) ABC Roofing, Co., Inc., VOSHA Review Board, Docket number VRB1067, finding 27(if applicable), page 5 (Hearing Officer Landerson, December 4, 2018).

(ii) ABC Roofing, Co., Inc., VOSHA Review Board, Docket numberVRB1067, p. #7 (Board Review, September 20, 2019).

(iii) *Hackensack Steel Corp.*, 20 BNA OSHC 1387, 1388 (No. 97-0755, 2003).

(b) ***References to court decisions.***

(1) ***Citation to court decisions should be to the official reporter whenever possible.*** For example,

(i) *Commissioner of Labor v. Lotus Films, LTD,* 206 A.3d 1260, 1262, 2019 VT 2, ¶ 4 (Vt., 2019).

(ii) *W.G. Yates & Sons Constr. Co. v. OSHRC*, 459 F.3d 604, 608-09 (5th Cir. 2006).

(iii) *Martin v. OSHRC (CF & I Steel Corp.)*, 499 U.S. 144, 150-51 (1991).

(2) ***Name of employer to be indicated.*** When a court decision is cited in which the first-listed party on each side is either the Secretary of Labor (or the name of a particular Secretary of Labor), the Commission, or a labor union, the citation should include in parenthesis the name of the employer in the Review Board proceeding. For example, *Donovan v. Allied Industrial Workers (Archer Daniels Midland Co.)*, 760 F.2d 783 (7th Cir. 1985); *Donovan v. OSHRC (Mobil Oil Corp.)*, 713 F. 2d 918 (2d Cir. 1983).

SUBPART B— PARTIES AND REPRESENTATIVES

§ 2200.20 Party Status

(a) ***Affected employees.***

(1) Affected employees and authorized employee representatives may elect party status concerning any matter in which the Act confers a right to participate. The election shall be accomplished by filing a written notice of election at least 30 days before the hearing. A notice of election filed less than 30 days prior to the hearing is ineffective unless good cause is shown for not timely filing the notice.

(2) A notice of election shall be served on all other parties in accordance with § 2200.7.

(b) ***Employees no longer employed by cited employer.*** An employee of a cited employer who was exposed to or had access to the hazard arising out of the allegedly violative circumstances, conditions, practices, or operations and who is no longer employed by the cited employer is permitted to participate as a party.

(c) ***Employee contest***.

(1) 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 by a notice filed at least 14 days before the hearing.

(2) A notice of election shall be served on all other parties in accordance with § 2200.7.

§ 2200.21 Intervention; Appearance by Non-parties.

(a) ***When Allowed.*** A petition for leave to intervene may be filed at any time prior to 30 days before commencement of the hearing, unless good cause is shown for not timely filing the notice. A petition filed less than 30 days prior to the commencement of the hearing will be denied unless good cause is shown for not timely filing the petition. A petition shall be served on all parties in accordance with § 2200.7.

(b) ***Requirements of petition.***

(1) 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 unduly delay the proceeding.

(2) If the petitioner is an employee who is not employed by the cited employer but who performed work at the cited worksite, the petition, in addition to the requirements of paragraph (b)(1) of this section, shall set forth material facts sufficient to demonstrate

that the petitioner was exposed to or has access to the hazard arising out of the allegedly violative circumstances, conditions, practices, or operations.

(c) ***Ruling on petition.***

(1) For petitions filed by an employee, as defined in paragraph (b)(2) of this section, the Review Board or the Hearing Officer, after being assigned a case, shall grant the petition for intervention.

(2) For all other petitions, the Review Board or the Hearing Officer, after being assigned a case, may grant a petition for intervention that meets the requirements of paragraph (b)(1) of this section.

(3) An order granting a petition shall specify the extent and terms of an intervenor's participation in the proceedings.

§ 2200.22 Representation of Parties and Intervenors.

(a) ***Representation.*** Any party or intervenor may appear in person, through an attorney, or through any non-attorney representative. A representative must file an appearance in accordance with § 2200.23. In the absence of an appearance by a representative, a party or intervenor will be deemed to appear for itself. A corporation, limited liability company, any partnership, unincorporated association or any other business entity may be represented by an authorized officer or agent.

(b) ***Affected employees in collective bargaining unit.*** Where an authorized employee representative (see § 2200.1(c)) elects to participate as a party, affected employees who are members of the collective bargaining unit may not separately elect party status. If the authorized employee representative does not elect party status, affected employees who are members of the collective bargaining unit may elect party status in the same manner as affected employees who are not members of the collective bargaining unit. See paragraph (c) of this section.

(c) ***Affected employees not in collective bargaining unit.*** Affected employees who are not members of a collective bargaining unit may elect party status under § 2200.20. If more than one employee so elects, the Hearing Officer, in the Hearing Officer's sole discretion, may provide for them to be treated as one party.

(d) ***Control of proceeding.*** 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.

§ 2200.23 Appearances and Withdrawals.

(a) ***Entry of appearance:***

(1) *General*. A representative of a party or intervenor shall enter an appearance by signing the first document filed on behalf of the party or intervenor in accordance with paragraph (a)(2) of this section or subsequently by filing an entry of appearance in accordance with paragraph (a)(3) of this section.

(2) ***Appearance in first document or pleading.*** If the first document filed on behalf of a party or intervenor is signed by a representative, the representative shall be recognized as representing that party. No separate entry of appearance by the representative is necessary, provided the document contains the information required by § 2200.6.

(3) ***Subsequent appearance.*** Where a representative has not previously appeared on behalf of a party or intervenor, the representative shall file an entry of appearance with the Clerk. The entry of appearance shall be signed by the representative and contain the information required by § 2200.6.

(b) ***Withdrawal of Counsel.*** Any counsel or representatives of record desiring to withdraw their appearance, or any parties desiring to withdraw the appearance of their counsel or representatives of record, must file a motion conforming with § 2200.40 with the Review Board or the Hearing Officer requesting leave to withdraw, showing that prior notice of the motion has been given by the counsel or representative or party to the client or counsel or representative, as the case may be, and providing current contact information for the client, including street address, email address, and phone number. The motion of counsel to withdraw may, in the discretion of the Review Board or the Hearing Officer, after being assigned to the case, be denied where it is necessary to avoid undue delay or prejudice to the rights of a party or intervenor.

SUBPART C— PLEADINGS AND MOTIONS

§ 2200.30 General Rules

(a) ***Format.*** Pleadings and other documents (other than exhibits) shall be typewritten, double spaced, with typeface of text being no smaller than 11-point and typeface of footnotes being no smaller than 11-point, on letter size paper (8 ½ inches by 11 inches). Pleadings and other documents shall be fastened without the use of staples.

(b) ***Clarity.*** Each allegation or response of a pleading or motion shall be simple, concise, and direct.

(c) ***Separation claims.*** Each allegation or response shall be made in separate numbered paragraphs. Each paragraph shall be limited as far as practicable to a statement of a single set of circumstances.

(d) ***Adoption by reference.*** Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part of the pleading for all purposes.

(e) ***Alternative pleading.*** A party may set forth two or more statements of a claim or defense alternatively or hypothetically. When two or more statements are made in the alternative and one of them would be sufficient if made independently, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may state as many separate claims or defenses as it has regardless of consistency. All statements shall be made subject to the signature requirements of § 2200.32.

(f) ***Form of pleadings, motions, and other documents.*** Any pleading, motion, or other document shall contain a caption complying with § 2200.31 and a signature complying with § 2200.32. The form and content of motions shall conform with § 2200.40.

(g) ***Enforcement of pleading rules.*** The Review Board or the Hearing Officer may refuse for filing any pleading or motion that does not comply with the requirements of this subpart.

§ 2200.31 Caption; Titles of Cases.

(a) ***Notice of contest cases.*** Cases initiated by a notice of contest shall be titled:

Commissioner of Labor,
Complainant

v.

(Name of Employer),
Respondent.

(b) ***Petitions for modification of abatement period.*** Cases initiated by a petition for modification of the abatement period shall be titled:

(Name of Employer),
Petitioner

v.

Commissioner of Labor,
Respondent.

(c) ***Location of title.*** The titles listed in paragraphs (a) and (b) of this section shall appear at the left upper portion of the initial page of any pleading or document (other than exhibits) filed.

(d) ***Docket number.*** The initial page of any pleading or document (other than exhibits) shall show, at the upper right of the page, opposite the title, the docket number, if known, assigned by the Review Board.

§ 2200.32 Signing of Pleadings and Motions.

Pleadings and motions shall be signed by the filing party or by the party's representative. The signature of a representative constitutes a representation by the representative that the representative is authorized to represent the party or parties on whose behalf the pleading is filed. The signature of a representative or party also constitutes a certificate by the representative that the representative has read the pleading, motion, or other document, that to the best of the representative's knowledge, information, and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not included for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other document is signed in violation of this rule, such signing party or its representative shall be subject to the sanctions set forth in § 2200.101 or § 2200.104. A signature by a party representative constitutes a representation by the representative that the representative understands that the rules and orders of the Review Board and its Hearing Officers apply equally to attorney and non-attorney representatives.

§ 2200.33 Notices of Contest.

Within 14 days after receipt of any of the following notices, the Commissioner shall notify the Review Board of the receipt in writing and shall promptly furnish to the Clerk of the Review Board any documents or records filed by the contesting party and all other documents or records relevant to the contest:

(a) Notification that the employer intends to contest a citation or proposed penalty under 21 VSA §226(a); or

(b) Notification that the employer wishes to contest a notice of a failure to abate or a proposed penalty under 21 VSA §226(b); or

(c) A notice of contest filed by an employee or representative of employees with respect to the reasonableness of the abatement period under 21 VSA §226(c);

(d) Failure to meet the 20 day deadline to file a notice of contest results in the citation or notification of failure to abate becoming a final order of the Review Board. Under extraordinary circumstances, the cited employer, an affected employee, or an authorized employee representative may seek relief from the said final order pursuant to Vermont Rule of Civil Procedure 60, by promptly filing a request for such relief with the Review Board's Clerk, at the VOSHA Review Board's current mailing address, or delivery to the VOSHA Review Board's current physical address. *See Brancifort Builders, Inc.*, 9 BNA OSHC 2113, 2116-17 (1981).

§ 2200.34 Employer Contests.

(a) ***Complaint.***

(1) The Commissioner shall file a complaint with the Review Board no later than 21 days after receipt of the notice of contest.

(2) 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

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

(3) 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.

(b) ***Answer.***

(1) Within 21 days after service of the complaint, the party against whom the complaint was issued shall file an answer with the Review Board.

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

(3) The answer shall include all affirmative defenses being asserted. Such affirmative defenses include, but are not limited to, "infeasibility," "unpreventable employee misconduct," and "greater hazard."

(4) The failure to raise an affirmative defense in the answer may result in the party being prohibited from raising the defense at a later stage in the proceeding, unless the Hearing Officer finds that the party has asserted the defense as soon as practicable.

(c) ***Motions filed in lieu of an answer.*** A motion filed in lieu of an answer pursuant to this subpart shall be filed no later than 21 days after service of the complaint. The form and content of the motion shall comply with § 2200.40. Upon denial of a parties motion, the party will have 14 days to file an answer.

§ 2200.35 [Reserved]

§ 2200.36 [Reserved]

§ 2200.37 Petitions for Modification of the 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) ***Contents of Petition.*** 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.

(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) ***When and where filed; Posting requirement; Responses to petition.*** A petition for modification of abatement date shall be filed with the Commissioner 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 of the petition or near each location where the violation occurred. The petition shall remain posted for a period of 14 days.

(2) Affected employees or the representatives may file an objection in writing to such petition with the Commissioner. Failure to file such objection within 14 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 shall have the authority to approve any uncontested petition for modification of abatement date filed pursuant to paragraphs (b) and(c)of this section. Such uncontested petitions shall become final orders pursuant to 21 VSA §§ 226(a) and (c).

(4) The Commissioner shall not exercise approval power until the expiration of 21 days from the date the petition was posted pursuant to paragraphs (c)(1) and (2) of this section by the employer.

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

(1) The Commissioner shall forward the petition, citation, and any objections to the Review Board within 14 days after the expiration of the 21 day period set out in paragraph (c)(4) of this section.

(2) The Review Board shall docket and process such petitions as expedited proceedings as provided for in § 2200.103 of this Part.

(3) An employer petitioning for a modification of the abatement period shall have the burden of proving in accordance with the requirements of 21 VSA 226(b) 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) Each objecting party shall file a response setting forth the reasons for opposing the abatement date requested in the petition, within 14 working days after service of the Review Board docketing notice of the petition for modification of the abatement date. Service of the response on the other parties and intervenors shall be accomplished in a manner prescribed in § 2200.7(c).

§ 2200.38 Employee Contests.

(a) ***Commissioner's statement of reasons.*** Where an affected employee or authorized employee representative files a notice of contest with respect to the abatement period, the Commissioner

shall, within 14 days from receipt of the notice of contest, file a clear and concise statement of the reasons the abatement period prescribed by the Commissioner is not unreasonable.

(b) ***Response to Commissioner's statement.*** Not later than 14 days after service of the Commissioner's statement, referred to in paragraph (a) of this section, the contesting affected employee or authorized employee representative shall file a response. Service of the filed statement on the other parties and intervenors shall be accomplished in a manner prescribed in § 2200.7(c).

(c) ***Expedited proceedings.*** All contests under this section shall be handled as expedited proceedings as provided for in § 2200.103.

§ 2200.39 Statement of Position.

At any time prior to the commencement of the hearing before the Hearing Officer, any person entitled to appear as a party, or any person who has been granted leave to intervene, may file a statement of position with respect to any or all issues to be heard. The Hearing Officer may order the filing of a statement of position.

§ 2200.40 Motions and Requests.

(a) ***How to make.*** An application or request for an order must be made by written motion. A motion shall not be included in another pleading or document, such as a brief or petition for discretionary review, but shall be made in a separate document. In exigent circumstances in cases pending before a Hearing Officer, an oral motion may be made during an off-the-record telephone conference if the motion is subsequently reduced to writing and filed within such time as the Hearing Officer prescribes.

(b) ***Form of motions.*** All motions shall contain a caption complying with § 2200.31 and a signature complying with § 2200.32. Requests for orders that are presented in any other form, such as by a business letter or by electronic transmission, shall not be considered or granted.

(c) ***Content of motions.*** A motion shall contain a clear and plain statement of the relief sought and state with particularity the grounds for seeking the order. Written memoranda, briefs, affidavits, or other relevant material or documents may be filed in support of the motion or a response.

(d) ***Duty to confer.*** Prior to filing a motion, the moving party shall confer or make reasonable efforts to confer with all other parties and shall state in the motion the efforts undertaken to confer. The motion shall also state if any other party opposes or does not oppose the motion.

(e) ***Proposed order for procedural motions.*** All procedural motions shall be accompanied by a proposed order that would grant the relief requested in the motion. A procedural motion may be ruled upon prior to the expiration of the time for response.

(f) ***Oral motions.*** Oral motions may be made during a hearing and shall be included in the transcript, if a transcript is being made.

(g) ***When to make***.

(1) A motion filed in lieu of an answer pursuant to § 2200.34(c) shall be filed no later than 21 days after service of the complaint.

(2) Motions shall be made as soon as the grounds for the motion are known. A party is not required to raise by motion any matter that the party has previously included in any pleading as defined in § 2200.1(n), unless the party seeks a ruling on the previously pleaded matter prior to the hearing on the merits.

(3) A motion to postpone a hearing shall comply with § 2200.62.

(h) ***Responses.*** Any party or intervenor upon whom a motion has been served shall file a response within 14 days from service of the motion.

(i) ***Reconsideration.*** A party adversely affected by a ruling on any motion may file a motion for reconsideration within 7 days of service of the ruling.

(j) ***Summary judgment motions.*** The provisions of Vermont Rule of Civil Procedure 56 apply to motions for summary judgment.

§ 2200.41 [Reserved]

SUBPART D— PREHEARING PROCEDURES AND DISCOVERY

§ 2200.50 [Reserved]

§ 2200.51 Prehearing Conferences and Orders.

(a) ***Scheduling Conference.***

(1) The Hearing Officer may, upon the Hearing Officer's discretion, consult with the attorneys, non-attorney party representatives, and any self-represented parties, by a scheduling conference, telephone, mail, or other suitable means, and within 30 days after the filing of the answer, enter a scheduling order that limits the time:

(i) To join other parties and to amend the pleadings;

(ii) To file and hear motions; and

(iii) To complete discovery.

(2) ***The scheduling order also may include:***

(i) The date or dates for conferences before hearing, a final prehearing conference and hearing; and

(ii) Any other matters appropriate to the circumstances of the case.

(b) ***Prehearing conference.*** In addition to the prehearing procedures set forth in Vermont Rules of Civil Procedure 16, the Hearing Officer may, upon the Hearing Officer's own initiative or on the motion of a party, direct the parties to confer among themselves to consider settlement, stipulation of facts, or any other matter that may expedite the hearing.

(c) ***Compliance.*** Parties must fully prepare for a useful discussion of all procedural and substantive issues involved in prehearing conferences and shall participate in such conferences in good faith. Parties failing to do so may be subject to sanctions under § 2200.101 and § 2200.104.

§ 2200.52 General Provisions Governing Discovery.

(a) ***General.*** Discovery will be permitted subject to the methods and limitations set forth in these rules.

(1) ***Methods and limitations.*** In conformity with these rules, any party may, without leave of the Review Board or Hearing Officer, obtain discovery through the following methods:

(i) Production of documents and things or permission to enter upon land or other property for inspection and other purposes to the extent provided in § 2200.53;

(ii) Requests for admission to the extent provided in § 2200.54;

(iii) Interrogatories to the extent provided in § 2200.55.

(iv) Discovery is not available under these rules through Depositions except to the extent provided in § 2200.56.

(v) In the absence of a specific provision, Hearing Officer may allow discovery procedures as set forth in the Vermont Rules of Civil Procedure, except that the provisions of Vermont Rule of Civil Procedure 26(a) do not apply to Review Board proceedings. This exception does not preclude any prehearing disclosures (including disclosure of expert testimony and written reports) directed in a scheduling order entered under § 2200.51.

(2) ***Time for discovery.*** A party may initiate all forms of discovery in conformity with these Rules at any time after the filing of the first responsive pleading or motion that delays the filing of an answer, such as a motion to dismiss. Discovery shall be initiated early enough to permit completion of discovery no later than 14 days prior to the date set for hearing, unless the Hearing Officer orders otherwise.

(3) ***Service of discovery documents.*** Every document relating to discovery required to be served on a party shall be served on all parties

(4) ***Stipulations about discovery procedures***. Unless the Review Board or Hearing Officer orders otherwise, the parties my stipulate that:

(i) A deposition may be taken before any person, at any time or place, on any notice, and in the manner specified—in which event it may be used in the same way as any other deposition; and

(ii) Other procedures governing or limiting discovery may be modified—but a stipulation extending the time for any form of discovery must be approved by the Review Board or the Hearing Officer if it would interfere with the time set forth for completing discovery, for hearing a motion, or for hearing.

(b) ***Scope of discovery.*** The information or response sought through discovery may concern any matter that is not privileged and that is relevant to the subject matter involved in the pending case and proportional to the needs of the case, considering the importance of the issues at stake, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

(c) ***Limitations.*** The frequency or extent of the discovery methods provided by these rules may be limited by the Review Board or the Hearing Officer if it is determined that:

(1) The discovery sought is unreasonably cumulative or duplicative, or it is obtainable from some other source that is more convenient, less burdensome, or less expensive.

(2) The party seeking discovery has had ample opportunity to obtain the information sought by discovery in the action; or

(3) The proposed discovery is outside the scope permitted by paragraph (b) of this section.

(d) ***Privilege:***

(1) ***Claims of privilege.*** The initial claim of privilege shall specify the privilege claimed and the general nature of the material for which the privilege is claimed. In response to an order from the Review Board or the Hearing Officer, or in response to a motion to compel, the claim shall: identify the information that would be disclosed; set forth the privilege that is claimed; and allege the facts showing that the information is privileged. The claim shall be supported by affidavits, depositions, or testimony and shall specify the relief sought. The claim may be accompanied by a motion for a protective order or by a motion that the allegedly privileged information be received, and the claim ruled upon in camera, that is, with the record and hearing room closed to the public, or ex parte, that is, without the participation of parties and their representatives. The Hearing Officer may enter an order and impose terms and conditions on the Hearing Officer's examination of the claim as justice may require, including an order designed to ensure that the allegedly privileged information not be disclosed until after the examination is completed.

(2) ***Upholding or rejecting claims of privilege.*** If the Hearing Officer upholds the claim of privilege, the Hearing Officer may order and impose terms and conditions as justice may require, including a protective order. If the Hearing Officer overrules the claim, the person claiming the privilege may obtain as of right an order sealing from the public those portions of the record containing the allegedly privileged information pending interlocutory or final review of the ruling, or final disposition of the case, by the Review Board. Interlocutory review of such an order shall be given priority consideration by the Review Board.

(3) ***Resolving claims of privilege outside of discovery proceedings.*** A Hearing Officer may utilize the procedures set forth in paragraphs (d) and (e) of this section outside of discovery proceedings, including during the hearing.

(e) ***Protective orders***. In connection with any discovery procedures and where a showing of good cause has been made, the Review Board or the Hearing Officer may make any order including, but not limited to, one or more of the following:

(1) That the discovery not be had;

(2) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(5) That discovery be conducted with no one present except persons designated by the Review Board or the Hearing Officer;

(6) That a deposition after being sealed be opened only by order of the Review Board or the Hearing Officer;

(7) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

(8) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the Review Board or the Hearing Officer.

(f) ***Failure to cooperate; Motions to compel; Sanctions:***

(1) ***Motions to compel discovery.*** A party may file a motion conforming to § 2200.40 for an order compelling discovery when another party refuses or obstructs discovery. In considering a motion to compel, the Hearing Officer shall treat an evasive or incomplete answer as a failure to answer.

(2) ***Sanctions.*** If a party fails to comply with an order compelling discovery, the Hearing Officer may enter an order to redress the failure. Such order may issue upon the initiative of a Hearing Officer, after affording an opportunity to show cause why the order should not be entered, or upon the motion of a party conforming to § 2200.40. The order may include any sanction stated in Vermont Rule of Civil Procedure 37, including the following:

(i) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for purposes of the action in accordance with the claim of the party obtaining that order;

(ii) An order refusing to allow the disobedient party to support or to oppose designated claims or defenses or prohibiting that party from introducing designated matters in evidence;

(iii) An order striking out pleadings or parts thereof of pleadings or parts thereof, or staying further proceedings until the order is obeyed; or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

(g) ***Unreasonable delays.*** None of the discovery procedures set forth in these rules shall be used in a manner or at a time which shall delay or impede the progress of the case toward hearing status or the hearing of the case on the date for which it is scheduled, unless, in the interests of justice, the Hearing Officer shall order otherwise. Unreasonable delays in utilizing discovery procedures may result in termination of the party's right to conduct discovery.

(h) ***Show cause orders.*** All show cause orders issued by the Review Board or the Hearing Officer under paragraph (f) of this section shall be served in a manner prescribed in § 2200.7(o).

(i) ***Supplementation of responses.*** A party that has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information subsequently acquired, except as follows:

(1) A party is under a duty to promptly supplement the response with respect to any question directly addressed to:

(i) The identity and location of persons having knowledge of discoverable matters; and

(ii) The identity of each person expected to be called as an expert witness at the hearing, the subject matter on which the person is expected to testify, and the substance of the person's testimony.

(2) A party is under a duty to promptly amend a prior response if the party obtains information upon the basis of which:

(i) The party knows that the response was incorrect when made; or

(ii) The party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to the hearing through new requests for supplementation of prior responses.

(j) ***Filing of discovery.*** Requests for production or inspection under § 2200.53 requests for admission under § 2200.54 and responses to requests for admissions, interrogatories under § 2200.55 and the answers to interrogatories, and depositions under § 2200.56 shall be served

upon other counsel or parties but shall not be filed with the Review Board or the Hearing Officer. The party responsible for service of the discovery material shall retain the original and become the custodian.

(k) ***Relief from discovery requests.*** If relief is sought under § 2200.101 or § 2200.52(e), (f), or (g) concerning any requests for admissions, depositions, production of documents and things, interrogatories, answers to interrogatories, or responses to requests for admissions and production of documents and things, copies of the portions of the interrogatories, requests, answers, or responses in dispute shall be filed with the Review Board or the Hearing Officer contemporaneously with any motion filed under § 2200.101 or § 2200.52(e), (f), or (g).

(l) ***Use at hearing.*** If interrogatories, requests, answers, responses, or depositions are to be used at the hearing or are necessary to a prehearing motion which might result in a final order on any claim, the portions to be used shall be filed with the Review Board or the Hearing Officer at the outset of the hearing or at the filing of the motion insofar as their use can be reasonably anticipated. Section § 2200.56(f) prescribes additional procedures pertaining to the use of depositions at a hearing.

(m) ***Use on review or appeal.*** When documentation of discovery not previously in the record is needed for review or appeal purposes, upon an application and order of the Review Board or the Hearing Officer, the necessary discovery documents shall be filed with the Clerk of the Review Board.

§ 2200.53 Production of Documents and Things

(a) ***Scope.*** At any time after the filing of the first responsive pleading or motion that delays the filing of an answer, such as a motion to dismiss, any party may serve on any other party a request to:

(1) Produce and permit the party making the request, or a person acting on the party's behalf, to inspect and copy any designated documents, or to inspect and copy, test, or sample any tangible things which are in the possession, custody, or control of the party upon whom the request is served;

(2) Permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation on the property.

(b) ***Procedure.*** The request shall set forth the items to be inspected, either by individual item or by category, and describe each item and category with reasonable particularity. It shall specify a reasonable time, place, and manner of making the inspection and performing related acts. The party upon whom the request is served shall serve a written response within 30 days after service of the request, unless the requesting party allows a longer time. The Review Board or the Hearing Officer may allow a shorter time or a longer time, should the

requesting party deny an extension. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to in whole or in part, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, that part shall be specified. To obtain a ruling on an objection by the responding party, the requesting party shall file a motion conforming to § 2200.40 with the Clerk and shall annex its request to the motion, together with the response and objections, if any.

§ 2200.54 Request for Admissions.

(a) ***Scope and procedure:***

(1) ***Scope.*** Any time after the filing of the first responsive pleading or motion that delays the filing of an answer, such as a motion to dismiss, a party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of § 2200.52(b) relating to:

(i) Facts, the application of law to fact, or opinions about either; and

(ii) The genuineness of any described documents.

(2) ***Form; Copy of a document.*** Each matter must be separately stated. The number of requested admissions shall not exceed 25, including subparts, except upon the agreement of the parties or by order of the Review Board or the Hearing Officer. A request to admit the genuineness of a document must be accompanied by a copy of the document unless it is, or has been, otherwise furnished or made available for inspection and copying.

(3) ***Time to respond; Effect of not responding.*** A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its representative. A shorter or longer time for responding may be provided by written stipulation of the parties or by order of the Review Board or the Hearing Officer.

(4) ***Answer.*** If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. A denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest. The answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny.

(5) ***Objections.*** The grounds for objecting to a request must be stated. A party must not object solely on the ground that the request presents a genuine issue for hearing.

(6) ***Motion regarding the sufficiency of an answer or objection.*** The requesting party may move to determine the sufficiency of an answer or objection. Unless an objection is sustained, the Review Board or the Hearing Officer must order that an answer be served. On finding that an answer does not comply with this rule, the Review Board or the Hearing Officer may order either that the matter is admitted or that an amended answer be served. The Review Board or the Hearing Officer may defer the final decision until a prehearing conference or a specified time before hearing.

(b) ***Effect of admission; withdrawal or modification.*** A matter admitted under paragraph (a) of this section is conclusively established unless the Review Board or the Hearing Officer on motion permits the admission to be withdrawn or amended. The Review Board or the Hearing Officer may permit withdrawal or modification if it would promote the presentation of the merits of the case and if the Review Board or the Hearing Officer is not persuaded that it would prejudice the requesting party in maintaining or defending the case on the merits. An admission, which is made under paragraph (a) of this section is not an admission for any other purpose and cannot be used against the party in any other proceeding.

§ 2200.55 Interrogatories.

(a) ***General***. At any time after the filing of the first responsive pleading or motion that delays the filing of an answer, such as a motion to dismiss, any party may serve interrogatories upon any other party. The number of interrogatories shall not exceed 25 questions, including subparts, except upon the agreement of the parties or by order of the Review Board or the Hearing Officer. The party seeking to serve more than 25 questions, including subparts, shall have the burden of persuasion to establish that the complexity of the case or the number of citation items necessitates a greater number of interrogatories.

(b) ***Answers***. All answers shall be made in good faith and as completely as the answering party's information will permit. The answering party is required to make reasonable inquiry and ascertain readily obtainable information. An answering party may not give lack of information or knowledge as an answer or as a reason for failure to answer, unless the answering party states that it has made reasonable inquiry and that information known or readily obtainable by it is insufficient to enable it to answer the substance of the interrogatory.

(c) ***Procedure***. Each interrogatory shall be answered separately and fully under oath or affirmation. If the interrogatory is objected to, the objection shall be stated in lieu of the answer. The answers are to be signed by the person making them and the objections shall be signed by the party or its counsel. The party on whom the interrogatories have been served shall serve a copy of its answers or objections upon the propounding party within 30 days after the service of the interrogatories. The Hearing Officer may allow a shorter or longer time. The burden shall be on the party submitting the interrogatories to file a motion conforming to § 2200.40 for an order with respect to any objection or other failure to answer an interrogatory.

§ 2200.56 Depositions.

(a) ***General.*** Depositions of parties, intervenors, or witnesses shall be allowed only by agreement of all the parties or on order of the Review Board or the Hearing Officer following the filing of a motion of a party stating good and just reasons. All depositions shall be before an officer authorized to administer oaths and affirmations at the place of examination. The deposition shall be taken in accordance with the Vermont Rules of Civil Procedure, particularly Vermont Rule of Civil Procedure 30.

(b) ***When to file.*** A motion to take depositions may be filed after the filing of the first responsive pleading or motion that delays the filing of an answer, such as a motion to dismiss.

(c) ***Notice of taking.*** Any depositions allowed by the Review Board or the Hearing Officer may be taken after 14 days' written notice to the other party or parties. The 14-day notice requirement may be waived by the parties pursuant to § 2200.52 (a)(4)(i).

(d) ***Method of recording and expenses.*** The party that notices the deposition must state in the notice the method for recording the testimony. Unless the Review Board or the Hearing Officer orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. Witnesses whose depositions are taken and the person recording the deposition shall each be paid the same fees that are paid for like services in the Vermont courts. Any party may arrange to transcribe a deposition. The party noticing the deposition shall pay the recording costs, any witness fees, and mileage expense. Deposition subpoenas shall comply with § 2200.65.

(e) ***Use of depositions.*** Depositions taken under this rule may be used for discovery, to contradict or impeach the testimony of a deponent as a witness, or for any other purpose permitted by the Vermont Rules of Evidence and the Vermont Rules of Civil Procedure, particularly Vermont Rule of Civil Procedure 32. An audio or audiovisual deposition offered into evidence in whole or in part must be accompanied by a transcription of the deposition. All transcription costs must be borne by the party offering the deposition into evidence.

(f) ***Excerpts from depositions to be offered at hearing.*** Except when used for purposes of impeachment, at least 7 days prior to the hearing, the parties or counsel shall furnish to the Clerk and all opposing parties or counsel the transcribed excerpts from depositions (by page and line number) which they expect to introduce at the hearing. Four working days later, the adverse party or counsel for the adverse party shall furnish to the Clerk and all opposing parties or counsel additional transcribed excerpts from the depositions (by page and line number) which they expect to be read pursuant to Vermont Rules of Civil Procedure 32(a)(4), as well as any objections (by page and line number) to opposing party's or counsel's depositions. With reasonable notice to the Clerk and all parties or counsel, other excerpts may be read.

SUBPART E— HEARINGS

§ 2200.60 Notice of hearing; Location.

Except by agreement of the parties, or in an expedited proceeding under § 2200.103, when a hearing is first set, the Clerk shall give the parties and intervenors notice of the time, place, and nature of the hearing at least 30 days in advance of the hearing. If a hearing is being rescheduled, or if exigent circumstances are present, at least 14 days' notice shall be given. The Clerk will designate a place and time of hearing that involves as little inconvenience and expense to the parties as is practicable.

§ 2200.61 Submission Without Hearing.

(a) A case may be fully stipulated by the parties and submitted to the Review Board or the Hearing Officer for a decision at any time. The stipulation of facts shall be in writing and signed by the parties or their representatives. The submission of a case under this rule does not alter the burden of proof, the requirements otherwise applicable with respect to adducing proof, or the effect of failure of proof.

(b) Motions for summary judgment are governed by § 2200.40(j).

§ 2200.62 Postponement of Hearing.

(a) ***Motion to postpone.*** A hearing may be postponed by the Hearing Officer on the Hearing Officer's own initiative or for good cause shown upon the motion of a party. A motion for postponement shall state the position of the other parties, either by a joint motion or by a representation of the moving party. The filing of a motion for postponement does not automatically postpone a hearing. The form and content of such motions shall comply with § 2200.40.

(b) ***Grounds for postponement.*** A motion for postponement grounded on conflicting engagements of counsel or employment of new counsel shall be promptly filed.

(c) ***When motion must be received.*** A motion to postpone a hearing must be received at least 14 days prior to the hearing. A motion for postponement received less than 14 days prior to the hearing will generally be denied unless good cause is shown for late filing.

(d) ***Postponement in excess of 60 days.*** No postponement in excess of 60 days shall be granted without the concurrence of the Review Board. The original of any motion seeking a postponement in excess of 60 days shall be filed with the Clerk.

§ 2200.63 Stay of Proceedings.

(a) ***Motion for stay.*** Stays are not favored. A party seeking a stay of a case assigned to a Hearing Officer shall file a motion for stay conforming to § 2200.40 with the Clerk. A motion for a stay shall state the position of the other parties, either by a joint motion or by the

representation of the moving party. The motion shall set forth the reasons a stay is sought and the length of the stay requested.

(b) ***Ruling on motion to stay.*** The Hearing Officer, with the concurrence of the Review Board Chairperson, may grant any motion for stay for the period requested or for such period as is deemed appropriate.

(c) ***Periodic reports required.*** The parties in a stayed proceeding shall be required to submit periodic reports on such terms and conditions as the Hearing Officer may direct. The length of time between the reports shall be no longer than 90 days unless the Hearing Officer otherwise orders.

§ 2200.64 Failure to Appear.

(a) ***Attendance at hearing.*** The failure of a party to appear in person or by a duly authorized representative at the hearing constitutes a waiver of the right to a hearing. A failure of the Respondent to appear is deemed an admission of the facts alleged and consent to the relief sought in the Complaint (or, in Simplified Proceedings, the citation and notification of proposed penalty). The Hearing Officer may default the non-appearing party without further proceeding or notice.

(b) ***Requests for reinstatement.*** Requests for reinstatement must be made, in the absence of extraordinary circumstances, within 7 days after the scheduled hearing date. See § 2200.90(c).

(c) ***Rescheduling hearing.*** The Review Board or its Hearing Officer, upon showing of good cause, may excuse such failure to appear. In such event, the hearing will be rescheduled as expeditiously as possible from the issuance of the Hearing Officer's order.

§ 2200.65 Issuance of Subpoenas; Petitions to Revoke or Modify Subpoenas; Payment of Witness Fees and Mileage; Right to Inspect or Copy Data.

(a) ***Issuance of subpoenas upon application of pro se party or party representative.*** On behalf of the Review Board or any Review Board member, the Hearing Officer shall, on the application of any party, issue to the applying party subpoenas requiring the attendance and testimony of witnesses and/or the production of any evidence, including, but not limited to, relevant books, records, correspondence, or documents, in the witness' possession or under the witness' control, at a deposition or at a hearing before the Review Board or the Hearing Officer. The party to whom the subpoena is issued shall be responsible for its service. Applications for subpoenas shall be filed with the Review Board Clerk either by First Class Mail to the current Review Board mailing address, or delivery to the Review Board current physical address. Applications for subpoena(s) may be made ex parte. The subpoena shall show on its face the name and address of the party at whose request the subpoena was issued.

(b) ***Service of subpoenas.*** A subpoena may be served by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon the person named may be made by delivering a copy thereof to such person and, if the person's attendance is commanded, by tendering to that person with the subpoena the fees for one day's attendance and the mileage allowed by law. A subpoena may be served at any place within the state. Proof of service when necessary, shall be made by filing with the Clerk a statement for which the subpoena is issued a statement of the date and manner of service and of the names of the persons served, certified by the person who made the service.

(c) ***Revocation or modification of subpoenas.*** Any person served with a subpoena, whether requiring attendance and testimony (ad testificandum) or for the production of evidence (duces tecum), shall, within 5 days after the date of service of the subpoena, move in writing to revoke or modify the subpoena if the person does not intend to comply. All motions to revoke or modify shall be served on the party at whose request the subpoena was issued. The Review Board or the 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 to be produced, or if for any other reason sufficient in law the subpoena is otherwise invalid. The Review Board or the Hearing Officer shall make a simple statement of procedural or other grounds for the ruling on the motion to revoke, modify, or affirm. The motion to revoke or modify, any answer filed, and any ruling on the motion shall become part of the record.

(d) ***Rights of persons compelled to submit data or other information in documents.*** Persons compelled to submit data or other information at a public proceeding are entitled to retain documents they submitted that contain the data or information, or to procure a copy of such documents upon their payment of lawfully prescribed costs. If such persons submit the data or other information by testimony, they are entitled to a copy of the transcript of their testimony upon their payment of the lawfully prescribed costs.

(e) ***Witness fees and mileage.*** Witnesses summoned to appear for a deposition before the Review Board or the Hearing Officer shall be paid the same fees and mileage that are paid witnesses 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.

(f) ***Failure to comply with subpoena.*** Upon the failure of any person to comply with the subpoena issued upon the request of a party, the Review Board may recommend to the Attorney General that proceedings be initiated in the appropriate court for the enforcement of the subpoena, if in the Review Board's judgment, the enforcement of the subpoena would be consistent with law and with policies of the VOSHA Code.

§ 2200.66 Transcript of Testimony.

(a) ***Hearings.*** A recording shall be made of the proceedings at the hearing by the Review Board. Persons desiring to listen to the recordings shall make appropriate arrangements with the Clerk. At the request of any party or intervenor, Review Board or its Hearing Officer's, an official verbatim transcript of the hearing shall be prepared. Any requested transcript shall be filed with the Review Board.

(b) ***Payment for transcript.*** Parties or intervenors may request the preparation of a transcript from the Clerk at their own expense. In the absence of a party or intervenor request for a transcript and should a Hearing Officer or a member of the Review Board request a copy, the Review Board shall bear all expenses for the court reporters' fees, and for any copy of the hearing transcript filed with it.

(c) ***Correction of errors.*** Error in the transcript of the hearing may be corrected by the Hearing Officer on the Hearing Officer's own motion, on joint motion by the parties, or on motion by any party, or the Review Board. The motion shall conform to § 2200.40 and shall state the error in the transcript and the correction to be made. The official transcript shall reflect the corrections.

§ 2200.67 Duties and Powers of the Hearing Officers.

It shall be the duty of the Review 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 Hearing Officer shall have authority with respect to cases assigned to a Hearing Officer, between the time the Hearing Officer is designated and the time a Hearing Officer issues a decision, subject to the rules and regulations of the Review Board, to:

(a) Administer oaths and affirmations;

(b) Issue authorized subpoenas and rule upon petitions to revoke modify, remove, or affirm, in accordance with § 2200.65;

(c) Rule on claims of privilege and claims that information is protected and issue protective orders, in accordance with § 2200.52(d) and (e);

(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 simplification of the issues;

(h) Dispose of procedural requests or similar matters, including motions referred to the Hearing Officer by the Review 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 3 VSA §812 of the Vermont Administrative Procedure Act;

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

(k) Approve or appoint an interpreter;

(l) Request the parties to state their respective positions concerning any issue in the case or theory in support of their position;

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

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

§ 2200.68 Recusal of the Hearing Officer.

(a) ***Discretionary recusal.*** A Hearing Officer may recuse himself or herself from a proceeding whenever the Hearing Officer deems it appropriate.

(b) ***Mandatory recusal.*** A Hearing Officer shall recuse himself or herself under circumstances that would require disqualification of a Review Board Hearing Officer under Vermont Code of Judicial Conduct Canon 2.11, except that the required recusal may be set aside under the conditions specified by Canon 2.11(C).

(c) ***Request for recusal.*** Any party may request that the Hearing Officer, at any time following the Hearing Officer's designation and before the filing of the decision, be recused under paragraph (a) or (b) of this section or both by filing with the Review Board, promptly upon the discovery of the alleged facts, an affidavit setting forth in detail the matters alleged to constitute grounds for recusal.

(d) ***Ruling on request.*** If the Hearing Officer, finds that a request for recusal has been filed with due diligence and that the material filed in support of the request establishes that recusal either is appropriate under paragraph (a) of this section or is required under paragraph (b) of this section, the Hearing Officer shall recuse himself or herself from the proceeding. If the Hearing Officer denies a request for recusal, the Hearing Officer shall issue a ruling on the record, stating the grounds for denying the request and shall proceed with the hearing, or if the hearing has closed, shall proceed in the issuance of a decision, and the provisions of § 2200.90.

§ 2200.69 Examination of Witnesses.

Witnesses shall be examined orally under oath or affirmation. Opposing parties or intervenors shall have the right to cross-examine any witness whose testimony is introduced by an adverse party. All parties shall have the right to cross-examine any witness called by the Hearing Officer pursuant to § 2200.67(j).

§ 2200.70 Exhibits.

(a) ***Marking exhibits.*** All exhibits offered in evidence by a party shall be marked for identification before or during the hearing. Exhibits shall be marked with a designation identifying the party or intervenor offering the exhibit.

(b) ***Removal or substitution of exhibits in evidence.*** Unless the Hearing Officer finds it impractical, a copy of each such exhibit shall be given to the other parties or intervenors. A party may remove an admitted exhibit from the official record during the hearing or at the conclusion of the hearing only upon permission of the Hearing Officer. The Hearing Officer, in the Hearing Officer's discretion, may permit the substitution of a duplicate for any original document offered into evidence.

(c) ***Reasons for denial of admitting exhibit.*** A Hearing Officer may, in the Hearing Officer's discretion, deny the admission of any exhibit because of its excessive size, weight, or other characteristic that prohibits its convenient transportation and storage. A party may offer into evidence photographs, models, or other representations of any such exhibit.

(d) ***Rejected exhibits.*** All exhibits offered but denied admission into evidence, except exhibits referred to in paragraph (c) of this section, shall be disposed of as required in the Review Board Record Retention Policy.

(e) ***Return of physical exhibits.*** A party may on motion request the return of a physical exhibit within 30 days after expiration of the time for filing a petition for review of a Review Board final order in the Vermont Superior Court under 21 VSA §227, or within 30 days after completion of any proceedings initiated in Vermont Superior Court. The motion shall be addressed to the Clerk and provide supporting reasons. The exhibit shall be returned if the Clerk determines that it is no longer necessary for use in any Review Board proceeding.

(f) ***Request for custody of physical exhibit.*** Any person may on motion to the Clerk request custody of a physical exhibit for use in any court or tribunal. The motion shall state the reasons for the request and the duration of custody requested. If the exhibit has been admitted in a pending Review Board case, the motion shall be served on all parties to the proceeding. Any person granted custody of an exhibit shall inform the Clerk of the status every 6 months of the person's continuing need for the exhibit and return the exhibit after completion of the proceeding.

(g) ***Disposal of physical exhibit.*** Any physical exhibit may be disposed of by the Review Board's Clerk subject to the requirements of the Review Board Records Retention Policy.

§ 2200.71 Rules of Evidence.

Hearings before the Hearing Officer shall be in accordance with 3 VSA 810 and the Vermont Rules of Evidence as applicable.

§ 2200.72 Objections.

(a) ***Statement of objection.*** Any objection with respect to the conduct of the hearing, including any objection to the introduction of evidence or a ruling by the 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) ***Offer of proof.*** Whenever evidence is excluded from the record, the party offering such evidence may make an offer of proof which shall be included in the record of the proceeding.

(c) ***Once the Hearing Officer rules definitively on the record***—either before or at the hearing—a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

§ 2200.73 Interlocutory Review.

(a) ***General.*** Interlocutory review of a Hearing Officer's ruling is discretionary with the Review Board. A petition for interlocutory review may be granted only where the petition asserts, and the Review Board finds:

(1) That the review involves an important question of law or policy that controls the outcome of the case, and that immediate review of the ruling may materially expedite the final disposition of the proceedings or subsequent review by the Review Board may provide an inadequate remedy; or

(2) That the ruling will result in a disclosure, before the Review Board may review the Hearing Officer's report of information that is alleged to be privileged.

(b) ***Petition for interlocutory appeal.*** Within 7 days following the service of a Hearing Officer's ruling from which review is sought, a party may file a petition for interlocutory appeal with the Review Board. Responses to the petition, if any, shall be filed within 7 days following service of the petition. Service of the filed petition on the other parties and intervenors shall be accomplished in a manner prescribed in § 2200.7(c). A copy of the petition and responses shall be filed with the Review Board Clerk. The petition is denied unless granted within 30 days of the date of receipt by the Review Board's Clerk.

(c) ***Denial without prejudice.*** The Review Board's decision not to grant 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.

(d) ***Stay.***

(1) ***Trade secret matters.*** The filing of a petition for interlocutory review of a Hearing Officer's ruling concerning an alleged trade secret shall stay the effect of the ruling until the petition is deemed denied or ruled upon.

(2) ***Other cases.*** In all other cases, the filing or granting of a petition for interlocutory review shall not stay a proceeding or the effect of a ruling unless otherwise ordered.

(e) ***Hearing Officer's comments.*** The Hearing Officer may be requested to provide the Review Board with an explanation for the Hearing Officer's decision. When the written comments are filed with the Review Board, the Hearing Officer shall serve the comments on all parties in a manner prescribed in § 2200.7(c).

(f) ***Briefs.*** Notice shall be given to the parties if the Review Board decides to request briefs on the issues raised by an interlocutory review. See § 2200.93–Briefs before the Review Board.

(g) ***When filing effective.*** A petition for interlocutory review is deemed to be filed only when received by the Review Board, as specified in § 2200.8(c)(3)(ii).

§ 2200.74 Filing of Briefs and Proposed Findings With the Hearing Officer; Oral Argument at the Hearing.

(a) ***General.*** A party is entitled to a reasonable period at the close of the hearing for oral argument, which shall be included in the transcript of the hearing. Any party 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 Hearing Officer. In lieu of briefs, the Hearing Officer may permit or direct the parties to file memoranda or statements of authority.

(b) ***Time.*** Briefs shall be filed simultaneously on a date established by the Hearing Officer. A motion for extension of time for filing any brief shall be made at least 3 working days prior to the due date and shall recite that the moving party has conferred with the other parties on the motion. Reply briefs shall not be allowed except by order of the Hearing Officer.

(c) ***Untimely briefs.*** Untimely briefs will not be accepted unless accompanied by a motion setting forth good cause for the delay. The form and content of motions shall comply with § 2200.40.

SUBPART F— POSTHEARING PROCEDURES

§ 2200.90 Decisions and Reports of Hearing Officers.

(a) ***Hearing Officer's decision:***

(1) ***Contents of Hearing Officer's decision***. The hearing officer shall prepare a decision that conforms to 3 VSA § 812 and constitutes the final disposition of the proceedings. The decision shall be in writing and shall include findings of fact, conclusions of law, and the reasons or bases for them, on all the material issues of fact, law, or discretion presented on the record. The decision shall include an order affirming, modifying, or vacating each contested citation item and each proposed penalty or directing other appropriate relief. A decision finally disposing of a petition for modification of the abatement period shall contain an order affirming or modifying the abatement period.

(2) ***Service of the Hearing Officer's decision.*** The Hearing Officer shall serve a copy of the decision on each party in a manner prescribed in § 2200.7(c).

(b) ***Hearing Officer's report:***

(1) ***Contents of Hearing Officer's report.*** The Hearing Officer's report shall consist of the entire record, including the Hearing Officer's decision.

(2) ***Filing of Hearing Officer's report.*** On the eleventh day after service of the decision on the parties, the Hearing Officer shall file the report with the Clerk for docketing.

(3) ***Docketing of Hearing Officer's report by Clerk.*** Promptly upon filing of the Hearing Officer's report, the Clerk shall docket the report and notify all parties of the docketing date. The date of docketing is the date the Hearing Officer's report is made for purposes of 21 VSA §230(b).

(4) ***Correction of errors in Hearing Officer's report.***

(i) Until the Hearing Officer's report has been directed for review or, in the absence of a direction for review, until the decision has become a final order as described in paragraph (f) of this section, the Hearing Officer may correct clerical errors arising through oversight or inadvertence in decisions, orders, or other parts of the record under Vermont Rule of Civil Procedure 60(a). If a Hearing Officer's report has been directed for review, the decision may be corrected during the pendency of review with leave of the Review Board.

(ii) After a Hearing Officer's decision has become a final order as described in paragraph (f) of this section, the Review Board or the Hearing Officer may correct a clerical mistake or a mistake arising from oversight or omission under Vermont Rule of Civil Procedure 60(a).

(c) ***Relief from default.*** Until the Hearing Officer's report has been docketed by the Clerk, the Hearing Officer may relieve a party of default or grant reinstatement under § 2200.101(b),(f)(2), or § 2200.64(b).

(d) ***Filing documents after the docketing date.*** Except for documents filed under paragraph (b)(4)(i) of this section documents filed with the Clerk after the docketing date will no longer be forwarded to the Hearing Officer.

(e) ***Settlement.*** Settlement documents shall be filed in the manner prescribed in § 2200.100(c).

(f) ***Hearing Officer's decision final unless review directed.*** If no Review 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 Review Board per 21 VSA §230.

§ 2200.91 Discretionary Review; Petitions for Discretionary Review; Statements in Opposition to Petitions.

(a) ***Review discretionary.*** Review by the Review Board is not a right. A Review Board Member may, as a matter of discretion, direct review on the Review Board's own motion or on the petition of a party.

(b) ***Petitions for discretionary review.*** A party adversely affected or aggrieved by the decision of a hearing officer may seek review by the Review Board by filing a Petition for Discretionary Review with the Clerk at any time following the service of the Hearing Officer's decision on the parties but no later than 20 days after the date of docketing of the Hearing Officer's report. Service of the filed petition on the other parties and intervenors shall be accomplished in a manner prescribed in § 2200.7(c). The earlier a petition is filed, the more consideration it can be given. A petition for discretionary review may be conditional, and it may state that review is sought only if a Review Board Member were to direct review on the petition of an opposing party.

(c) ***Cross-petitions for discretionary review.*** Where a petition for discretionary review has been filed by one party, any other party adversely affected or aggrieved by the decision of the Hearing Officer may seek review by the Review Board by filing a cross-petition for discretionary review. The cross-petition may be conditional. See paragraph (b) of this section. A cross-petition shall be filed directly with the Clerk within 27 days after the date of docketing of the Hearing Officer's report. The earlier a cross-petition is filed, the more consideration it can be given.

(d) ***Contents of the petition.*** No particular form is required for a petition for discretionary review. A petition should state why review should be directed, including: whether the Hearing Officer's decision raises an important question of law, policy, or discretion; whether review by the Review Board will resolve a question about which the Review Board's Hearing Officers have rendered differing opinions; whether the Hearing Officer's decision is contrary

to law or Review Board precedent; whether a finding of material fact is not supported by a preponderance of the evidence; whether a prejudicial error of procedure or an abuse of discretion was committed. A petition should concisely state the portions of the decision for which review is sought and should refer to the citations and citation items (for example, citation 3, item 4a) for which review is sought. A petition shall not incorporate by reference a brief or legal memorandum. Brevity and the inclusion of precise references to the record and legal authorities will facilitate prompt review of the petition.

(e) ***When filing effective.*** A petition for discretionary review is filed when received by the Review Board, as specified in § 2200.8(c)(3)(ii).

(f) ***Prerequisite to judicial review; effect of filing.*** A petition for review under this section is a prerequisite to the seeking of judicial review of the Review Board action by the Vermont Superior Court. A petition for review under this section per 21 VSA § 227 does not stay the final order of the Review Board unless ordered by the court.

(g) ***Statements in opposition to petition***. Statements in opposition to petitions for discretionary review may be filed in the manner specified in this section for the filing of petitions for discretionary review. Statements in opposition shall concisely state why the Hearing Officer's decision should not be reviewed with respect to each portion of the petition to which it is addressed.

§ 2200.92 Review by the Review Board.

(a) ***Jurisdiction of the Review Board; Issues on review.*** Unless the Review Board orders otherwise, a direction for review establishes jurisdiction in the Review Board to review the entire case. The issues to be decided on review are within the discretion of the Review Board.

(b) ***Review on a Review Board Member's motion; Issues on review.*** At any time within 30 days after the docketing date of the Hearing Officer's report, a Review Board Member may, on the Review Board Member's own motion, direct that a Hearing Officer's decision be reviewed. Factors that may be considered in deciding whether to direct review absent a petition include, but are not limited to, whether the case raises novel questions of law or policy or involves a conflict between Hearing Officers' decisions. When a Review Board Member directs review on the Review Board Member's own motion, the issues ordinarily will be those specified in the direction for review or any later order.

(c) ***Issues not raised before the Hearing Officer.*** The Review Board will ordinarily not review issues that the Hearing Officer did not have the opportunity to pass upon. In exercising discretion to review issues that the Hearing Officer did not have the opportunity to pass upon, the Review Board may consider such factors as whether there was good cause for not raising the issue before the Hearing Officer, the degree to which the issue is factual, the degree to which proceedings will be disrupted or delayed by raising the issue on review, whether the ability of an adverse party to press a claim or defense would be impaired, and whether

considering the new issue would avoid injustice or ensure that judgment will be rendered in accordance with the law and facts.

§ 2200.93 Briefs Before the Review Board.

(a) **Requests for briefs:** The Review Board ordinarily will request the parties to file briefs on issues before the Review Board. After briefs are requested, a party, instead of filing a brief, may file a letter setting forth its arguments, or a letter stating that it will rely on its petition for discretionary review or previous brief. A party not intending to file a brief shall notify the Review Board in writing within the applicable time for filing briefs and shall serve a copy on all other parties. The provisions of this section apply to the filing of briefs and letters filed in lieu of briefs.

(b) ***Filing briefs***. Unless the briefing notice states otherwise:

(1) ***Time for filing briefs.*** The party required to file the first brief shall do so within 40 days after the date of the briefing notice. All other parties shall file their briefs within 30 days after the first brief is served. Any reply brief permitted by these rules or by order shall be filed within 15 days after the second brief is served.

(2) ***Sequence of filing.***

(i) If one petition for discretionary or interlocutory review has been filed, the petitioning party shall file the first brief.

(ii) If more than one petition has been filed, the party whose petition was filed first shall file the first brief.

(iii) If no petition has been filed, the parties shall file simultaneous briefs.

(3) ***Reply briefs.*** The party that filed the first brief may file a reply brief, or, if briefs are to be filed simultaneously, both parties may file a reply brief. Additional briefs are otherwise not allowed except by leave of the Review Board.

(c) ***Motion for extension of time for filing briefs.*** An extension of time to file a brief will not ordinarily be granted except for good cause shown. A motion for extension of time to file a brief shall be filed at the Review Board no later than 5 days prior to the expiration of the time limit prescribed in paragraph (b) of this section, shall comply with § 2200.40, 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*:** The Review Board may decline to accept a brief that is not timely filed.

(e) ***Length of briefs*:** Except by permission of the Review Board, a main brief, including briefs and legal memoranda it incorporates by reference, shall contain no more than 35 pages of text. A reply brief, including briefs and legal memoranda it incorporates by reference, shall contain no more than 20 pages of text.

(f) ***Format.*** Briefs shall be typewritten, and double spaced.

(g) ***Table of contents*:** A brief in excess of 15 pages shall include a table of contents.

(h) ***Failure to meet requirements*:** The Review Board may return briefs that do not meet the requirements of paragraphs (e-g) of this section.

§ 2200.94 [Reserved]

§ 2200.95 Oral Argument Before the Review Board.

(a) ***When ordered.*** Upon motion of any party or upon its own motion, the Review Board may order oral argument in any matter directed for review before it. Parties requesting oral argument must demonstrate why oral argument would facilitate resolution of the issues before the Review Board. Normally, motions for oral argument shall not be considered until after all briefs have been filed.

(b) ***Notice of argument.*** The Clerk shall advise all parties whether oral argument is to be heard. Within a reasonable time before the oral argument is scheduled, the Clerk shall inform the parties of the time and place therefor, the issues to be heard, and the time allotted to the parties.

(c) ***Postponement.***

(1) Except under extraordinary circumstances, a request for postponement must be filed at least 10 days before oral argument is scheduled.

(2) The Clerk shall notify the parties of a postponement in a manner best calculated to avoid unnecessary travel or inconvenience to the parties. The Clerk shall inform all parties of the new time and place for the oral argument.

(d) ***Order and content of argument.***

(1) Counsel shall be afforded such time for oral argument as the Review Board may provide by order. Requests for enlargement of time may be made by motion filed reasonably in advance of the date fixed for the argument.

(2) The petitioning party shall argue first. If the case is before the Review Board on cross-petitions, the Review Board will inform the parties in advance of the order of appearance.

(3) Counsel may reserve a portion of the time allowed for rebuttal but in opening argument shall present the case fairly and completely and shall not reserve points of substance for presentation during rebuttal.

(4) Oral argument should undertake to emphasize and clarify the written arguments appearing in the briefs. The Review Board will look with disfavor on any oral argument that is read from a previously filed document.

(5) At any time, the Review Board may terminate a party's argument or interrupt the party's presentation for questioning by the Review Board Members.

(e) ***Failure to appear.*** Should either party fail to appear for oral argument, the party present may be allowed to proceed with its argument.

(f) ***Consolidated cases.*** Where two or more consolidated cases are scheduled for oral argument, the consolidated cases shall be considered as one case for the purpose of allotting time to the parties unless the Review Board otherwise directs.

(g) ***Multiple counsel.*** Where more than one counsel argues for a party to the case or for multiple parties on the same side in the case, it is counsels' responsibility to agree upon a fair division of the total time allotted. In the event of a failure to agree, the Review Board will allocate the time. The Review Board may, in its discretion, limit the number of counsel heard for each party or side in the argument. No later than 5 days prior to the date of scheduled argument, the Review Board must be notified of the names of the counsel who will argue.

(h) ***Exhibits/visual aids.***

(1) The parties may use exhibits introduced into evidence at the hearing. If a party wishes to use a visual aid not part of the record, written notice of the proposed use shall be given to opposing counsel 15 days prior to the argument. Objections, if any, shall be in writing, served on all adverse parties, and filed not fewer than 7 days before the argument.

(2) No visual aid shall introduce or rely upon facts or evidence not already part of the record.

(3) If visual aids or exhibits other than documents are to be used at the argument, counsel shall arrange with the Clerk to have them placed in the hearing room on the date of the argument before the Review Board convenes.

(4) Parties using visual aids not introduced into evidence shall have them removed from the hearing room unless the Review Board directs otherwise. If such visual aids are not reclaimed by the party within a reasonable time after notice is given by the Clerk, such visual aids shall be disposed of at the discretion of the Clerk.

(i) ***Recording oral argument.***

(1) Unless the Review Board directs otherwise, oral arguments in a directed review shall be electronically recorded by the Review Board and made part of the record. Persons desiring to listen to the recordings shall make appropriate arrangements with the Clerk. At the request of any party or intervenor, the Review Board or its Hearing Officer's, an official verbatim transcript of the hearing shall be prepared. Any requested transcript shall be filed with the Review Board.

(2) Parties or intervenors who request the preparation of a transcript from the Clerk shall do so at their own expense. In the absence of a party or intervenor request for a transcript and should a Hearing Officer or a member of the Review Board request a transcript, the Review Board shall be responsible for the expense of the transcript preparation.

(3) Error in the transcript of the oral argument may be corrected by the Review Board on its own motion, on joint motion by the parties, or on motion by any party. The motion shall state the error in the transcript and the correction to be made. The official transcript shall reflect the corrections.

(j) ***Failure to file brief.*** A party that fails to file a brief shall not be heard at the time of oral argument except by permission of the Review Board.

SUBPART G— MISCELLANEOUS PROVISIONS

§ 2200.100 Settlement.

(a) ***Policy*:** Settlement is permitted and encouraged by the Review Board at any stage of the proceedings.

(b) ***Requirements:***

(1) ***Notification of Settlement.*** If the parties have agreed to a partial or full settlement, they shall so notify the Review Board in a written joint submission (titled "Notification of Settlement" or "Notification of Partial Settlement," as appropriate), in which the parties shall:

(i) List the contested items that have been settled and, if only a partial settlement agreement has been reached, also list the contested items that remain to be decided;

(ii) If posting of the settlement agreement is required by § 2200.7(g) or (i), certify that the parties' settlement agreement has been posted in the manner for posting notices prescribed by that rule and certify the date of posting;

(iii) If party status has been elected under § 2200.20, certify that the party has been afforded an opportunity to provide input on all matters pertaining to the settlement before the agreement is finalized; and

(iv) If the settlement agreement includes the withdrawal of a notice of contest, citation, notification of proposed penalty, or petition for modification of abatement period, state whether such withdrawal is with prejudice;

(2) The parties shall not incorporate the settlement agreement in, or append it to, the joint submission required in paragraph (b)(1) of this section or substitute the settlement agreement for the required joint submission.

(3) ***Issuance of order terminating proceeding.*** If the requirements of paragraphs (b)(1) and (2) of this section have been met with respect to all contested citation items and no affected employees who have elected party status have raised an objection to the reasonableness of any abatement period, the Review Board shall issue an Order acknowledging that the parties have resolved all contested citation items and agreed to terminate the proceeding before the Review Board.

(c) ***Filing; Service; Notice and Objection.*** A Notification of Settlement submitted shall be filed with the Clerk. Proof of service shall be filed with the Notification of Settlement, showing service upon all parties and authorized employee representatives in the manner prescribed by § 2200.7(c) and (d) and the posting of notice to non-party affected employees in the manner

prescribed by § 2200.7(g). If the time has not expired under these rules for electing party status, an order acknowledging the termination of the proceedings before the Review Board because of the settlement shall not be issued until at least 14 days after service or posting to consider any affected employee's or authorized employee representative's objection to the reasonableness of any abatement time. The affected employee or authorized employee representative shall file any such objection within this time. If such objection is filed, the Review Board shall provide an opportunity for the affected employees or authorized employee representative to be heard and present evidence on the objection, which shall be limited to the reasonableness of the abatement period.

§ 2200.101 Failure to Obey Rules.

(a) ***Sanctions.*** When any party has failed to plead or otherwise proceed as provided by these rules or as required by the Review Board or the Hearing Officer, the party may be declared to be in default either on the initiative of the Review Board or the Hearing Officer, after having been afforded an opportunity to show cause why the party should not be declared to be in default, or on the motion of a party. Subsequently, the Review Board or the Hearing Officer, in their discretion, may enter a decision against the defaulting party or strike any pleading or document not filed in accordance with these rules.

(b) ***Motion to set aside sanctions.*** For reasons deemed sufficient by the Review Board or the Hearing Officer and upon motion conforming to § 2200.40 expeditiously made, the Review Board or the Hearing Officer may set aside a sanction imposed under paragraph (a) of this section. See § 2200.90(c).

(c) ***Discovery sanctions and failure to appear.*** This section does not apply to sanctions for failure to comply with orders compelling discovery, which are governed by § 2200.52(f), or to a default for failure to appear, which is governed by § 2200.64(a).

(d) ***Show cause orders.*** All show cause orders issued by the Review Board or the Hearing Officer under paragraph (a) of this section shall be served in a manner prescribed in § 2200.7(o).

§ 2200.102 Withdrawal.

A party may withdraw its notice of contest, citation, notification of proposed penalty, or petition for modification of abatement period at any stage of the proceeding. The notice of withdrawal shall be served in accordance with § 2200.7(c) upon all parties and authorized employee representatives that are eligible to elect, but have not elected, party status. It shall also be posted in the manner prescribed in § 2200.7(g) for the benefit of any affected employees not represented by an authorized employee representative who are eligible to elect, but have not elected, party status. Proof of service shall accompany the notice of withdrawal in accordance with § 2200.7(d).

§ 2200.103 Expedited Proceeding.

(a) ***When ordered.*** Upon application of any party or intervenor, or upon its own motion, the Review Board may order an expedited proceeding. When an expedited proceeding is ordered by the Review Board, the Clerk shall notify all parties or intervenors.

(b) ***Automatic expedition.*** Cases initiated by employee contests and petitions for modification of abatement period shall be expedited. See § 2200.37(d)(2) and § 2200.38(c).

(c) ***Effect of ordering expedited proceeding.*** When an expedited proceeding is required by these rules or ordered by the Review Board, it shall take precedence on the docket of the Hearing Officer to whom it is assigned, or on the Review Board's review docket, as applicable, over all other classes of cases, and shall be set for hearing or for the submission of briefs at the earliest practicable date.

(d) ***Time sequence set by Hearing Officer.*** The assigned Hearing Officer or Review Board shall make rulings with respect to time for filing of pleadings and all other matters, without reference to times set forth in these rules, and shall do all other things necessary to complete the proceeding in the minimum time consistent with fairness.

§ 2200.104 Standards of Conduct.

(a) ***General.*** All representatives appearing before the Review Board or its Hearing Officers shall comply with the letter and spirit of the ethical conduct required in the courts Vermont Rules of Professional Conduct.

(b) ***Misbehavior before a Hearing Officer:***

(1) ***Exclusion from a proceeding.*** A Hearing Officer may exclude from participation in a proceeding any person, including a party or its representative, who engages in disruptive behavior, refuses to comply with orders or rules of procedure, continuously uses dilatory tactics, refuses to adhere to standards of orderly or ethical conduct, or fails to act in good in good faith. The cause for the exclusion shall be stated in writing or may be stated in the record if the exclusion occurs during the course of the hearing. Where the person removed is a party's attorney or other representative, the Hearing Officer shall suspend the proceeding for a reasonable time for the purpose of enabling the party to obtain another attorney or other representative.

(2) ***Appeal rights if excluded.*** Any attorney or other representative excluded from a proceeding by a Hearing Officer may, within 7 days of the exclusion, appeal to the Review Board for reinstatement. No proceeding shall be delayed or suspended pending disposition of the appeal.

(c) ***Disciplinary action by the Review Board.*** If an attorney or other representative practicing before the Review Board engages in unethical or unprofessional conduct or fails to comply

with any rule or order of the Review Board or its Hearing Officers, the Review Board may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested, take any appropriate disciplinary action, including suspension or disbarment from practice before the Review Board.

(d) ***Show cause orders.*** All show cause orders issued by the Review Board under paragraph (c) of this section shall be served in a manner prescribed in § 2200.7(o).

§ 2200.105 Ex Parte Communication.

(a) ***General.*** Except as permitted by § 2200.120 or as otherwise authorized by law, there shall be no ex parte communication with respect to the merits of any case not concluded, between any Board Member, Hearing Officer, employee or agent of the Review Board who is employed in the decisional process, and any of the parties or intervenors, representatives, or other interested persons.

(b) ***Disciplinary action.*** In the event an ex parte communication occurs, the Review Board or its Hearing Officer may make such orders or take such action as fairness requires. The exclusion of a person by a Hearing Officer from a proceeding shall be governed by Standards of Conduct. § 2200.104(b). Any disciplinary action by the Review Board, including suspension or disbarment, shall be governed by § 2200.104(c).

(c) ***Placement on public record.*** All ex parte communications in violation of this section shall be placed on the public record of the proceeding.

§ 2200.106 Amendments to Rules.

The Review 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 in this Part. Such suggestions should be addressed to the Review Board at its mailing address or e-mailed to the clerk

§ 2200.107 Special Circumstances; Waiver of Rules.

In special circumstances not contemplated by the provisions of these rules, or for good cause shown, the Review Board or the Hearing Officer 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 VOSHA Code requires.

SUBPART H— SETTLEMENT PART

§ 2200.120 Settlement Procedure.

(a) ***Voluntary settlement:***

(1) ***Applicability and duration.***

(i) Voluntary settlement applies only to notices of contests by employers.

(ii) Upon motion of the Hearing Officer, Review Board or any party, conforming to § 2200.40 after the docketing of the notice of contest, or with the consent of the parties at any time in the proceedings, the Review Board Chairperson may assign a case to a Settlement Hearing Officer for proceedings under this section. In the event either the Commissioner or the employer objects to the use of a Settlement Hearing Officer procedure, such procedure shall not be imposed.

(2) ***Length of voluntary settlement procedures.*** Voluntary settlement procedures shall be for a period not to exceed 75 days, unless extended with the concurrence of the Review Board Chairperson.

(b) ***Powers and duties of Settlement Hearing Officers.***

(1) The Settlement Hearing Officer shall confer with the parties regarding the whole or partial settlement of the case and seek resolution of as many issues as is feasible.

(2) The Settlement Hearing Officer may require the parties to provide statements of the issues in controversy and the factual predicate for each party's position on each issue and may enter other orders as appropriate to facilitate the proceedings.

(3) The Settlement Hearing Officer may allow or suspend discovery during the settlement proceedings.

(4) The Settlement Hearing Officer has the discretion to engage in ex parte communications throughout the course of settlement proceedings. The Settlement Hearing Officer may suggest privately to each attorney or other representative of a party what concessions the client should consider and assess privately with each attorney or other representative the reasonableness of the party's case or settlement position.

(5) The Settlement Hearing Officer may, with the consent of the parties, conduct such other settlement proceedings as may aid in the settlement of the case.

(c) ***Settlement conference:***

(1) ***General.*** The Settlement Hearing Officer shall convene and preside over conferences between the parties. Settlement conferences may be conducted telephonically or in person. The Settlement Hearing Officer shall designate a conference place and time.

(2) ***Participation in conference.*** The Settlement Hearing Officer may require that any attorney or other representative who is expected to try the case for each party be present. The Settlement Hearing Officer may also require that the party's representative be accompanied by an official of the party having full settlement authority on behalf of the party. The parties and their representatives or attorneys are expected to be completely candid with the Settlement Hearing Officer so that the Settlement Hearing Officer may properly guide settlement discussions. The failure to be present at a settlement conference or otherwise to comply with the orders of the Settlement Hearing Officer or the refusal to cooperate fully within the spirit of this rule may result in default or the imposition of sanctions under § 2200.101.

(3) ***Confidentiality of settlement proceedings.***

(i) All statements made and all information presented during the course of settlement proceedings under this section shall be regarded as confidential and shall not be divulged outside of these proceedings except with the consent of the parties. The Settlement Hearing Officer shall issue appropriate orders to protect the confidentiality of settlement proceedings.

(ii) The Settlement Hearing Officer shall not divulge any statements or information presented during private negotiations with a party or the party's representative during settlement proceedings except with the consent of that party.

(iii) The following shall not be admissible in any subsequent hearing, except by stipulation of the parties:

(A) Evidence of statements or conduct in settlement proceedings under this section within the scope of Vermont Rule of Evidence 408,

(B) Notes or other material prepared by or maintained by the Settlement Hearing Officer in connection with settlement proceedings, and

(C) Communications between the Settlement Hearing Officer and the Review Board Chairperson or Clerk in connection with settlement proceedings including the report of the Settlement Hearing Officer under paragraph (e) of this section.

(iv) Documents and factual information disclosed in the settlement proceeding may not be used in litigation unless obtained through appropriate discovery or subpoena.

(v) With respect to the Settlement Hearing Officer's participation in settlement proceedings, the Settlement Hearing Officer shall not discuss the merits of the case with any other person, nor appear as a witness in any hearing of the case.

(vi) The requirements of paragraph (c)(3) of this section apply unless disclosure is required by any applicable law or public policy.

(d) ***Record of settlement proceedings.*** No material of any form required to be held confidential under paragraph (c)(3) of this section shall be considered part of the official case record required to be maintained under 21 VSA §230(c) nor shall any such material be open to public inspection as required by section 230(c), unless the parties otherwise stipulate. With the exception of an order approving the terms of any partial settlement agreed to between the parties as set forth in paragraph (e)(1) of this section, the Settlement Hearing Officer shall not file or cause to be filed in the official case record any material in the Settlement Hearing Officer's possession relating to these settlement proceedings, including but not limited to communications with the Review Board Chairperson or Clerk and the Settlement Hearing Officer's report under paragraph (e) of this section, unless the parties otherwise stipulate.

(e) ***Report of Settlement Hearing Officer.***

(1) The Settlement Hearing Officer shall promptly notify the Clerk in writing of the status of the case at the conclusion of the settlement period or such time that the Settlement Hearing Officer determines further negotiations would be fruitless. If the Settlement Hearing Officer has made such a determination and a settlement agreement is not achieved within 75 days of the case being assigned to voluntary settlement proceedings, the Settlement Hearing Officer shall then advise the Clerk in writing. The Clerk, in consultation with the Review Board may allow an additional period of time, for further proceedings under this section. If at the expiration of the period allotted under this paragraph the Settlement Hearing Officer has not approved a full settlement, the Settlement Hearing Officer shall furnish to the Clerk copies of any written stipulations and orders embodying the terms of any partial settlement the parties have reached.

(2) At the termination of the settlement period without a full settlement, the Clerk shall promptly assign the case to a Hearing Officer other than the Settlement Hearing Officer for appropriate action on the remaining issues. If all the parties, the Settlement Hearing Officer, and the Review Board Chairperson agree, the Settlement Hearing Officer may be retained as the Hearing Officer.

(f) ***Non-reviewability.*** Notwithstanding the provisions of § 2200.73 regarding interlocutory review, any decision concerning the assignment of any Hearing Officer and any decision by

the Settlement Hearing Officer to terminate settlement proceedings under this section is not subject to review, appeal, or rehearing

SUBPART I-L [RESERVED]

SUBPART M— SIMPLIFIED PROCEEDINGS

§ 2200.200 Purpose.

(a) The purpose of the Simplified Proceedings subpart is to provide simplified procedures for resolving contests under the Vermont Occupational Safety and Health Act so that parties before the Review Board or its Hearing Officer may reduce time and expense of litigation while being assured due process and a hearing that meets the requirements of the Vermont Administrative Procedure Act 3 VSA §809. These procedural rules will be applied to accomplish this purpose.

(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 Review Board's Rules of Procedure are as follows:

(1) Complaints and answers are not required.

(2) Pleadings generally are not required. Early discussions among the parties and the Hearing Officer are required to narrow and define the disputes between the parties.

(3) The Commissioner is required to provide the employer with certain informational documents early in the proceeding.

(4) Discovery is not permitted except as ordered by the Hearing Officer.

(5) Interlocutory appeals are not permitted.

(6) Hearings are less formal. The admission of evidence is not controlled by the Vermont Rules of Evidence except as provided for in § 2200.209(c). The Hearing Officer may allow the parties to argue their case orally at the conclusion of the hearing and may allow or require post-hearing briefs or statements of position. The Hearing Officer may render a decision from the bench.

§ 2200.201 Application.

The rules in this subpart will govern proceedings before a Hearing Officer if a case is chosen for Simplified Proceedings under § 2200.203.

§ 2200.202 Eligibility for Simplified Proceedings.

(a) Those cases selected for simplified proceedings will be those that do not involve complex issues of law or fact. Cases appropriate for Simplified Proceedings will generally include those with one or more of the following characteristics:

(1) Relatively few citation items,

(2) An aggregate proposed penalty of not more than $20,000,

(3) No allegation of willfulness or a repeat violation,

(4) Not involving a fatality,

(5) A hearing that is expected to take less than 2 days, or

(6) A small employer whether appearing pro se or represented by counsel.

(b) Those cases with an aggregate proposed penalty of more than $20,000, but not more than $30,000, if otherwise appropriate, may be selected for Simplified Proceedings at the discretion of the Review Board Chairperson.

§ 2200.203 Commencing Simplified Proceedings.

(a) ***Selection.*** Upon receipt of a Notice of Contest, the Review Board Chairperson at his/her discretion may assign an appropriate case for Simplified Proceedings.

(b) ***Party request.*** Within 21 days of the notice of docketing, any party or intervenor may request that the case be assigned for Simplified Proceedings. The request must be in writing. For example, "I request Simplified Proceedings" will suffice. The request must be sent to the Clerk. Copies must be sent to each of the other parties.

(c) ***Review Board Chairperson or Hearing Officer's ruling on request.*** The Review Board Chairperson or the Hearing Officer assigned to the case may grant a party's request and assign a case for Simplified Proceedings at the Review Board Chair's or Hearing Officer's discretion. Such request shall be acted upon within 14 days.

(d) ***Time for filing complaint or answer under § 2200.34***. If a party has requested Simplified Proceedings or the Hearing Officer has assigned the case for Simplified Proceedings, the times for filing a complaint or answer will not run. If a request for Simplified Proceedings is denied, the period for filing a complaint or answer will begin to run upon issuance of the notice denying Simplified Proceedings.

§ 2200.204 Discontinuance of Simplified Proceedings.

(a) ***Procedure.*** If it becomes apparent at any time that a case is not appropriate for Simplified Proceedings, the Review Board Chairperson, or Hearing Officer assigned to the case may, upon motion by any party or upon the Review Board Chairperson or Hearing Officer's own motion, discontinue Simplified Proceedings and order the case to continue under conventional rules. Before discontinuing Simplified Proceedings, the Hearing Officer will consult with the Review Board Chairperson.

(b) ***Party motion.*** At any time during the proceedings any party may request that Simplified Proceedings be discontinued and that the matter continue under conventional procedures. A

motion to discontinue must conform to § 2200.40 and explain why the case is inappropriate for Simplified Proceedings. Responses to such motions shall be filed within the time specified by § 2200.40. Joint motions to return a case to conventional proceedings shall be granted by the Hearing Officer and do not require a showing of good cause, except that the Hearing Officer may deny such a motion that is filed less than 30 days before a scheduled hearing date.

(c) ***Ruling.*** If Simplified Proceedings are discontinued, the Hearing Officer or Review Board Chairperson may issue such orders as are necessary for an orderly continuation under conventional rules.

§ 2200.205 Filing of Pleadings.

(a) ***Complaint and Answer:*** Once a case is designated for Simplified Proceedings, the complaint and answer requirements are suspended. If the Commissioner has filed a complaint under § 2200.34(a), a response to a petition under § 2200.37(d)(4), or a response to an employee contest under § 2200.38(a), and if Simplified Proceedings has been ordered, no response to these documents will be required.

(b) ***Motions:*** Limited, if any, motion practice is contemplated in Simplified Proceedings, but all motion practice shall conform with § 2200.40. 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 any prehearing conference or hearing.

§ 2200.206 Disclosure of Information.

(a) ***Disclosure to Employer.***

(1) Within 21 days after a case is designated for Simplified Proceedings, the Commissioner shall provide the employer, free of charge, copies of the Inspection Report, Safety Narrative and the Violation Worksheet or their equivalents.

(2) Within 30 days after a case is designated for Simplified Proceedings, the Commissioner shall provide the employer with reproductions of any photographs or videotapes that the Commissioner anticipates using at the hearing.

(3) Within 30 days after a case is designated for Simplified Proceedings, the Commissioner shall provide to the employer any exculpatory evidence in the Commissioner's possession.

(4) The Hearing Officer shall act expeditiously on any claim by the employer that the Commissioner improperly withheld or redacted any portion of the documents, photographs, or videotapes on the grounds of confidentiality or privilege.

(b) ***Disclosure to the Commissioner.*** When the employer raises an affirmative defense pursuant to § 2200.207(b), the Hearing Officer shall order the employer to disclose to the Commissioner such documents relevant to the affirmative defense as the Hearing Officer deems appropriate.

§ 2200.207 Pre-hearing Conference.

(a) ***When held.*** As early as practicable after the employer has received the documents set forth in § 2200.206(a)(1), the Hearing Officer may conduct a pre-hearing conference, which the Hearing Officer may hold in person, or by telephone or electronic means.

(b) ***Content.*** At the pre-hearing conference, the parties may discuss the following: settlement of the case; the narrowing of issues; an agreed statement of issues and facts; all defenses; witnesses and exhibits; motions; and any other pertinent matter. Except under extraordinary circumstances, any affirmative defenses not raised at the pre-hearing conference may not be raised later. At the conclusion of the conference, the Hearing Officer will issue an order that may set forth any further agreements reached by the parties and that may specify the issues to be addressed by the parties at the hearing.

§ 2200.208 Discovery.

Discovery conditions and time limits, including requests for admissions, shall not be allowed except at the discretion of the Hearing Officer.

§ 2200.209 Hearing.

(a) ***Procedures.*** As soon as practicable after the conclusion of the pre-hearing conference, the Hearing Officer will hold a hearing on any issue that remains in dispute. The hearing will be in accordance with subpart E of these rules, except for § 2200.73 which will not apply.

(b) ***Agreements.*** At the beginning of the hearing, the Hearing Officer will enter into the record all agreements reached by the parties as well as defenses raised during the pre-hearing conference. The parties and the Hearing Officer then will attempt to resolve or narrow the remaining issues. The Hearing Officer will enter into the record any further agreements reached by the parties.

(c) Except as to matters that are protected by evidentiary privilege, the admission of evidence is not controlled by 3 VSA 810 and the Vermont Rules of Evidence except as determined by the Hearing Officer at the Hearing Officer's discretion. The Hearing Officer will receive oral, physical or documentary evidence that is not irrelevant, unduly repetitious, or unreliable. Testimony shall be given under oath or affirmation.

(d) Transcripts shall be governed by § 2200.66.

(e) ***Oral and Written Argument.*** Each party may present an oral argument at the close of the hearing. The Hearing Officer may allow or require post-hearing briefs or statements of position and statement of facts upon the request of either party or on the Hearing Officer's own motion. The form of any post-hearing briefs shall conform to § 2200.74 unless the Hearing Officer specifies otherwise.

(f) ***Hearing Officer Decision.***

(1) ***Bench decision.*** The Hearing Officer may render a decision from the bench. In rendering a decision from the bench, the Hearing Officer shall state the issues in the case and make clear both the Hearing Officer's findings of fact and conclusions of law on the record. The Judge shall reduce the bench decision in the matter to writing and serve it on the parties as soon as practicable, but no later than 45 days after the hearing. If additional time is needed, approval of the Review Board Chair permission is required. The decision shall be prepared in accordance with § 2200.90(a). The written decision shall include, as an appendix, the bench decision as set forth in the transcript.

(2) ***Written decision.*** If the Hearing Officer does not render a decision from the bench, the Hearing Officer will issue a written decision within 60 days of the close of the record. The record will ordinarily be deemed closed upon the completion of any permitted post-hearing briefing, provided however if a request for a transcript of the recording of the hearing is made, the record will be deemed closed upon the later of the filing of said transcript and the completion of any post hearing briefing. The decision will be in accordance with § 2200.90(a). If additional time is needed, approval of the Review Board Chairperson is required.

(g) ***Filing of Hearing Officer's Decision With the Clerk.*** When the Hearing Officer issues a written decision, service, filing, and docketing of the Hearing Officer's written decision shall be in accordance with § 2200.90.

§ 2200.210 Review of Hearing Officer's decision.

Any party may petition for Review Board review of the Hearing Officer's decision as provided in § 2200.91. After the issuance of the Hearing Officer's written decision, the parties may pursue the case following the rules in Subpart F of this part.

§ 2200.211 Applicability of subparts A through G.

The provisions of subpart D (§§ 2200.51-2200.56) and § 2200.34, § 2200.37(d), § 2200.38, § 2200.71, and § 2200.73 will not apply to Simplified Proceedings. All other rules contained in subparts A through G of the Review Board's rules of procedure will apply when consistent with the rules in this subpart governing Simplified Proceedings.