

DEPARTMENT OF CONSUMER AND INDUSTRY SERVICES

BUREAU OF SAFETY AND REGULATIONS

OCCUPATIONAL SAFETY AND HEALTH

(By authority conferred on the board of health and safety compliance and appeals by section 46 of Act No. 154 of the Public Acts of 1974, as amended, and section 33 of Act No. 306 of the Public Acts of 1969, as amended, being SS408.1046 and 24.233 of the Michigan Compiled Laws)

PART 4. PROCEDURES

GENERAL PROVISIONS

R 408.21401 Scope.

Rule 401. (1) These rules shall govern proceedings in contested cases before the board or a hearings officer.

(2) Proceedings in a hearing before the board or a hearings officer shall also be governed by chapter 4 of Act No. 306 of the Public Acts of 1969, as amended, being S24.271 et seq. of the Michigan Compiled Laws, and the act.

History: 1979 AC.

R 408.21403 Definitions; A to D.

Rule 403. (1) "Act" means the Michigan occupational safety and health act, Act No. 154 of the Public Acts of 1974, as amended, being S408.1001 et seq. of the Michigan Compiled Laws.

(2) "Board" means the board of health and safety compliance and appeals.

(3) "Bureau" means the bureau of safety and regulation or the bureau of environmental and occupational health.

(4) "Citation" means a written communication issued by the department to an employer pursuant to section 33 of the act.

(5) "Day" means a calendar day.

(6) "Department" means the department of consumer and industry services or the department of public health.

(7) "Director" means the director of the department of consumer and industry services or his authorized representative, or the director of the department of public health or his authorized representative.

History: 1979 AC.

R 408.21405 Definitions; E to P.

Rule 405. (1) "Executive secretary" means secretary to the board.

(2) "Party" means the employer cited, the employee or employees affected by the citation, or their legal representative, and the department.

(3) "Person" means 1 or more individuals, partnerships, associations, corporations, business trusts, representatives, an organized group of individuals, or the state or a political subdivision of the state, or an agency, instrumentality, or authority thereof.

History: 1979 AC.

R 408.21411 Computation of time.

Rule 411. In the computation of the period of time within which an act shall be performed or appeal filed, the calendar day from which the act shall be performed or appeal filed shall be excluded in the computation of time. The calendar day on which a compliance therewith is required shall be included. If the last day within which the act shall be performed or appeal filed is a Saturday, Sunday, or a legal holiday, that day shall be excluded and the period shall run until the end of the next day which is neither a Saturday, Sunday, or legal holiday.

History: 1979 AC.

R 408.21412 Extension of time.

Rule 412. Requests for an extension of time for the filing of any document or application shall be received in advance of the date on which document or application is due to be filed.

History: 1979 AC.

R 408.21413 Filing.

Rule 413. (1) All documents, with the exception of the notice of appeal, shall be filed with the Board of Health and Safety Compliance and Appeals, State Secondary Complex, 7150 Harris Drive, Box 30015, Lansing, Michigan 48909. The notice of appeal shall be filed with the division of the department that issued the citation.

(2) Delivery for filing may be accomplished by registered, certified, or first class mail or by personal delivery at the Board of Health and Safety Compliance and Appeals, State Secondary Complex, 7150 Harris Drive, Box 30015, Lansing, Michigan 48909.

(3) Filing is deemed effective at the time of mailing or at the time of personal service at the board. The mailing date shall be presumed to be the postmark date appearing on the envelope if postage was prepaid and the envelope was properly addressed.

History: 1979 AC.

R 408.21414 Protection of trade secrets.

Rule 414. Upon application of a party, the board or a hearings officer shall issue such orders as may be appropriate to protect the confidentiality of trade secrets obtained in connection with an inspection, investigation, or proceedings conducted pursuant to the act.

History: 1979 AC.

R 408.21415 Responsibility of employers to notify employees of proceedings.

Rule 415. (1) The employer shall, upon filing an appeal at the place where citations are required to be posted, post a copy of the notice of appeal and serve, by prepaid postage, first class mail, or by personal delivery, a copy of the notice of appeal on an authorized employee representative. The notice shall inform the affected employees of their right to party status and of the availability of all pleadings for their inspection and copying at reasonable times. The notice shall remain posted until the notice of hearing is received and posted. The employee rights statement made in the following form shall be deemed to comply with this rule:

"(name of employer) Your employer has been cited by the (Michigan Department of Consumer and Industry Services or Michigan Department of Public Health) for violation of an occupational safety or health standard.

The citation (or penalty) has been contested and will be the subject of a hearing before the Board of Health and Safety Compliance and Appeals.

Affected employees are entitled to participate as parties under the terms and conditions established by the Board of Health and Safety Compliance and Appeals in its rules of procedure. Notice of intent to

participate should be sent to the Board of Health and Safety Compliance and Appeals, Secondary Complex, 7150 Harris Drive, Box 30015, Lansing, Michigan 48909.

All documents filed relative to this matter and a copy of the board rules, may be inspected at (place reasonably convenient to employees, preferably at or near work place)."

(2) Where appropriate, the second sentence of the above notice shall be deleted and the following sentence shall be substituted: "The reasonableness of the period prescribed by the (department of consumer and industry services or department of public health) for the abatement of the violation has been contested and will be the subject of a hearing before the Board of Health and Safety Compliance and Appeals."

History: 1979 AC.

R 408.21416 Responsibility of employee to notify employer and other employees of proceedings.

Rule 416. Where an employee petition relating to the reasonableness of the abatement period is filed by an employee or an authorized employee representative, a copy of the employee petition shall be provided to the employer by the department for posting at or near the place where the citation is required to be posted.

History: 1979 AC.

R 408.21417 Parties and representatives.

Rule 417. (1) Employees may elect to participate as parties at any time before the commencement of a hearing, unless, for good cause shown, the board allows an election at a later time.

(2) Where an employee appeal is filed with respect to the reasonableness of a period of abatement of a violation, the employer charged with the responsibility of abating the violation may elect party status at any time before the commencement of the hearing, unless, for good cause shown, the board allows an election at a later time.

(3) An authorized employee representative who files an appeal shall be responsible for serving a copy of the appeal with an authorized employee representative whose members are affected.

(4) The department shall be a party to all proceedings before the board.

History: 1979 AC.

R 408.21418 Representative of parties.

Rule 418. (1) A party may appear in person or by a representative.

(2) Nothing contained herein shall be construed to require a representative to be an attorney-at-law.

History: 1979 AC.

## DOCUMENTS

R 408.21421 Form of documents.

Rule 421. (1) There are no specific requirements relative to the form of documents.

(2) A document shall contain:

(a) A caption sufficient to identify the parties.

(b) The board's docket number, if assigned.

(c) A clear, plain statement of the relief sought, together with the grounds therefor.

(d) A signature by the party involved or by his representative.

History: 1979 AC.

R 408.21422 Notice of hearing.

Rule 422. (1) The board shall, immediately upon receiving a notice of hearing from the department, send the notice of hearing to all parties.

The employer shall post a copy of the notice of hearing at the place where the notice of appeal was required to be posted, and serve by prepaid postage first class mail, or by personal delivery, a copy of the notice on an authorized employee representative. Notice of hearing shall remain posted until the conclusion of the hearing.

(2) The notice of hearing, which has been prepared by the department, shall have endorsed thereon prior to the mailing to the parties, a date of hearing.

(3) The notice of hearing shall comply with the requirements of section 71 of Act No. 306 of the Public Acts of 1969, as amended, being S24.271 of the Michigan Compiled Laws, as follows:

(a) The parties shall be given an opportunity for a hearing without undue delay.

(b) The parties shall be given a reasonable notice of the hearing. The notice shall include:

(i) A statement of the date, hour, place, and nature of the hearing.

Unless otherwise specified in the notice, the hearing shall be held at the principal office of the agency.

(ii) A statement of the legal authority and jurisdiction under which the hearing is to be held.

(iii) A reference to the particular sections of the statutes and rules involved.

(iv) A short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is given, the initial notice may state the issues involved.

Thereafter, on application, the agency or other party shall furnish a more definite and detailed statement of the issues.

History: 1979 AC.

R 408.21423 Intervention.

Rule 423. (1) A petition for leave to intervene may be filed at any stage of a proceeding before commencement of the hearing.

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

(3) The board or the hearings officer may grant a petition for intervention to such an extent and upon such terms as the board or the hearings officer determines.

History: 1979 AC.

R 408.21424 Statement of position and oral participation.

Rule 424. At any time prior to the commencement of a hearing, a person entitled to appear as a party or an intervenor may file a statement of position with respect to any issue to be heard.

History: 1979 AC.

R 408.21425 Withdrawal of notice of appeal.

Rule 425. At any stage of the proceeding, a party may withdraw his appeal or petition.

History: 1979 AC.

R 408.21426 Prehearing conference.

Rule 426. (1) At any time before a hearing, the board or hearings officer, on its own motion or on motion of a party, may direct the parties to exchange information or to participate in a prehearing conference for the purpose of considering matters which will tend to simplify the issues or expedite the proceedings.

(2) The hearings officer shall issue a prehearing statement which shall include the agreements reached by the parties. This statement shall be served on the parties and shall be a part of the record.

History: 1979 AC.

R 408.21427 Issuance of subpoenas; petitions to revoke or modify subpoenas; right to inspect or copy data.

Rule 427. (1) The board shall, on the written application of a party, issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence, including relevant books, records, correspondence, or documents, in his possession or under his control. An application for a subpoena 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.

(2) Witness fees shall be paid to subpoenaed witnesses by the party who sought the subpoena. Witnesses ordered to appear in a proceeding pending before the board shall be entitled to the same fees as paid for like services in the circuit court.

History: 1979 AC.

R 408.21428 Failure to appear.

Rule 428. (1) If a party fails to appear in a contested case after proper notice, the hearing may proceed in the absence of the party.

(2) The hearings officer, upon request filed within 10 days after the scheduled hearing date and upon a showing of good cause, may excuse the failure to appear. In that event, the hearing shall be rescheduled.

History: 1979 AC.

R 408.21429 Transcript of testimony.

Rule 429. A hearing shall be recorded verbatim. A transcript of the testimony shall be prepared upon request of a party or the board. A transcript shall be duly certified by the reporter. Parties requesting a transcript shall pay for the transcript.

History: 1979 AC.

## HEARINGS

R 408.21431 Duties and powers of hearings officer.

Rule 431. (1) The hearings officer shall conduct a fair and impartial hearing, assure that the facts are fully elicited, adjudicate all issues, and avoid delay.

(2) The hearings officer shall have authority, with respect to cases assigned to him between the time he is designated and the time he issues his report and subject to the rules of the board and the provisions of chapter 4 of Act No. 306 of the Public Acts of 1969, being S24.271 et seq. of the Michigan Compiled Laws, to do the following:

- (a) Administer oaths and affirmations.
- (b) Sign and issue subpoenas in the name of the agency and require the attendance and giving of testimony by witnesses and the production of books, papers, and other documentary evidence.
- (c) Provide for the taking of testimony by deposition.
- (d) Regulate the course of the hearings, set the time and place for continued hearings, and fix the time for filing of briefs and other documents.
- (e) Direct the parties to appear and confer to consider simplification of the issues by consent of the parties.

History: 1979 AC.

R 408.21432 Report of hearings officer.

Rule 432. (1) The report of the hearings officer shall include findings of fact, conclusions of law, and a determination.

(2) The hearings officer shall sign and date the report. Upon filing of the report with the executive secretary and the parties, jurisdiction shall rest solely in the board. All motions, petitions, and other pleadings filed subsequent to the filing of the report shall be addressed to the executive secretary.

(3) The report of the hearings officer shall become the final order of the board 30 days after filing with the board and parties, unless a board member directs that the report be reviewed and acted upon by the board.

(4) A party may file with the board exceptions, including written arguments, to the report of the hearings officer. Exceptions shall be received by the board within 20 days of the filing of the report.

History: 1979 AC.

R 408.21433 Authority of board.

Rule 433. (1) In reviewing a report of a hearings officer, the board, by a vote of not less than a majority of its members, may:

(a) Dismiss or modify the citation.

(b) Modify the abatement time of the citation.

(c) Issue a final order sustaining the citation, the abatement time, or the assessed penalty.

(d) Vacate or modify assessed penalties.

(e) Remand the case for the taking of additional evidence or for correction of proceedings.

(f) Direct other appropriate relief.

(2) Upon a showing by an employer that a good faith effort has been made to comply with the abatement requirements of a citation that has become a final order of the board as provided in the act, and that the abatement has not been completed because of circumstances beyond the reasonable control of the employer, the board, after a hearing if requested by the employer, affected employees, or the department, shall issue an order affirming or modifying the abatement requirements in the citation.

History: 1979 AC.

R 408.21434 Oral argument before the board; briefs; remand by board.

Rule 434. (1) Oral argument before the board shall not ordinarily be allowed.

(2) The board, upon request, may permit a party to submit a brief relative to an issue raised in the matter before it. The board may request briefs from the parties.

(3) In the event the board finds that the record is inadequate, the board may order the matter remanded to a hearings officer for a rehearing.

History: 1979 AC.

## PETITIONS

R 408.21441 Petition for modification of abatement period.

Rule 441. (1) An employer may file a petition for modification of abatement date when the employer has made a good faith effort to comply with the abatement requirements of a citation, that has become a final order of the board, but the abatement has not been completed because of the factors beyond the employer's reasonable control.

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

(a) Steps taken by the employer, and the dates of those steps in an effort to achieve compliance during the prescribed abatement period.

(b) The specific additional abatement time needed in order to achieve compliance.

(c) The reasons the 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.

(d) Available interim steps being taken to safeguard the employees against the cited hazard during the abatement period.

(e) A certification that the petition for modification of abatement date has been filed and posted in accordance with subrule (4).

(3) A petition for modification of abatement date shall be filed with the board no later than the close of the next working day following the date on which abatement was originally required. A petition filed later shall be accompanied by the employer's statement of exceptional circumstances explaining the delay.

(4) On the same day that the petition is filed with the board, a copy of the petition shall be filed with the department that issued the citation and a copy shall be posted by the employer in a conspicuous place at or near the place where the citation was required to be posted and remain so posted for a period of 10 working days.

(5) The department, affected employees, or their representatives may file written objection to the petition with the board setting forth the reasons for opposing the petition. An objecting party shall also file a copy of the written objection with the other parties. Failure to file an objection within 10 working days of the date of filing the petition shall constitute a waiver of any further right to object to the petition.

(6) The board may approve without a hearing a petition for modification of an abatement date to which an objection has not been filed.

(7) Where a petition is objected to by the department or affected employees, the petition shall be processed as follows:

(a) The board shall process the petition in the same manner as any other contested case, except that a hearing on the petition shall be handled in an expeditious fashion.

(b) An employer petitioning for a modification of an abatement period shall have the burden of proving by a preponderance of the evidence that he 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 his control.

History: 1979 AC.

## MISCELLANEOUS PROVISIONS

R 408.21442 Settlement.

Rule 442. (1) Settlement is encouraged at any stage of the proceedings where the settlement is consistent with the provisions and objectives of the act.

(2) A settlement agreement submitted by the parties shall be accompanied by an appropriate, proposed order.

(3) Where parties to a settlement agree upon a proposal, it shall be served upon the represented and unrepresented affected employees not less than 10 days prior to submission to the board for approval in the same manner as required for serving notices of hearing in R 408.21422(1) of these rules. The proposed settlement, when submitted to the board or hearings officer, shall contain a certification indicating the date and the manner in which service of the settlement was made on the represented and unrepresented affected employees.

History: 1979 AC.

R 408.21443 Ex parte communication.

Rule 443. There shall not be ex parte communication, with respect to the merits of a case not concluded, between the board, including a member, officer, employee or agent of the board who is employed in the decisional process, and a party.

History: 1979 AC.

R 408.21444 Restriction as to participation by investigative or prosecuting officers.

Rule 444. In a proceeding noticed pursuant to the rules, the director shall not participate or advise, except as a party to the proceeding, with respect to the report of the hearings officer or the board decision.

History: 1979 AC.

R 408.21445 Inspection and reproduction of documents.

Rule 445. (1) Subject to the provision of law restricting public disclosures of information, a person may, at the offices of the board, inspect and copy a document filed in a proceeding.

(2) Actual costs of reproduction shall be borne by the person seeking the document.

History: 1979 AC.

R 408.21446 Restriction with respect to former employee.

Rule 446. (1) A former employee of the board or of the director, including a member of the board or the director, shall not appear before the board as an attorney or other representative for a party in a contested case in which that person participated personally and substantially during the period of that person's employment.

(2) A former employee of the board or of the director, including a member of the board or the director, shall not appear before the board as an attorney or other representative for a party in a proceeding or other matter, formal or informal, for which that person was personally responsible during the period of that person's employment, unless 1 year has elapsed since the termination of the employment.

(3) The prohibition against participation as an attorney or other representative as specified in subrules (1) and (2) applies to the attorney general and the assistants of the attorney general who serve the department.

History: 1979 AC.

R 408.21447 Amendment to rules.

Rule 447. The board may at any time upon its motion or initiative, or upon written suggestion of an interested person setting forth reasonable grounds therefor, amend or revoke any of the rules contained herein, pursuant to the administrative procedures act, Act No. 306 of the Public Acts of 1969, as amended, being S24.201 et seq. of the Michigan Compiled Laws.

History: 1979 AC.