

Administrative Procedures – Final Proposed Rule Filing

Instructions:

In accordance with Title 3 Chapter 25 of the Vermont Statutes Annotated and the “Rule on Rulemaking” adopted by the Office of the Secretary of State, this filing will be considered complete upon filing and acceptance of these forms with the Office of the Secretary of State, and the Legislative Committee on Administrative Rules.

All forms requiring a signature shall be original signatures of the appropriate adopting authority or authorized person, and all filings are to be submitted at the Office of the Secretary of State, no later than 3:30 pm on the last scheduled day of the work week.

The data provided in text areas of these forms will be used to generate a notice of rulemaking in the portal of “Proposed Rule Postings” online, and the newspapers of record if the rule is marked for publication. Publication of notices will be charged back to the promulgating agency.

PLEASE REMOVE ANY COVERSHEET OR FORM NOT REQUIRED WITH THE CURRENT FILING BEFORE DELIVERY!

Certification Statement: As the adopting Authority of this rule (see 3 V.S.A. § 801 (b) (11) for a definition), I approve the contents of this filing entitled:

VOSHA Review Board Rules of Procedure

_____/s/Leigh Keyser Phillips_____, on 6/14/21
(signature) (date)

Printed Name and Title:
Leigh Keyser Phillips, Chairperson

RECEIVED BY: _____

- Coversheet
- Adopting Page
- Economic Impact Analysis
- Environmental Impact Analysis
- Strategy for Maximizing Public Input
- Scientific Information Statement (if applicable)
- Incorporated by Reference Statement (if applicable)
- Clean text of the rule (Amended text without annotation)
- Annotated text (Clearly marking changes from previous rule)
- ICAR Minutes
- Copy of Comments
- Responsiveness Summary

1. TITLE OF RULE FILING:

VOSHA Review Board Rules of Procedure

2. PROPOSED NUMBER ASSIGNED BY THE SECRETARY OF STATE

20P-021

3. ADOPTING AGENCY:

VOSHA Review Board

4. PRIMARY CONTACT PERSON:

(A PERSON WHO IS ABLE TO ANSWER QUESTIONS ABOUT THE CONTENT OF THE RULE).

Name: Carolyn Desch

Agency: VOSHA Review Board

Mailing Address: 133 State Street, Montpelier, VT 05633-6701

Telephone: 802 828 - 2775 Fax: 802 828 - 1132

E-Mail: carolyn.desch@vermont.gov

Web URL *(WHERE THE RULE WILL BE POSTED)*:

<https://voshaboard.vermont.gov/>

5. SECONDARY CONTACT PERSON:

(A SPECIFIC PERSON FROM WHOM COPIES OF FILINGS MAY BE REQUESTED OR WHO MAY ANSWER QUESTIONS ABOUT FORMS SUBMITTED FOR FILING IF DIFFERENT FROM THE PRIMARY CONTACT PERSON).

Name: Leigh Keyser Phillips

Agency: VOSHA Review Board

Mailing Address: 133 State Street, Montpelier, VT 05633-6701

Telephone: 802 238 - 6968 Fax: -

E-Mail: lphillip@together.net

6. RECORDS EXEMPTION INCLUDED WITHIN RULE:

(DOES THE RULE CONTAIN ANY PROVISION DESIGNATING INFORMATION AS CONFIDENTIAL; LIMITING ITS PUBLIC RELEASE; OR OTHERWISE EXEMPTING IT FROM INSPECTION AND COPYING?) Yes

IF YES, CITE THE STATUTORY AUTHORITY FOR THE EXEMPTION:

Title 21 VSA 207; 1 VSA 317

PLEASE SUMMARIZE THE REASON FOR THE EXEMPTION:

21 VSA 207 and Rules of Procedure 2200.52(e)7: A trade secret or other confidential research, development, or

Final Proposed Coversheet

commercial information shall not be disclosed or shall be disclosed only in a designated way.

Title 1 VSA 317 and Rules of Procedure 2200.8(c&d), 2200.120(c&d) related to redaction of sensitive information and protection of settlement agreement proceedings.

7. LEGAL AUTHORITY / ENABLING LEGISLATION:

(THE SPECIFIC STATUTORY OR LEGAL CITATION FROM SESSION LAW INDICATING WHO THE ADOPTING ENTITY IS AND THUS WHO THE SIGNATORY SHOULD BE. THIS SHOULD BE A SPECIFIC CITATION NOT A CHAPTER CITATION).

Title 21 VSA §230 (d)

8. EXPLANATION OF HOW THE RULE IS WITHIN THE AUTHORITY OF THE AGENCY:

Title 21 VSA §230 (d) states "The Board[Review Board] is authorized to make such rules as are necessary for the orderly transaction of its proceedings. Unless the Board[VRB] has adopted a different rule, its proceedings shall be in accordance with the rules promulgated by the Supreme Court for the Superior Courts."

9. THE FILING HAS CHANGED SINCE THE FILING OF THE PROPOSED RULE.

10. THE AGENCY HAS INCLUDED WITH THIS FILING A LETTER EXPLAINING IN DETAIL WHAT CHANGES WERE MADE, CITING CHAPTER AND SECTION WHERE APPLICABLE.

11. SUBSTANTIAL ARGUMENTS AND CONSIDERATIONS WERE RAISED FOR OR AGAINST THE ORIGINAL PROPOSAL.

12. THE AGENCY HAS INCLUDED COPIES OF ALL WRITTEN SUBMISSIONS AND SYNOPSES OF ORAL COMMENTS RECEIVED.

13. THE AGENCY HAS INCLUDED A LETTER EXPLAINING IN DETAIL THE REASONS FOR THE AGENCY'S DECISION TO REJECT OR ADOPT THEM.

14. CONCISE SUMMARY (150 WORDS OR LESS):

These rules serve as a guide to the Review Board, its Clerk and Hearing Officers and parties regarding the orderly transaction of its proceedings regarding contested VOSHA Cases.

Final Proposed Coversheet

There are two levels of review available to the parties through the Rules of Procedure. The first is through a hearing before a Hearing Officer. The second level is through a discretionary review by the Review Board, should a party (or the Review Board on its own motion) want to appeal the Hearing Officer's decision.

There are two types of proceedings offered in the Rules: conventional and simplified. Simplified Proceedings offer employers (respondents) an easier and less formal way to contest a citation and may make it unnecessary for an employer to use an attorney.

Rules regarding settlement and the parties' option of using Hearing Officers to mediate a settlement are covered in the Rules.

15. EXPLANATION OF WHY THE RULE IS NECESSARY:

The Review Board has the responsibility of hearing and deciding on cases involving workplace safety violations, which are contested by an employer. The Rules are necessary to provide the orderly transaction of the Review Board's proceedings for employers contesting workplace safety citations and penalty.

A revision is needed, because the current Review Board Rules were adopted over 20 years ago, and there are several provisions that need expansion and clarification to support and correspond with the evolution of the Review Board's procedural process.

16. EXPLANATION OF HOW THE RULE IS NOT ARBITRARY:

The revision process involved a thoughtful consideration of and comparison with the Federal Review Commission (known as the Occupational Safety and Health Review Commission (OSHRC) Rules of Procedure, in order to give more structure and guidance to the Review Board itself and to the parties, who appear before it. Using the OSHRC Rules as a guide and basis for the Review Board's Rules will also give the Review Board the

Final Proposed Coversheet

ability to refer to federal case law for the interpretation of its Rules.

17. LIST OF PEOPLE, ENTERPRISES AND GOVERNMENT ENTITIES AFFECTED BY THIS RULE:

Vermont Department of Labor VOSHA Program (Complainant); and employers and employees, or their employee representatives, who contest said VOSHA Program's citations for workplace safety violations (Respondents).

18. BRIEF SUMMARY OF ECONOMIC IMPACT (150 WORDS OR LESS):

There is minimal economic impact. The Rules are being revised to update, through expansion and clarification, the Review Board Procedures.

19. A HEARING WAS HELD.

20. HEARING INFORMATION

(THE FIRST HEARING SHALL BE NO SOONER THAN 30 DAYS FOLLOWING THE POSTING OF NOTICES ONLINE).

IF THIS FORM IS INSUFFICIENT TO LIST THE INFORMATION FOR EACH HEARING PLEASE ATTACH A SEPARATE SHEET TO COMPLETE THE HEARING INFORMATION.

Date: 10/16/2020

Time: 09:00 AM

Street Address: Meeting to be held remotely via the following video conference bridge:

Join Microsoft Teams Meeting

+1 802-828-7667 United States, Montpelier (Toll)

Conference ID: 950 933 956#

Zip Code:

Date:

Time: AM

Street Address:

Zip Code:

Date:

Time: AM

Street Address:

Zip Code:

Final Proposed Coversheet

Date:

Time: AM

Street Address:

Zip Code:

21. DEADLINE FOR COMMENT (NO EARLIER THAN 7 DAYS FOLLOWING LAST HEARING):

10/26/2020

KEYWORDS (PLEASE PROVIDE AT LEAST 3 KEYWORDS OR PHRASES TO AID IN THE SEARCHABILITY OF THE RULE NOTICE ONLINE).

VOSHA Review Board

Rules of Procedure

Rule revision

Administrative Procedures – Adopting Page

Instructions:

This form must accompany each filing made during the rulemaking process:

Note: To satisfy the requirement for an annotated text, an agency must submit the entire rule in annotated form with proposed and final proposed filings. Filing an annotated paragraph or page of a larger rule is not sufficient. Annotation must clearly show the changes to the rule.

When possible, the agency shall file the annotated text, using the appropriate page or pages from the Code of Vermont Rules as a basis for the annotated version. New rules need not be accompanied by an annotated text.

1. TITLE OF RULE FILING:

VOSHA Review Board Rules of Procedure

2. ADOPTING AGENCY:

VOSHA Review Board

3. TYPE OF FILING (*PLEASE CHOOSE THE TYPE OF FILING FROM THE DROPDOWN MENU BASED ON THE DEFINITIONS PROVIDED BELOW*):

- **AMENDMENT** - Any change to an already existing rule, even if it is a complete rewrite of the rule, it is considered an amendment as long as the rule is replaced with other text.
- **NEW RULE** - A rule that did not previously exist even under a different name.
- **REPEAL** - The removal of a rule in its entirety, without replacing it with other text.

This filing is **AN AMENDMENT OF AN EXISTING RULE** .

4. LAST ADOPTED (*PLEASE PROVIDE THE SOS LOG#, TITLE AND EFFECTIVE DATE OF THE LAST ADOPTION FOR THE EXISTING RULE*):

94-34 Vermont Occupational Safety and Health Review Board Rules of Procedure.

Adopted on August 29, 1994

INTERAGENCY COMMITTEE ON ADMINISTRATIVE RULES (ICAR) MINUTES

Meeting Date/Location: August 10, 2020, Microsoft Teams Meeting

Members Present: Chair Brad Ferland, Dirk Anderson, Diane Bothfeld, Jennifer Mojo, John Kessler, Matt Langham, Steve Knudson and Clare O'Shaughnessy

Members Absent: Ashley Berliner

Minutes By: Melissa Mazza-Paquette

- 2:02 p.m. meeting called to order, welcome and introductions.
- Review and approval of minutes from the July 13, 2020 meeting.
- No additions/deletions to agenda. Agenda approved as drafted.
- No public comments made.
- Presentation of Proposed Rules on pages 2-4 to follow.
 1. Regulation I-97-3, Credit for Reinsurance (Revised 2020), Department of Financial Regulation, page 2
 2. VOSHA Review Board Rules of Procedure, VOSHA Review Board, page 3
 3. Rule Governing Outage Reporting Requirements for Originating Carriers and Electric Power Companies, Vermont Enhanced 911 Board, page 4
- Next scheduled meeting is September 14, 2020 at 2:00 p.m.
- 3:00 p.m. meeting adjourned.

Proposed Rule: VOSHA Review Board Rules of Procedure, VOSHA Review Board
Presented by: Carolyn Desch

Motion made to accept the rule by Dirk Anderson, seconded by Matt Langham, and passed unanimously except for Dirk Anderson who abstained, with the following recommendations:

1. Proposed Rule Coversheet:
2. Proposed Rule Coversheet, page 2, #4: Complete.
3. Proposed Rule Coversheet, page 3, #5: Add a space between 'sensitive' and 'information'.
4. Proposed Rule Coversheet, page 4, #10: Consider removing 'No part of the rule was created randomly.'
5. Economic Impact Analysis, page 1, #3: Quantify/provide more information about specific businesses, or be more inclusive, such as 'employers'.
6. Economic Impact Analysis, page 2, #6: Provide more information, such as: How many cases have large penalties; What constitutes a large penalty; What does the history show; How many use lawyers now; and will more lawyers be needed now because of the change?
7. Economic Impact Analysis, page 2, #6: Change 'in' to 'is' in the second sentence.
8. Economic Impact Analysis, page 2, #8: Clarify the first sentence.
9. Economic Impact Analysis, page 2, #9: Include more data, such as on the number of lawyers and how many will lead to a benefit – or cost.

Administrative Procedures – Economic Impact Analysis

Instructions:

In completing the economic impact analysis, an agency analyzes and evaluates the anticipated costs and benefits to be expected from adoption of the rule; estimates the costs and benefits for each category of people enterprises and government entities affected by the rule; compares alternatives to adopting the rule; and explains their analysis concluding that rulemaking is the most appropriate method of achieving the regulatory purpose.

Rules affecting or regulating schools or school districts must include cost implications to local school districts and taxpayers in the impact statement, a clear statement of associated costs, and consideration of alternatives to the rule to reduce or ameliorate costs to local school districts while still achieving the objectives of the rule (see 3 V.S.A. § 832b for details).

Rules affecting small businesses (excluding impacts incidental to the purchase and payment of goods and services by the State or an agency thereof), must include ways that a business can reduce the cost or burden of compliance or an explanation of why the agency determines that such evaluation isn't appropriate, and an evaluation of creative, innovative or flexible methods of compliance that would not significantly impair the effectiveness of the rule or increase the risk to the health, safety, or welfare of the public or those affected by the rule.

1. TITLE OF RULE FILING:

VOSHA Review Board Rules of Procedure

2. ADOPTING AGENCY:

VOSHA Review Board

3. CATEGORY OF AFFECTED PARTIES:

LIST CATEGORIES OF PEOPLE, ENTERPRISES, AND GOVERNMENTAL ENTITIES POTENTIALLY AFFECTED BY THE ADOPTION OF THIS RULE AND THE ESTIMATED COSTS AND BENEFITS ANTICIPATED:

1. Employers with employees working in the State of Vermont
2. Employees
3. Vermont Department of Labor, VOSHA Division

Economic Impact Analysis

The proposed revision of the rules of procedure will not have any significant estimated costs or benefits, except that the new settlement hearing officer provisions may result in reduced costs to the parties, if settlements are reached.

4. IMPACT ON SCHOOLS:

INDICATE ANY IMPACT THAT THE RULE WILL HAVE ON PUBLIC EDUCATION, PUBLIC SCHOOLS, LOCAL SCHOOL DISTRICTS AND/OR TAXPAYERS CLEARLY STATING ANY ASSOCIATED COSTS:

There will be no impact on public education, public schools, local school districts and/or taxpayers.

5. ALTERNATIVES: *CONSIDERATION OF ALTERNATIVES TO THE RULE TO REDUCE OR AMELIORATE COSTS TO LOCAL SCHOOL DISTRICTS WHILE STILL ACHIEVING THE OBJECTIVE OF THE RULE.*

n/a

6. IMPACT ON SMALL BUSINESSES:

INDICATE ANY IMPACT THAT THE RULE WILL HAVE ON SMALL BUSINESSES (EXCLUDING IMPACTS INCIDENTAL TO THE PURCHASE AND PAYMENT OF GOODS AND SERVICES BY THE STATE OR AN AGENCY THEREOF):

The new rule will not have a negative impact on small businesses which have employees working in Vermont. Employers may incur legal fees if they engage an attorney to represent them but that is a result of the citation and penalty issued and imposed by the VOSHA Division of the Vermont Department of Labor. It is not a result of the rules of procedure.

The proposed rules of procedure offer a new section which gives either party an opportunity to request a settlement hearing officer at no extra cost to them. Even though it is likely that legal counsel will already have been engaged, it is still a procedure that all parties (including pro se parties) can use to help them reach a settlement with respect to any citation and thereby avoid having to go through a full Review Board hearing process. There is potential here for cost savings (either in lawyer's fees or acceptable citation or penalty reductions) should the parties reach a settlement after electing to have a settlement hearing officer.

In addition, for citations with total penalties (less than \$20,000) or at the Board's discretion in the case of total penalties between \$20,000-30,000, parties may choose to elect a simplified proceedings process. This process has less formalities, specifically simpler pleadings and documentation requirements, and generally decreases the time required for a case to be heard and have a final order issued. Simplified proceedings provide a more straight forward process that pro se respondents might choose, in order to minimize or eliminate attorney's fees and costs.

7. SMALL BUSINESS COMPLIANCE: *EXPLAIN WAYS A BUSINESS CAN REDUCE THE COST/BURDEN OF COMPLIANCE OR AN EXPLANATION OF WHY THE AGENCY DETERMINES THAT SUCH EVALUATION ISN'T APPROPRIATE.*

As a quasi-judicial body, the Review Board is not involved in any compliance or enforcement of its decisions.

8. COMPARISON:

COMPARE THE IMPACT OF THE RULE WITH THE ECONOMIC IMPACT OF OTHER ALTERNATIVES TO THE RULE, INCLUDING NO RULE ON THE SUBJECT OR A RULE HAVING SEPARATE REQUIREMENTS FOR SMALL BUSINESS:

The VOSHA Review Board is statutorily mandated and provides an opportunity and forum for employers to contest their VOSHA violation and penalty. The proposed rules of procedure are necessary for the operation of any procedures before the Review Board, and there is not a feasible alternative. There are no separate rules for small business employers. However, the simplified procedures provisions are structured to allow a small business employer to use a less formal and simpler, and potentially less costly, process for contesting a citation and/or penalty before the Review Board without needing to use an attorney.

9. SUFFICIENCY: *EXPLAIN THE SUFFICIENCY OF THIS ECONOMIC IMPACT ANALYSIS.*

The proposed rules of procedure provide guidance and structure for employers, who are contesting and seeking relief from their VOSHA citations and/or penalties. They will update and clarify, where appropriate, the current rules and bring them in line with the recently

Economic Impact Analysis

revised federal OSHA Review Court rules. As the proposed revisions to the Review Board's rules of procedure will have minimal impact economically, the above analysis is sufficient with respect to that minimal impact.

Administrative Procedures – Environmental Impact Analysis

Instructions:

In completing the environmental impact analysis, an agency analyzes and evaluates the anticipated environmental impacts (positive or negative) to be expected from adoption of the rule; compares alternatives to adopting the rule; explains the sufficiency of the environmental impact analysis.

Examples of Environmental Impacts include but are not limited to:

- Impacts on the emission of greenhouse gases
- Impacts on the discharge of pollutants to water
- Impacts on the arability of land
- Impacts on the climate
- Impacts on the flow of water
- Impacts on recreation
- Or other environmental impacts

1. TITLE OF RULE FILING:

VOSHA Review Board Rules of Procedure

2. ADOPTING AGENCY:

VOSHA Review Board

3. GREENHOUSE GAS: *EXPLAIN HOW THE RULE IMPACTS THE EMISSION OF GREENHOUSE GASES (E.G. TRANSPORTATION OF PEOPLE OR GOODS; BUILDING INFRASTRUCTURE; LAND USE AND DEVELOPMENT, WASTE GENERATION, ETC.):*

This administrative rule does not impact the emission of greenhouse gases.

4. WATER: *EXPLAIN HOW THE RULE IMPACTS WATER (E.G. DISCHARGE / ELIMINATION OF POLLUTION INTO VERMONT WATERS, THE FLOW OF WATER IN THE STATE, WATER QUALITY ETC.):*

This administrative rule does not impact water.

5. LAND: *EXPLAIN HOW THE RULE IMPACTS LAND (E.G. IMPACTS ON FORESTRY, AGRICULTURE ETC.):*

This administrative rule does not impact land.

6. RECREATION: *EXPLAIN HOW THE RULE IMPACT RECREATION IN THE STATE:*

This rule does not impact recreation.

Environmental Impact Analysis

7. **CLIMATE:** *EXPLAIN HOW THE RULE IMPACTS THE CLIMATE IN THE STATE:*

This rule does not impact climate.

8. **OTHER:** *EXPLAIN HOW THE RULE IMPACT OTHER ASPECTS OF VERMONT'S ENVIRONMENT:*

This rule does not impact other aspects of Vermont's environment.

9. **SUFFICIENCY:** *EXPLAIN THE SUFFICIENCY OF THIS ENVIRONMENTAL IMPACT ANALYSIS.*

These are administrative rules that do not have a bearing on the environment, and therefore, no analysis is necessary.

Administrative Procedures – Public Input

Instructions:

In completing the public input statement, an agency describes the strategy prescribed by ICAR to maximize public input, what it did do, or will do to comply with that plan to maximize the involvement of the public in the development of the rule.

This form must accompany each filing made during the rulemaking process:

1. TITLE OF RULE FILING:

VOSHA Review Board Rules of Procedure

2. ADOPTING AGENCY:

VOSHA Review Board

3. PLEASE DESCRIBE THE STRATEGY PRESCRIBED BY ICAR TO MAXIMIZE PUBLIC INVOLVEMENT IN THE DEVELOPMENT OF THE PROPOSED RULE:

ICAR did not have anything to add to the below strategy.

4. PLEASE LIST THE STEPS THAT HAVE BEEN OR WILL BE TAKEN TO COMPLY WITH THAT STRATEGY:

Informal Review: The Review Board and the Hearing Officers were all closely involved in the rule revision. The proposed rule was posted on its website along with a summary of changes. The Review Board also sent the proposed rule as an initial informal notification to key stake holders (See attached). Those stakeholders have been parties to cases over the course of the last three years. The initial notification resulted in informal comments from the Vermont Department of Labor.

In preparation for a more the formal public comment period, the Rules of Procedure were again sent to the key stakeholders. A public hearing was held on October 16, 2020 and the public comment period ended on October 26, 2020. During this period the Review Board heard from three stakeholders which included the Vermont

Public Input

Department of Labor, a hearing officer and a an employer representative. Those comments and related responses have been posted on the Review Board website.

After the Final Proposed Rules are filed with LCAR and the Secretary of State, notification will again be sent to the stakeholders.

5. BEYOND GENERAL ADVERTISEMENTS, PLEASE LIST THE PEOPLE AND ORGANIZATIONS THAT HAVE BEEN OR WILL BE INVOLVED IN THE DEVELOPMENT OF THE PROPOSED RULE:

See attached list of stakeholders.

Employer	Contact name	e-mail address	
Able Paint, Glass and Flooring, Inc.	Christina Jensen	cjensen@lisman.com	
Acadamy Roofing Corp	James Laboe	jlabo@orr-reno.com	
Associated General Contractors of VT		info@agcv.org	
Associated General Contractors of VT	Richard Wobby	riw@agcv.org	
Bannister Custom Exteriors	Kevin Bannister	k@bannisterrroofing.net	
Bread Loaf Corp	Sheila McLaughlin	smclaughlin@breadloaf.com	
CCS Construction	William Staar	wstaar@morrisonmahoney.com	
Cedar Creek Home Improvements	Renee LaFountain	cedar.creekv@comcast.net	
Daily Precast	Lou Merkle	lmerk@peckham.com	
DEW Construction	Pamela Moreau	pmoreau@DEWCORP.COM	
Durocher Carpentry	Greg Durocher	gdurocher802@gmail.com	
Engineers Construction			See Eustis Cable contact names
Eustis Cable	Michelle Daily	MDaily@lynnlawvt.com	
Eustis Cable	Pietro Lynn	plynn@lynnlawvt.com	
Eustis Cable	Kienan Christianson	kchristianson@lynnlawvt.com	
Eustis Cable	Casey Osborne	cosborne@lynnlawvt.com	
Future Floors	John Kamencik	jkamencik@futurefloorsinc.com	
Hunt Companies, Inc.	Amie Gonzalez	agonzales@huntcompanies.net	
Interstate Electrical Services Corp.	Ben Traverse	btraverse@drm.com	
Kingsbury Companies			See Eustis Cable contact names
Lowes Home Centers	Hank Jones	hank.h.jones@lowes.com	
MFK Properties	Mark Foley		P.O. Box 99, Rutland, VT 05701 22 James Brown Drive, Williston, VT 05495
Mill Boys	Aaron Vincelette		
Murphy's Metals	Andre Laroque	murphysm@sover.net	
Precision Coastings	Chris Michaud	Crim6@comcast.net	
R. Parker Enterprises	Brian Suslak	bsuslak@morrisonmahoney.com	
Ready Funeral Services	Michael Leddy	mleddy@mcneilvt.com	
RL Valley	Otto Hansen	ottoh@rlvallee.com	
S.D. Ireland	Byron Furman	bfurman@sdieland.com	
SVMC (Downs Raclin Martin_	Tim Copeland	tcopeland@drm.com	
Telephone Operating Company of VT	Stacey Reyome	sreyome@sheehyvt.com	
town of Pawlet	Michael Beecher		P.O. Box 128, Pawlet, VT 05761
True Builders	Guy Parker	gp10@aol.com	
Twin State Traffic Control	Gary Robinson	twinstatetraffic@gmail.com	
Two Go Dry Cleaning	Thomas Little	tlittle@clawvt.com	
United Parcel Service	Raymond Perez	raymond.perez@jacksonlewis.com	
United Parcel Service	Dawn Gann	dawn.gann@jacksonlewis.com	
United Parcel Service	Ashley Brightwell	ashley.brightwell@alston.com	
US Stucco	Robert Joblonski	robert@usstucco.com	
US Stucco	Robert Pszczola	roberti@usstucco.com	
UVMMC	Dawn LeBeron	dawn.lebaron@uvmhealth.org	
Vermont Attorney Generals Office	Sarah London	Sarah.London@vermont.gov	Sarah sent it out to several people
Vermont BGS	Greg Harris	gregg.harris@vermont.gov	
Vermont Dept. of Labor	Dan Whipple	dan.whipple@vermont.gov	Dan Whipple sent message to VOSHA listserv which includes Project Work Safe and Vermont Safety and Health Council
Vermont Dept. of Labor	Annika Green	annika.green@vermont.gov	
Vermont Dept. of Labor	Dirk Anderson	dirk.anderson@vermont.gov	
Vermont Dept. of Labor	Stephen Monahan	stephen.monahan@vermont.gov	
Vermont Dept. of Mental Health	Karen Barber	karen.barber@vermont.gov	
Vermont Roofing Corp	Roger Louiselle	rlouiselle@vermontroofing.com	
Vt Dept. of Transportation	Leslie Welts	leslie.welts@vermont.gov	
NSA Industries	Tim Loucks	tloucks@nsaindustries.com	unable to reach
Eustis Cable	Eryn Banach	ebanach@lynnlawvt.com	No longer at the firm
Opechee Construction	Keith Kelley	keithk@opechee.com	error received

Stakeholders active on June 15, 2021

Dan Whipple	dan.whipple@vermont.gov
Annika Green	annika.green@vermont.gov
Dirk Anderson	dirk.anderson@vermont.gov
Stephen Monahan	stephen.monahan@vermont.gov
Michelle Daily	MDaily@lynnlawvt.com
Meagan Collins	mcollins@lynnlawvt.com
Pietro Lynn	plynn@lynnlawvt.com
Kienan Christianson	kchristianson@lynnlawvt.com
Casey Osborne	cosborne@lynnlawvt.com
Ashley Brightwell	ashley.brightwell@alston.com
Robert Joblonski	robert@usstucco.com
Robert Pszczola	roberti@usstucco.com
Brian Suslak	bsuslak@morrisonmahoney.com
Christina Jensen	cjensen@lisman.com
Ben Traverse	btraverse@drm.com

VOSHA Review Board Summary of Changes

After the federal Occupational Safety & Health Act of 1970 (“OSHA”) was adopted by the U.S. Congress, Vermont was one of many states that elected to establish its own program to enforce the OSHA regulations (currently the VOSHA Division of the Department of Labor) and a review board to hear contests of the VOSHA Division’s citations and/or penalties. In 1971, Title 21 V.S.A. §230 created the Occupational Safety and Health Review Board, which is referred to as the “VOSHA Review Board” (“Review Board”) and authorized the Review Board “...to make such rules as are necessary for the orderly transaction of its proceedings.” *Id.*

Since then, the Review Board rules have been revised in 1980 and 1994. Notably in 1994, the VOSHA Division was under the Department of Employment & Industry and its Commissioner, therefore, the current Review Board rules continue to refer to the Commissioner of Employment & Industry, instead of the Commissioner of Labor, in whose department the VOSHA Division is now located.

The Proposed Rules have been modified and changed to reflect and follow the recently revised Federal OSHA Review Commission Rules of Procedure. The incorporation of these federal rule provisions as much as possible is important, as it allows for the use of federal case law with respect to interpretation of the Review Board rules.

Some of the more notable provisions that have changed are as follows:

Subpart A – General Provisions

- Definitions have been added and alphabetized.
- The “day is a day” rule is implemented here, replacing “working days”.
- Allowing electronic transmission filing which includes e-mail.
- Allowing service to parties upon their agreement.

Subpart B – Parties and Representatives

- Rule 20 clarifies those employees, who no longer work for the cited employer but were exposed or had access to the hazard may participate as a party.
- Many sections clarify timing rules and the hearing officer’s role.

Subpart C – Pleadings and Motions

- This subpart was reorganized for clarity.
- Added a requirement that motions include language to show that the parties have conferred on the subject of the motion.

Subpart D – Prehearing Procedures and Discovery

Rules of Procedure have been modified to include more options for discovery:

- Production of documents and things – “allowed after the filing of the first responsive pleading or motion that delays the filing of an answer”.
- Interrogatories “at any time after the filing of the first responsive pleading” and

- Depositions “upon agreement by the parties or order of the Board or Hearing Officer.”
- Rule 55 has moved to Subpart E.

Subpart E – Hearings

- More details added for clarification.

Subpart F – Post Hearing Procedure

- Rule 90 allows for correction of the Hearing Officer’s report.
- Rule 91 Petitions for Review are filed directly with the Clerk.
- Rule 95 is expanded to clarify the requirements for Oral Argument.
- Rule 95(i) was corrected and modified. The track changes and clean copy versions of this portion of the rules submitted to ICAR did not match and therefore corrected and modified.

Subpart G – Miscellaneous Provisions

- Rule 100 has been changed to eliminate the requirement of the Review Board’s reviewing and approving settlement agreements. Instead, it requires a notice of settlement be provided by the parties for purposes of the Review Board’s issuing a final order. It also gives more detail as to the procedure for the Notification of Settlement.
- Rule 101 Failure to Obey the Rules section has been added.
- Rules 104 Standards of Conduct has been expanded for clarification.

Subpart H – Settlement Part

- This subpart was added to give the parties an option to pursue mediation with a hearing officer on a voluntary basis, to try to reach a settlement.

Subpart M – Simplified Proceedings

- This subpart has been updated for clarification.
- Rule 202 has been updated to define and clarify which situations would be acceptable for Simplified Proceedings.
- Rule 203 gives the Review Board a process to designate cases for simplified proceedings.

VOSHA Review Board

Comments and Responses

Preparation for a public meeting: Sent an email out to a list of stakeholders which included employers, representatives of employers, Department of Labor and Review Board Hearing Officers. A letter was sent to those employers for which a mailing address was the only form of contact.

Public Comments: A virtual public meeting was held on October 16, 2020, via Microsoft Teams Conference Bridge. There were no attendees at this meeting. Public comment deadline was October 26, 2020. Three stakeholders responded in writing.

Comment from an employer's attorney:

The only comment that I have at this time is that the concept of having to get permission to conduct discovery in a standard-track case is seems bizarre and unfair to me. I appreciate the desire for efficiency, but once a party opts out of the fast-track option, the VOSHA Review Board should permit all discovery allowed in a standard superior-court case. Having to obtain permission to conduct depositions and submit interrogatories is wrong. That is exactly what we had to do recently in a pending matter. We spent more time filing motions and fighting the multiple opposing papers of the Department of Labor than we did actually preparing interrogatories and taking the requested deposition. The Department of Labor opposition was so vociferous that it begged the question of what the Department might be trying to hide. Discovery is a fundamental litigation process designed to be a liberal and open process designed to allow both sides to collect as much information as they reasonably believe that they need to support their positions. That process should not require prerequisite motion practice or be put at risk by the whims of a referee.

Response: The Rules of Procedure have been modified to include more options for discovery. The Review Board agreed that to do otherwise puts the burden of deciding when to allow discovery on the Hearing Officer without specific guidelines/factors. The inclusion of the below areas follows the Federal OSHA Review Commission Rules of Procedure:

1. Production of documents and things – “allowed after the filing of the first responsive pleading or motion that delays the filing of an answer”;
2. Interrogatories “at any time after the filing of the first responsive pleading”; and
3. Depositions “upon agreement by the parties or order of the Board or Hearing Officer.”

In addition, motions must show that the parties have conferred on the topic of the motion. The intention here is to encourage discussion among the parties prior to filing such documents.

Comment from a VOSHA Review Board Hearing Officer

I have spent a bit of time going over the OSHA rules, our present rules and the proposed ones. The Federal Rule [OSHA Review Commission Rules of Procedure] seems to be more liberal, as Depos can be allowed for “good and just reasons”. Our present Rules state, that, upon Motion,

Depos can be allowed by “Special Order” of the Hearing Officer. The proposed Rule gets more restrictive stating that the Depos can only be allowed upon “Exceptional circumstances.” As can be seen, the language can be a bit nebulous when one needs to interpret the language of any one of them. The important question is the intent on changing our present Rules. As a Hearing Officer, I can only act and be guided by the language I am working under. I am aware that the Labor Department, as shown by the case pending before me, is quite opposed to the use of Depos. As one who has litigated for years, the use of Depos and Interrogatories is quite commonplace. Why the restrictive philosophy? For instance, when a criminal action is initiated by the States Attorney, in a serious case, it is assumed that the detective or policeman can be deposed. On the other hand, in a misdemeanor case, it is not allowed, except by special granting by the Judge. Possibly, in a simplified proceeding, it should not be allowed, but in a more major case, it should be allowed. As for the new language proposed, how would one show “exceptional circumstances?” When one looks at the difference between Federal and State Rules, including this one proposed, it is ASSUMED that, in the Federal matter, Depos would be granted, where, in the State proposed Rule, it is ASSUMED that the Depo would not be granted. I do question the reason for tightening it up. Just my opinion, but I do respect the Board if, for some reason, they want it tightened. Where is this coming from, the Labor Department? My last parting shot: if the State brings a case worth over \$80,000.00, the respondent should have the right to discover the case, before the actual testimony to be given at a hearing.

Response: See response to employer’s attorney.

Comments from the Department of Labor

DOL Comment 1: The proposed Rule appears to greatly expand the persons who may be parties in a VOSHA proceeding. The statute permits employees limited party status to challenge the length of the abatement period, portions of the proposed rule appear to recognize this limited status, but it is not clear that the party status is limited. We recommend defining the status as “limited party status” upfront, to remove the possibility of disputes.

The proposal also grants party status to individuals who are not mentioned or recognized in the statute – persons no longer employed by the employer. Such persons perhaps may be witnesses in the proceeding but granting them party status serves only to complicate and delay matters – what relief could they seek? Since they are no longer employed, the former employee really has no standing to challenge the abatement period.

Response 1: It appears that there is confusion over Title 21 VSA 226(c) to limit an employee’s right to be a party to challenging the period of time for abatement as unreasonable. This provision is really about procedure, and not an employee’s right to intervene as a party. It deals with the two situations when the Commissioner is required to notify the VRB of receiving either a notice of contest from an employer or a notice alleging that the period of time for abatement is unreasonable.

Looking at Rule 20, section (c) limits an employee's right to contest a violation to with respect to the reasonableness of the period of abatement, but it does not limit an affected employee's ability to intervene as a party. Under sections (a) and (b), the language is clear that employees can elect party status in a matter before the VRB, and with amendment to Federal Rule 20, former employees can also do so if exposed to the hazard arising out of the violative situation. The intervention process in Rule 21 supports these interpretations.

The following comment in the Federal Register explains the reason for amending Rule 20 to include former employees:

The Commission has amended Rule 20, Party status, to specify that an individual who, at the time of the violation, met the definition of "affected employee" set forth in Rule 1(e) and was employed by the cited employer, but who, as the case progresses, is no longer employed by the cited employer, is permitted to elect party status. This revision to the rule is in conformity with the Commission's decision in *S. Scrap Materials Co.*, 23 BNA OSHC 1596, 1613 n.15 (No. 94-3393, 2011) ("[Rule 20(a)] does not preclude participation in OSHA proceedings by employees who, at the time of the hearing, are no longer employed by the cited employer."). 84 FR 14554-01(April 10, 2019)

The original case gives some context to this:

"As an "affected employee," Harmason was given party status and entitled to participate in the hearing. His participation included the right to present witnesses, cross-examine witnesses, and offer documentary evidence on the issues in dispute. *See Donovan v. Oil, Chemical, and Atomic Workers International Union*, 718 F.2d 1341, 1349 (5th Cir. 1983). Although the Secretary has the burden of proof to establish the alleged violations, an affected employee is entitled to fully participate at the hearing as any other party. SSM was not prejudiced by Harmason's participation. Any information obtained by Harmason was available to him under the Freedom of Information Act or by attending the public hearing. Secretary of Labor, Complainant v. Southern Scrap Materials Co., Inc., Respondent and Willie Harmason, Affected Employee, 1997 WL 735352, at *7

Also, based on the comments, we do think that use of the term "VOSHA Code" in proposed Rule 20(a)(1) should be changed back the "Act", meaning the Occupational Safety and Health Act of 1970.

DOL Comment 2: It is not clear that all the proposed definitions are necessary since the meanings of the terms or phrases are plain and conform to generally accepted understanding of the terms. It is not clear if the effort to specifically create definitions is meant to somehow limit the ordinary meaning of the terms and phrases.

Response 2: We do not agree that these terms are plain meaning to everyone and believe that these rules need to be accessible to all who participate in the adjudicatory setting.

DOL Comment 3: Permitting electronic filing is a step in the right direction. VOSHA would appreciate it if the Rules specifically permitted filing of the notice of contest, citations and penalties with the Review Board via e-mail or fax without having to obtain prior consent to do so. VOSHA believes this would reduce the amount of paperwork filed with the Review Board, make it easier for the clerk to forward materials to the assigned Hearing Officer without having to scan the material first.

Response 3: We are changing the filing language so that all documents can be filed through electronic transmission without an agreement to do so. We are also adding verbiage to the definition of electronic transmission to include “Facsimile transmission is not considered an electronic transmission”, because facsimile transmission is already listed as a method for serving and filing. Further, please note that the Vermont Rules for Electronic Filing, Rule 5(d), explicitly states that a facsimile transmission is considered a nonelectronic document. To clarify, however, filing and service are not the same. Therefore, electronic service to parties will still require an agreement to do so.

DOL Comment 4: §2200.33(d): Does this prevent the Commissioner from conducting further negotiations about the case in which the statutory 20-day timeframe for employers to file notice of contest with VOSHA expires? I would be concerned about that as it would make it difficult to get abatement verification in case that would be true.

Response 4: Title 21 VSA 226(c) requires the 20-day time frame not the Rules of Procedure. This should not be a bar on any negotiations.

DOL Comment 5: I would note that there are specific provisions that seem awkwardly written, e.g., proposed rule §2200.38, Commissioner’s statement. Rather than “the Commissioner shall ... file a clear and concise statement of the reasons the abatement period prescribed by the Commissioner is not unreasonable” perhaps “the Commissioner shall file a clear, concise statement explaining why the prescribed abatement period is reasonable” would be clearer.

Response 5: To clarify §2200.38, when an affected employee is contesting, they are contesting the unreasonableness of the abatement period. The Commissioner then needs to respond with why the abatement period is NOT unreasonable. Please also note that this wording has not changed from the current Rules.

DOL Comment 6: §2200.52 Comments:

(a)(1)(ii) – Rule should outline factors HO will consider in deciding a special order

(a)(1)(iii) – Same as (ii) – what are the factors HO will consider

(a)(1)(iv) – “Depositions are not available except in exceptional circumstances and through special order of HO” – Please define “exceptional circumstances”

(a)(1)(v) specifically excludes VRCP 26(a) now, then later outlines its own version of Rule 26. Why not still defer to Civil Rule on discovery?

Response 6: See response to employer's attorney in response to (a)(1)(ii-iv). In response to the question about (a)(1)(iv) the Proposed Rules have been modified and changed to reflect and follow the recently revised Federal OSHA Review Commission Rules of Procedure. The incorporation of the provisions of these federal rule provisions as much as possible is important, as it allows for the use of federal case law with respect to interpretation of the Review Board rules.

DOL Comment 7: §2200.65(b) Service of subpoenas – VDOL Commissioner has subpoena power under 21 V.S.A. §206(b) within the State. As with any state agency, VDOL and/or Board only has subpoena power within the State and cannot reach across state line absent a Court Order from the receiving jurisdiction. Board does not have federal jurisdiction. V.R.C.P. 45(b)(1) requires in hand service to the person named therein only. The proposed Rule 2200.65 does not comply with service requirements by allowing simply leaving the subpoena at the place of employment or at the person's residence with a person of suitable age. This could cause a variety of problems when a person does not comply with a subpoena (i.e., does not show for a hearing stating they were never served, thereby causing delay, cost and time to all parties).

Response 7: The rules have been modified to correct the issues.

DOL Comment 8: §2200.66(a) Transcript of Testimony – Hearings: All Board hearings are open to the public per Title 1. V.S.A. §312. Anyone may attend and there are no known prohibitions against recording. The Board may not restrict the press or anyone else from preserving their own record of the proceedings.

Response 8: After reviewing this language it was found that the Department of Labor is correct. Therefore "Any other sound recording in the hearing room is prohibited" has been removed.

DOL Comment 9: Proposed §2200.67(e) Duties and Powers of HO's includes "to cause depositions to be taken whenever the interests of justice would be served." This appears to be in direct conflict with Proposed Rule 2200.52(a)(1)(iv) – depositions not allowed except in exceptional circumstances by special order.

Response 9: Please see response to employer's attorney.

DOL Comment 10: Proposed §2200.70(d) – Rejected Exhibits: Proposal calls for the Board to retain all exhibits offered but denied admission to be placed into a file and retained by the Board as "Rejected Exhibits." The Board should only be retaining admitted evidence that will be part

of the record should the case be appealed or otherwise requested perhaps through a Public Records request. Rejected exhibits that are not part of the record should not be retained by anyone except the party that sought its admission if they choose to do so. These exhibits, if kept by the Board, could be easily confused later with admitted exhibits and should not be retained for any purpose.

Response 10: We talked with the Court Operations Manager of the Washington County Superior Court (WCSC). If a party submits exhibits ahead of time which they sometimes do, the exhibits become a part of the record. They are disposed of per their retention policy. The Clerk at Superior Court said that they label only the admitted exhibits. Exhibits that are not admitted are no different than those that have not been offered as evidence. The Review Board has changed this proposed rule and its retention policy to reflect that change.

DOL Comment 11: §2200.95 – Oral Arguments Before the Board

§2200.95(g) – Multiple Counsel Total time allotted for argument same as for opposing counsel?

Response 11: If there are multiple counsel, they need to decide how to divide their allocated time set by the Review Board.

DOL Comment 12: §§2200.95(i)- Recording Oral Argument--As with the Hearing itself, appellate proceedings are public under Title 1 V.S.A §312, and the Board may not restrict personal recording of the proceedings either by the press or anyone attending.

Response 12: After reviewing this language it was found that the Department of Labor is correct. Therefore “Any other sound recording in the hearing room is prohibited” has been removed.

DOL Comment 13: Settlement General Comment: Parties with limited party status should have input on the abatement period outlined in an agreement, but not the principal terms of the agreement. Allowing otherwise could lead to delay, confusion of the issues, and even a potential breakdown of the agreement reached by the parties.

Response 13: Please refer to the response to DOL Comment 1.

Annotated
text

~~VERMONT OCCUPATIONAL SAFETY AND HEALTH VOSHA Review~~
~~Board REVIEW BOARD~~

RULES OF PROCEDURE

CVR 3-140-036
Part 2200

Adopted on

SUBPART A -- GENERAL PROVISIONS

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

§200.1 Definitions.

As used in the rules in this part:

Commented [A1]: (1)Alphabetized and added more words. (2) Also broke up groupings of definitions that referred to the statute. (3)Incorporated words that were in the current Rule glossary.

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

~~(a)~~

(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.

(b)(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.

(e) (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.

Clerk means the Clerk of the Review Board.

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

(b)(d) (e) Clerk means the Clerk of the Review Board.

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

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

(g) (f)-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 judgeHearing 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) ~~(d)~~ The terms "~~n~~Notification of proposed penalty" and "~~N~~notification of failure to correct a violation" mean written communications from the Commissioner issued pursuant to 21 VSA Section 226(a) or 226(b).

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

(m) ~~(f)~~ Party shall 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) ~~(f)~~ The term "~~p~~Proceeding" means any proceeding before the Review Board or its Hhearing Oofficer 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) The term 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.

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

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

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

~~(j) The term "eClerk" shall means Clerk of the Review Board.~~

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

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

§2200.2a Scope of Rules; Applicability of Vermont Rules of Civil Procedure and Vermont Administrative Procedures Act; and Construction. Representation in Board Proceedings.

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

(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.

Commented [A2]: Working day has been replaced with a day is a day rule.

Commented [A3]: See Proposed Rule 22.

~~§2200.2b The Board.~~

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

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

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

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

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

~~(4) Processes all formal submissions to the Board.~~

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

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

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

~~Vermont Occupational Safety and Health Review Board~~

~~State Administration Building Post Office~~

~~133 State Street~~

~~Montpelier, Vermont 05633-6701~~

§2200.3 Use of Gender and Number.

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

Commented [A4]: Removed completely. Section (a) can be found in Title 21 VSA 230. Section (b) is a job description, not a procedure. OSHRC does not have a comparable section. Section (c) can be found in other areas of the Rules of Procedure or found on the website.

and vice versa.

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

§2200.4 Computation of 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. In computing any period of time prescribed or allowed in these rules, the day from which the designated period begins to run shall not be included. The last day of the period so computed shall be included unless it is a Saturday, Sunday or State holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday or State holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays and State holidays shall be excluded in the computation.

(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 legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(1)(2) (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
- (i) 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).

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

§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.

§2200.65 Record Address.

(a) ~~The initial~~Every pleading or document filed by any person-party or intervenor shall contain that person's name, current address, and 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 Board or its hearing Clerk officer, and to all other parties or intervenors. A party or intervenor who fails to furnish such information shall be deemed to have waived their right to notice and service under these rules until such time as the required information is provided to the Clerk.

Commented [A5]: Switched to Clerk to stream-line the process and decrease confusion. After the Hearing Officer has been assigned, all filings will still be sent to the Clerk, who will immediately forward information, documents and pleadings to the Hearing Officer.

(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.

§2200.76 Service, Notice, and Posting, of Pleadings and Documents.

(a) *When service is required.* At the time of filing pleadings or other documents, ~~the filer a copy of any such pleading or document shall be served by the filing party or intervenor a copy upon 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 If either a party or intervenor, who has appeared throughs by a representative, service shall be made upon that such representative in the same manner as for a party or intervenor 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.*
~~by personal delivery or postage prepaid first class mail.~~ Service shall be deemed accomplished at the time of upon delivery to the recipient's record address provided pursuant to §2200.6. (if service is by personal delivery), or mailing (if service is by mail).

(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, depositing the item in the outgoing mail box receipt of

(5) *Electronic Transmission.* Documents may be served by electronic transmission (Examples

Commented [A6]: Electronic Transmission is a new provision to the rules. The VRCP allows for e-mail if there is an agreement between the parties to do so. Since the Review Board does not have a secure electronic filing system, this seemed like a reasonable alternative. If an electronic filing system becomes available, then this language would cover that as well.

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. ~~Proof of service shall be provided by the filing of a written statement filed at the time the pleadings or documents are filed. The statement shall state the manner of service, the day of service and, if service is personal, the time of service.~~

(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)(i) A notice in the following form shall be deemed to comply with this -

paragraph): (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.

§2200.7 Service of Notices from Clerk.

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

~~[n* APPENDIX 1A-1D]~~

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

§2200.8 Filing.

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

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

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

~~(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, if elected, 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, such as priority 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, or 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

Commented [A7]: The Review Board and Hearing Officers prefer a more streamlined process, whereby the Clerk receives the documentation and forwards it when all the filing has been complete. This is how it is normally done in the court systems.

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 redacted 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, (Examples 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, Protection of Trade Secrets, Other Confidential Information:~~

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

~~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.~~

Commented [A8]: Consolidation is covered under current Rule 33. For sensitive and other confidential information, see Proposed Rules 8(d)5, 52(e)7, and 73(d)(1).

Commented [A9]: Severance is covered under current Rule 33.

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.

Commented [A10]: This section is covered under current Rule 30(d).

(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 number VRB1067-, p. #7 (Board Review, September, 20, 2019)**
- (iii) Hackensack Steel Corp., 20 BNA OSHC 1387, 1388 (No. 97-0755, 2003).**

(2) -Electronic:

- (i) Hackensack Steel Corp., No. 97-0755, 2003 WL 22232017, at *4 (OSHRC Sept. 25, 2003).**
- (ii) Hackensack Steel Corp., No. 97-0755, 2003 LEXIS 450392, at *2 (OSHRC Sept. 25, 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)(a) Affected employees and authorized employee representatives may elect party status concerning any matter in which the OSHA Code 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, as parties at any time before the commencement of the hearing before the Board or its hearing officer unless, for good cause shown, the Board or its hearing officer allows such election at a later time. See Section 2200.21.~~

(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)(b) Where a notice of contest is filed by an employee or by an authorized employee representative with respect to the reasonableness of the period for abatement of a violation, the employer charged with the responsibility of abating the violation may elect party status at any time by a notice filed at least 14 days before the hearing, commencement of the hearing before the Board or its hearing officer. See Section 2200.21.~~

(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 ~~stage of a proceeding~~ before 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 before 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 ~~Board or its hearing officer.~~

(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 unnecessarily unduly delay the proceeding.

~~(e) The Board~~

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 its hearing officer 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 to such an that meets the requirements of paragraph (b)(1) of this section.

(3) An order granting a petition shall specify the extent and upon such terms as the Board or its hearing officer shall determine.

of an intervenor's participation in the proceedings.

§ 2200.22 Representation of Parties or and Intervenors.

(a) -

Representation. Any party or intervenor may appear in person or, 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.

(b)

(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.

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

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

§ 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 signed to the case, be denied where it is necessary to avoid undue delay or prejudice to the rights of a party or intervenor.

SUB-PART C – PLEADINGS AND MOTIONS

§ 2200.30 General Rules, Form.

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

(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 and (8 ½ inches by 11 inches). Pleadings and other documents shall be fastened without the use of staples at the upper left corner.

(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

Commented [A11]: See Proposed Rules 30- 31.

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

(e).

(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.

Commented [A12]: See current Rule 30.

(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 ~~intervenor filing or by their~~ the party's representative. ~~Such signing~~ The signature of a representative constitutes a representation ~~that the signer~~ 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 ~~or~~, that to the best of ~~that person's~~ 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 ~~the statements made therein are true and it is not being filed for frivolous reasons.~~

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

Commented [A13]: Was 2200.30(c) of current Rules.

Commented [A14]: This relates to how to cite a case which is in Proposed Rule 12.

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);

2200.33

(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.

2200.31 Contest Proceedings: (a) If an Employer contests a citation, the employer must file a notice of contest with the Commissioner within the time period set by the citation. The Commissioner shall, within 7 days of receipt of a notice of contest, transmit the original to the Board, together with copies of all relevant documents.;

(b):

(a) Complaint:{n*}

{n* APPENDIX 2}

(1) If the Commissioner decides to pursue the matter with the Board, the Commissioner,

(1) The Commissioner shall file a complaint with the Board Review Board no later than 2021 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 ~~is~~ based.

(3)

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

(b)

~~(e)~~ Answer: [n*]

[n* APPENDIX 3]

(1).

(1) Within ~~45~~21 days after service of the complaint, the party ~~or intervenor~~ against whom the complaint was issued shall file an answer with the ~~Board~~.

~~(2)~~ Commission Review Board.

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

~~(d)~~ Employee contests to abatement period:

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

~~(2)~~ Not later than 10 days after receipt of the statement referred to in paragraph (1) of

~~this section, the~~ contestant shall file a response.

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

(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 JudgeHearing 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) Grounds for modifying abatement date. 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.

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

(1) A copy of such petition shall be posted in a conspicuous place where all affected employees will have notice of the petition or near each location where the violation occurred. The petition shall remain posted for a period of 140 days.

~~The posting shall include a notice stating that any affected employee or a representative shall have 10 days to object by filing an objection in writing with the Commissioner.~~

(2) Affected employees or ~~their~~ the representatives may file an objection in writing to such petition with the ~~aforsaid~~ Commissioner. Failure to file such objection within 14 working days of the date of posting of such petition shall constitute a waiver of any further right to object to said petition.

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

(4) The Commissioner, ~~or the duly authorized agent of the Commissioner,~~ shall not exercise approval power until the expiration of 15-21 working 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 shall be forwarded to the Board Review Board within 3 14 working days after the expiration of the 15-21 day period set out in paragraph (c)(4).~~

~~(2)~~ of this section.

~~(2) The Board Review Board shall docket and process such petitions as expedited proceedings as provided for in § 2200.103 Section 2200.101.~~

~~(3)~~ of this Part.

~~(3) An employer petitioning for a modification of the abatement period shall have the burden of proving, by a preponderance of the evidence, 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) Within 10 working days after the receipt of notice of the docketing by the Board of any petition for modification of abatement date, each objecting party or intervenor shall file a response setting forth the reasons for opposing the granting of a modification date different from that requested in the petition.~~

~~(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).~~

~~2200.33 Motions, Consolidation, Severance; Other Statements.~~

~~(a) Statement of position:~~

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

~~(b) Motions:~~

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

~~(c) Consolidation:~~

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

~~(d) Severance:~~

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

~~2200.34 Failure to File:~~

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

§ 2200.38 Employee Contests:

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.

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

Commented [A15]: See Proposed Rule 40.

Commented [A16]: See Proposed Rule 9.

Commented [A17]: See Proposed Rule 10.

Commented [A18]: See Proposed Rules 30(h) and 101.

Commented [A19]: See current Rule 31(d).

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).

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

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

shall be a part of the record.

(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 Rule 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;

Commented [A20]: See current Rule 53(b).

Commented [A21]: See current Rule 51.

Commented [A22]: See current Rule 52-54.

(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;

—
(i) ~~(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 may 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 and the answers to interrogatories under 2200.55-, 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.

2200.52 Requests for Admissions.

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

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

§ 2200.54 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.

2200.53 Discovery Depositions; Interrogatories.

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

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

2200.54 Failure to Comply with Orders for Discovery.

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

Commented [A23]: See Proposed Rule 52(f).

officer may issue appropriate orders.

~~§ 2200.55 Issuance of Subpoenas; Petitions to Revoke or Modify Subpoenas; Right to Inspect or Copy Data.~~

Commented [A24]: See Proposed Rule 65.

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

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

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

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

§ 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 ~~h~~ Hearing; ~~L~~ Location.

Notice of the time, place and nature of a hearing shall be given to the parties or intervenors at least 10 days in advance of such hearing, except as otherwise provided in Section 2200.101. 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) Postponement of a hearing may be allowed at the discretion of the Board provided such request is received in writing at least 3 days in advance of the time set for the hearing. Requests for postponement may be granted at the Board's discretion for good cause only and could result in the assessment of costs to the party or intervenor making the request. *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) No postponement in excess of 30 days shall be allowed without Board approval.

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.

Commented [A25]: See current Rule 61 which restricts postponement to 30 days.

§ 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. ~~Subject to the provisions of paragraph (e) of this section, the failure of a party or intervenor to appear in person or by a duly authorized representative at the at a hearing shall be deemed to be constitutes a waiver of theH rights to a hearing, except the right to be served with a copy of the decision of the Board or its hearing officer, and to request Board review pursuant to Section 2200.91, in the case of a hearing officer's decision. 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 of rights waived under (a) must be made, in the absence of extraordinary circumstances, within 75 days after the scheduled hearing date. See § 2200.90(c).

(c) Rescheduling hearing. The Board 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.

§2200.653 Issuance of subpoenas; petitions to revoke or modify subpoenas. Payment of witness fees and mileage; Fees of Persons Taking Depositions; right to inspect or copy data.

Commented [A26]: See current Rule 55.

(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. service on the person named, by certified mail return receipt requested, or by leaving a copy at the person's principal place of business or at the person's residence with a person of suitable age and discretion who resides there. A subpoena may be served at any place within the state, United States or any Territory or possession of the United States. A subpoena may command a person to attend and produce documents or tangible things, from any place in the United States or any Territory or possession of the United States, at any designated place of hearing or deposition. 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.

~~(b)~~(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.

~~(c)~~ ***Witness fees and mileage.*** Witnesses summoned to appear for a deposition before the ~~Board Review Board or their Hearing Officer~~ shall be paid the same fees and mileage that are paid witnesses in the courts of the State of Vermont, ~~and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the State of Vermont.~~ Witness fees and mileage shall be paid by the party or intervenor at whose instance the witness appears, ~~and the person taking a deposition shall be paid by the party or intervenor at whose instance the deposition is taken.~~

~~(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.

Commented [A27]: See current Rule 55(d).

~~2200.64 Reporter's and Hearing Officer's Fees.~~

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

~~§ 2200.65 Record-Transcript of Testimony.~~

~~(a) A record of the hearing shall be made by the reporter. That record shall be retained by the reporter for a period of 6 months from the date of the hearing. Transcripts shall be prepared upon request of either party, intervenor or the hearing officer. Costs shall be borne by the party.~~

~~or intervenor requesting the transcript, or if the request is made by the Board or its hearing officer, the cost shall be borne by the Board. A copy of the record of testimony taken at the hearing, duly certified by the reporter, shall be filed with the hearing officer. The hearing officer shall promptly serve notice upon each of the parties or intervenors of such filing.~~

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

(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, 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.

(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 bare 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.

§2200.676 Duties and Powers of the Board or Its Hearing Officers.

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

(a) Administer oaths and affirmations;

(b) Issue authorized subpoenas and

~~(c) Rule upon petitions to revoke~~ modify, remove, or affirm, in accordance with § 2200.65; subpoenas;

~~(d)~~ (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 ~~H~~hearing Officer by the ~~Board 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 Rules of Civil Procedure 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 or intervenors at any time during the hearing to state their respective positions concerning any issue in the case or theory in support ~~thereof~~ of their position;

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

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

~~§ 2200.687 Disqualification of Board Members or a Board Recusal of the Hearing Officer.~~

(a) Discretionary recusal. A ~~Board member or H~~hearing Officer may ~~withdraw recuse himself or herself from a proceeding whenever they deem themselves disqualified~~ 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 or intervenor may request a Board member or 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 to withdraw on grounds of personal bias or disqualification, by filing with the Board or its hearing officer Review Board, promptly upon the discovery of the alleged facts, an affidavit setting forth in detail the matters alleged to constitute grounds for disqualification recusal.~~

~~(d) **Ruling on request.** If, in the opinion of the Board or its 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 the affidavit referred to in paragraph (b) of this section is filed with due diligence and is sufficient on its face, a Board member or Hearing Officer shall disqualify themselves recuse himself or herself and withdraw from the proceeding.~~

~~(e) If a Board member or the Hearing Officer denies a request for recusal, does not disqualify themselves and withdraw from the proceeding, the Hearing Officer shall issue a ruling on they shall so rule upon the record, stating the grounds for their ruling 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 § Section 2200.90 shall apply.~~

§2200.698 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 or intervenor. All parties shall have the right to cross-examine any witness called by the Hearing Officer pursuant to § 2200.67(j).

2200.69 Affidavits.

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

2200.70 Deposition in Lieu of Oral Testimony: Application; Procedures; Form; Rulings.

~~(a) An application to take the deposition of a witness in lieu of oral testimony shall be in writing and shall set forth the reasons such deposition should be taken, the name and address of the witness, the matters concerning which it is expected the witness will testify, and the time and place proposed for the taking of the deposition, together with the name~~

Commented [A28]: See Proposed Rule 56.

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

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

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

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

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

§2200.70+ Exhibits.

(a) Marking exhibits. All exhibits offered in evidence by a party shall be numbered and

marked for identification before or during the hearing. Exhibits shall be marked with a designation identifying the party or intervenor offering by whom the exhibit is offered.

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

~~(b) **Removal or substitution of exhibits in evidence.** Unless the Board or its Hearing Officer finds it impractical, a copy of each such exhibit shall be given to the other parties or intervenors. 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.~~

§2200.713 Rules of Evidence.

Hearings before the ~~Board or its Hearing Officer~~ shall be in accordance with 3 VSA 810 and the Vermont Rules of Evidence as applicable. ~~Civil Procedure insofar as practicable.~~

2200.73 Burden of Proof.

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

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

Commented [A29]: This section has been deleted because the burden of proof can change, such as with an affirmative defense.

Commented [A30]: See Proposed Rule 37(d)(3).

§2200.724 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 ~~Board or its Hearing Officer~~, may be stated orally or in writing, accompanied by a short statement of the grounds for the objection, and shall be included in the record. No such objection shall be deemed waived by further participation in the hearing.

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

(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.

§2200.735 Interlocutory Appeals Review.

Commented [A31]: See current Rule 73.

(a) *Generally.*

~~(1) Interlocutory review of a Hearing Officer's interlocutory ruling is discretionary with the Review Board may be appealed to the Board only in the manner prescribed by this rule. A petition for interlocutory review may be granted only where the petition asserts, and the Review Board finds:~~

(b) *Certification:*

~~(1) A party or intervenor desiring to appeal from an interlocutory ruling shall file with the hearing officer a written request for certification of the appeal. The request and~~

supporting documents shall be filed within 5 days after receipt of the hearing officer's ruling from which appeal is sought. Responses to the request, if any, shall be filed within 5 days after service of the request. The hearing officer shall certify an interlocutory appeal when the ruling That the review involves an important question of law or policy that controls the outcome of the case, where there is substantial grounds for difference of opinion and an that immediate appeal review of the ruling may materially expedite the proceedings, 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.

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

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

(be) Petition for interlocutory appeal.:

~~(+) Within 75 days following the receipt service of a Hhearing Oefficer's order ruling from which review is sought, denying certification, a party or intervenor may file with the Board a petition for interlocutory appeal with the Review Board. Responses to the petition, if any, shall be filed within 75 days following service of the petition. The Board shall grant a petition for interlocutory appeal only in exceptional circumstances where it finds: a) that the appeal satisfies the criteria for certification of an appeal set forth in paragraph (b) of this section; and b) that there is a substantial probability of reversal. 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.~~

(dc) Denial without prejudice.:

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

(ed) Stay.:

(1) *Trade secret matters:*

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

(2) *Other cases:*

~~(i) In all other cases, the filing or granting of a request to certify an interlocutory appeal, or the filing or granting of a petition for interlocutory ~~appeal, 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. ~~written views on whether the petition is meritorious.~~ 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).~~

(g) *Briefs:*

~~(1) Should the Board desire briefs on the issues raised by an interlocutory appeal, it Notice shall be given notice to the parties or intervenors. if the Review Board decides to request briefs on the issues raised by an interlocutory review. -See ~~§Section 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).~~

§2200.746 Filing of Briefs and Proposed Findings with the Board or Its Hearing Officer; Oral Argument at the Hearing.

~~(a) General. Any party or intervenor shall be entitled, upon request, to a reasonable period at the close of the hearing, ~~to for~~ oral argument, which shall be included in the ~~stenographic report~~ transcript of the hearing. Any party or intervenor shall be entitled, upon request made before the close of the hearing, to file a brief, proposed findings of fact and conclusions of law, or both with the Board or its ~~H~~ Hearing Officer. In lieu of briefs, the Hearing Officer may permit or direct the parties to file memoranda or statements of authority. ~~The Board or its hearing officer may fix a reasonable amount of~~~~

~~time for such filing, but such initial period may not exceed 20 days from the receipt by the party or intervenor of the record of the hearing.~~

(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 -- ~~Post-Hearing Procedures~~

§ 2200.90 Decisions and Reports of the Board or Its Hearing Officers.

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

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

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

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

~~(1) Contents of Hearing Officer's decision. The hearing officer shall prepare a decision^{*} upon completion of the proceeding. ~~When a hearing is held, the decision shall comply~~ that conforms to with 3 VSA ~~§Section~~ 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).~~

~~(a) 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.~~

~~Copies of the decision shall be mailed to the Board and to all parties or intervenors.~~

Commented [A32]: The current Rules do not delineate procedures between the Hearing Officer and the Board. The Proposed Rules break this Subpart into two parts: the Hearing Officer procedure and the Review Board discretionary review procedure.

~~Thereafter, the hearing officer shall file with the Clerk a report consisting of the decision, the record in support thereof and any petitions for discretionary review of the decision or statements in opposition to such petitions that may be filed in accordance with Section 2200.91.~~

~~(2) The hearing officer shall file the report no later than 21 days following the date of the mailing of the decision to the parties or intervenors.~~ 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 receipt of the Hearing Officer's report, the Clerk shall docket the ~~case report~~ and notify all parties or intervenors of that fact of the docketing date. The date of docketing shall be the date the Hearing Officer's report is made for purposes of 21 VSA Section ~~§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), § 2200.52(f)(2), or § 2200.64(b).

~~(d) Filing documents after the docketing date.~~ On or after the date of docketing of the case, all pleadings or other documents that may be filed in the case shall be addressed to the Clerk. Except for documents filed under paragraph (b)(4)(j) 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.~~ In the event if no Board

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 Board Review Board per 21 VSA §230.

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

(a)

(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 ~~or intervenor~~ adversely affected or aggrieved by the decision of a hearing officer may seek review by the Review Board by filing ~~submit a~~ Petition for Discretionary Review-
{n*}

{n* APPENDIX 4 & 5}

~~Any party or intervenor shall be entitled, upon request, to a reasonable period at the close of the hearing, to oral argument, which shall be included in the stenographic report of the hearing. Any party or intervenor shall be entitled, upon request made before the close of the hearing, to file a brief proposed findings of fact and conclusions of law, or both, with the Board or its hearing officer. The Board or its hearing officer may fix a reasonable period of time for such filing, but such initial period may not exceed 20 days from the receipt by the party or intervenor of the record of the hearing, 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) ~~(e)~~ 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 at the times and places in the manner specified in this section for the filing of petitions for discretionary review. Any statements in opposition shall contain a concisely statement on why the Hearing Officer's decision should not be reviewed with respect to each portion of the petition to which it is addressed.

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

§2200.92 Review by the Review Board. ~~{n*}~~

~~{n* APPENDIX 6A & 6B}~~

~~(a) Review is a matter of sound discretion of the Board. 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) In exercising direction, the Board will consider assertions of the following:~~

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

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

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

~~(4) A prejudicial error of procedure was committed.~~

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

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

Commented [A33]: Very similar to Proposed Rule 92(b-c).

(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 BoardBoard.

(a) Requests for briefs:

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

(b) ~~Time for~~ Filing briefs. Unless the briefing notice states otherwise:

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

(i) *Appeal by one party or intervenor.* A party or intervenor whose petition for review or for interlocutory appeal is granted, or whose interlocutory appeal is certified, shall file a ~~The party required to file the first brief shall do so~~ within 40 days after the date of the briefing notice. All other parties ~~or intervenors~~ shall file their briefs within 30 days after the first brief is served, of the petitioning or appealing party or intervenor 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) _____

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

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

~~(3iv) 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: Additional briefs shall be otherwise not be allowed except by leave of the Board Review Board.~~

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

~~(1) Any extension of time to file a brief shall will not ordinarily be granted except in ~~extraordinary~~ circumstances 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 within 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:*

~~(1) The Board Review Board shall may decline to accept a brief that is not filed on timely filed.~~

(e) Length of briefs:

~~(1)~~ Except by permission of the ~~Board~~ 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:

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

(gh) Failure to meet requirements:

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

(h) Number of copies:

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

§ 2200.94 [Reserved] Stay of Final Order.

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

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

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

Commented [A34]: See Proposed Rule 63.

2200.95 Oral Argument Before the ~~Board~~ Review Board.

~~(a)~~ Oral argument before the Board will be granted upon request of a party or intervenor. 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. ~~When oral argument is requested, the Board Clerk shall advise all parties or intervenors whether oral argument is to be heard, to the proceeding of the date, hour, place, time allotted and scope of such argument at least 10 days prior to the date set. 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) ~~Persons desiring to listen to the recordings shall make appropriate arrangements with the Clerk.~~ Parties or intervenors ~~may~~ 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. ~~bare all expenses for the court reporters' fees, and for any copy of the hearing transcript filed with it.~~

(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 conform to § 2200.40 and 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:

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

(b) Requirements:

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

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

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

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

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

(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;

Commented [A35]: The Proposed Rules eliminate the need for the Review Board to review and approve any settlements. Instead, the parties are required to certify that the settlement meets certain criteria. The Review Board will issue a final order based on the acknowledging the resolution of the contested items and agreement to terminate the proceeding.

- (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.

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

§2200.1020a Withdrawal of Notice of Contest.

At any time of the proceedings, ~~A~~ a party or intervenor may move to withdraw its notice of contest, citation, notification of proposed penalty, or petition for modification of abatement period at any stage of the proceeding, or any portion thereof. The motion shall include a statement that a promise of another party or intervenor has not led to the motion to withdraw the notice of contest. The rule on settlements, Section 2200.100, shall apply whenever a promise of another party or intervenor has led to the party's or intervenor's motion to withdraw. 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).

§2200.1034 Expedited Proceeding.

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

~~(b)~~ When such 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.

~~(e)~~

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

§2200.1042 Standards of Conduct.

(a) General. All ~~representatives~~ persons appearing in any proceeding before the Review Board or its Hearing Officers shall ~~conform~~ comply with the letter and spirit of the ~~to the standards of ethical conduct required in the courts of the State of 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(c).

§2200.1053 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 the any Board Member, including any member, Hearing Officer, employee or agent of the Board-Review Board who is employed in the decisional process, and any of the parties or intervenors, representatives, or other interested persons, unless all other parties or intervenors have the opportunity to participate.

(b) Disciplinary action. In the event such an ex parte communication occurs, the Board-Review Board or its Hhearing Oofficer may make such orders or take such action as fairness requires. Upon notice and hearing, the Board or its hearing officer may take such disciplinary action as is appropriate in the circumstances against any person who knowingly and willfully makes or solicits the making of a prohibited communication. The exclusion of a person by a Hearing Officer from a proceeding shall be governed by § 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.

~~2200.104 Restrictions as to Participation by the Commissioner or the Duly Authorized Agent of the Commissioner.~~

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

~~2200.105 Inspection and Reproduction of Documents.~~

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

~~(b) Costs shall be borne by such person.~~

~~2200.106 Restrictions with Respect to Former Employees.~~

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

~~§2200.1067 Amendments to Rules.~~

~~The Board-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 herein in this Part, in accordance with the Administrative Procedures Act. Such suggestions should be addressed to the Board-Review Board at its mailing address or e-mailed to the clerk.~~

~~§2200.1078 Special Circumstances; Waiver of Rules.~~

~~In special circumstances not contemplated by the provisions of these rules, or for good cause shown, the Board-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.~~

2200.109 Penalties.

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

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

2200.110 Official Seal—Vermont Occupational Safety and Health Review Board.

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

Commented [A36]: There is no statutory requirement for an official seal. The Review Board no longer uses an embosser on its orders, and therefore there is no reason to keep this language.

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.

(c) 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

INTRODUCTION

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

~~or~~

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

~~These are common concerns heard by members of the Vermont Occupational Safety and Health Review Board. In an effort to solve these problems, the Board has adopted federally instituted~~

Commented [A37]: This provision of the current Rule will be placed on the Review Board website together with other helpful information. Therefore, it does not need to be included in the rules themselves.

"Simplified Proceedings" to help make it easier for those concerned to "have their day in court." These simplified proceedings are designed to make the resolution of cases faster, to make it easier for those appearing before the Board or its hearing officer to proceed without an attorney, and to reduce paperwork and the expense of litigation.

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

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

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

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

(a) ~~The purpose of this the Simplified Proceedings subpart is to provide simplified procedures for resolving contests under the Vermont Occupational Safety and Health Act so that parties or intervenors before the Board-Review Board or its Hearing Officer may save-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. while preserving fundamental procedural fairness. These procedural rules shall will be construed and applied to accomplish these ends 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 ~~Board's-Review Board's~~ Rules of Procedure are ~~the as~~ following:

(1) ~~Complaints and answers are not required.~~

(2)

~~Pleadings generally are not permitted or required. Early discussions among the parties and the Hearing Officer are required to narrow and define the disputes between the parties or intervenors will include legal and factual matters in dispute and narrow the issues to the extent possible.~~

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

(42) ~~Discovery is generally not permitted except as ordered by the Hearing Officer.~~

(54) ~~Interlocutory appeals are not permitted.~~

(63) ~~Hearings are less formal. The admission of evidence is not controlled by the Vermont Rules of Evidence as applied in the Superior Courts of the State of Vermont shall not apply, 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 ~~shall will~~ govern proceedings before the Board or its ~~a~~ Hearing Officer ~~when (a) theif a case is eligible chosen for Ssimplified Proceedings under SSection-2200.2032, (b) any party or intervenor requests simplified proceedings and (c) no party or intervenor files an objection to the request.~~

§ 2200.202 Eligibility for Simplified Proceedings.

(a) Those cases is eligible 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: unless it concerns an alleged violation of any of the following:

~~(a) Section 1910.94 (Ventilation)~~

~~(b) Section 1910.95 (Occupational noise exposure)~~

~~(c) Section 1910.96 (Ionizing radiation)~~

~~(d) Section 1910.97 (Non-ionizing radiation)~~

~~(e) Section 1910.1000—Section 1910.1045 and any future standard that might be published under Subpart Z of Section 1910 involving "Toxic and Hazardous Substances"~~

~~(f) Section 1926.52 (Occupational noise exposure)~~

~~(g) Section 1916.53 (Ionizing radiation)~~

~~(h) Section 1926.55 (Gases, vapors, fumes, dusts and mists)~~

~~(i) Section 1926.57 (Ventilation)~~

~~(k) Section 1926.800(e) (Tunnels and shorings—air quality and ventilation)~~

(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.

Requesting simplified proceedings:

(b) Party request. Within 21 days of the notice of docketing,

(1) Who may request:

(i) 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.

(2) When to request:

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

(3) How to request:

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

(4) Effect of the request:

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

(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.

~~(b) Objecting to simplified proceedings:~~

~~(1) Who may object:~~

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

~~(2) When to object:~~

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

~~(3) How to object:~~

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

~~(4) Effect of the objections:~~

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

~~(e) Notice:~~

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

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

§ 2200.204 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.

§ 2200.2054 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.

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

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

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

§ 2200.2075 Pre-hearing Conferences; Hearings.

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

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

~~(1) Conference:~~

~~(i) The purpose of the conference is to resolve as many disputed issues as possible prior to hearing. At the beginning of the conference, the Board or its hearing officer shall enter into the record all agreements reached by the parties or intervenors, as well as defenses raised during the discussion set forth in Section 2200.205. The parties or intervenors and the Board or its hearing officer shall attempt to resolve or narrow the remaining issues. At the conclusion of the conference, the Board or its Hearing Officer shall will issue an order that may set forth enter into the record any further agreements reached by the parties or intervenors 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.

~~(2) Hearing:~~

~~(a) **Procedures.** As soon as practicable after the conclusion of the pre-hearing conference, (i) ~~the Board or its Hearing Officer shall will~~ hold a hearing on any issue that remains in dispute at the conclusion of the conference. The hearing shall will be in accordance with ~~3 VSA Section 809, 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) **Evidence:**~~

~~(i) 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 shall be received, but the Board or its Hearing Officer may exclude that is not irrelevant, or unduly repetitious, or unreliable evidence. Testimony shall be given under oath or affirmation. ~~The Rules of Evidence as applied in the Superior Courts of the State of Vermont shall not apply.~~~~

§ 2200.206(d) Transcript

Transcripts shall be governed by §2200.66.

~~(1) (c) **Oral and Written Argument:**~~

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

~~§ 2200.206 Reporter Present; Records; Transcript~~

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

~~§ 2200.207(f) Decision of the Board or Its Hearing Officer Decision.~~

~~(1a) 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 Board or its Hearing Officer shall 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 §Section 2200.90(a). If additional time is needed, approval of the Review Board Chairperson is required.~~

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

~~(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.~~

Commented [A38]: See Proposed Rule 209(d).

Commented [A39]: See Proposed Rule 2200.211.

~~§ 2200.208 Discovery.~~

~~Discovery, including requests for admissions, shall not be will only be allowed except by order of the Board or its under the conditions and time limits set by the Hearing Officer.~~

Commented [A40]: See Proposed Rule 2200.52.

~~§ 2200.209 Interlocutory Appeals Not Permitted.~~

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

§ 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 (§§ 2200.50-2200.564) 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.

~~Appendix 1A. Notice of Contest to Citation and Proposed Penalties.~~

~~Chandler Concrete Corporation~~

~~211 Valley Road~~

~~Passumpsic, VT 05861~~

~~March 1, 1993~~


~~Mr. ABC, Manager/VOSHA~~

~~Dept. of Labor and Industry~~

~~120 State Street~~

~~Montpelier, VT 05620-3401~~

~~Dear Mr. ABC:~~



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

Sincerely,

CHANDLER CONCRETE CORPORATION

N.B. Chandler

President

Appendix 1B- Notice of Contest to Proposed Penalties-Only.

Chandler Concrete Corporation

211 Valley Road

Passumpsic, VT 05864

March 1, 1993

Mr. ABC, Manager OSHA

Dept. of Labor and Industry

120 State Street

Montpelier, VT 05620-3401

Dear Mr. ABC:

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

Sincerely,

CHANDLER CONCRETE CORPORATION

N.B. Chandler

President

Appendix 1C- Notice of Contest by Employee Representative:

Metal Workers International Union

~~589 22nd Street, NW
Washington, D.C. 20006~~

~~March 1, 1993~~

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

~~Dear Mr. ABC:~~

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

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

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

~~Sincerely,~~

~~W. T. Metz, Director~~

~~Safety Department~~

~~Appendix 1D. Notice of Contest by Employer.~~

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

~~Metal Workers International Union~~

~~589 22nd Street, NW~~

~~Washington, D.C. 20006~~

~~Your employer has been cited by the Commissioner of Labor and Industry for violation of the Vermont Occupational Safety and Health Code. The citation has been contested and will be the subject of a hearing before the Vermont Occupational Safety and Health Review Board. Affected employees are entitled to participate in this hearing as parties or intervenors under~~

terms and conditions established by the Review Board in its Rules of Procedure. Notice of intent to participate should be sent to:

~~Vermont Occupational Safety and Health Review Board~~

~~State Administration Building Post Office~~

~~133 State Street~~

~~Montpelier, Vermont 05633-6701~~

All papers relevant to this matter may be inspected at:

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

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

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

-
Appendix 2. Complaint.

STATE OF VERMONT

OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

DOCKET NO. 000

COMMISSIONER OF LABOR AND INDUSTRY, Complainant vs. CHANDLER-
CONCRETE CORPORATION, Respondent

-
COMPLAINT

-
JURISDICTION

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

-
PARTIES

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

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

-
CLAIM

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

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

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

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

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

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

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

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

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

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

-
XYZ

Special Ass't. Attorney General

-
CERTIFICATE OF SERVICE

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

-
XYZ

Special Ass't. Attorney General

-
Appendix 3. Answer.

STATE OF VERMONT

OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

DOCKET NO. 000

COMMISSIONER OF LABOR AND INDUSTRY, Complainant vs. CHANDLER CONCRETE CORPORATION, Respondent

-
ANSWER

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

1. Admitted.

2. Admitted.

3. Admitted.

4. Admitted.

5. Admitted.

6. Admitted.

7. Admitted.

8. It is admitted. Citation is attached.

9. Respondent admits that two employees were engaged at the worksite mentioned but were not affected by any alleged violations.

~~10. Admitted.~~

~~11. Respondent maintains that no violation in fact existed and that therefore no penalty is reasonable.~~

~~12. Respondent is unable to reply to this paragraph as it constitutes a conclusion and a motivation for the penalty which is within the complete control of the Commission.~~

~~It is respectfully requested that the Citation be dismissed.~~

—

~~N.B. Chandler, President~~

~~Chandler Concrete Corporation~~

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

—

~~N.B. Chandler, President~~

~~Chandler Concrete Corporation [Corporation]~~

-

~~Appendix 4. Notice of Decision.~~

~~STATE OF VERMONT~~

~~OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD~~

~~Commissioner of Labor and Industry vs. —~~

~~Docket No. RB. —~~

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

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

3. Petitions for review submitted prior to the above noted filing date should be sent to me. Those submitted after the filing date should be mailed to the VOSHA Review Board at the following address: State Administration Building Post Office, 133 State Street, Montpelier, Vermont 05633-6704.

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

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

Dated:

Appendix 5. Petition for Discretionary Review.

STATE OF VERMONT

OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

DOCKET NO. 000

COMMISSIONER OF LABOR AND INDUSTRY, Complainant vs. CHANDLER
CONCRETE CORPORATION, Respondent

PETITION FOR DISCRETIONARY REVIEW

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

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

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

STATEMENT OF REASONS FOR WHICH EXCEPTIONS ARE TAKEN

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

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

Respectfully submitted,

~~N.B. Chandler, President~~

~~Chandler Concrete Corporation~~

~~March 30, 1993~~

~~Appendix 6A. Order Granting Request for Discretionary Review.~~

~~STATE OF VERMONT~~

~~OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD~~

~~DOCKET NO. 000~~

~~COMMISSIONER OF LABOR AND INDUSTRY, Complainant vs. CHANDLER
CONCRETE CORPORATION, Respondent~~

~~ORDER GRANTING REQUEST FOR DISCRETIONARY REVIEW~~

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

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

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

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

~~Dated at Montpelier, Vermont this ... day of ..., 199 ...~~

~~XYZ~~

~~Chair of the Board~~

~~Appendix 6B. Order Denying Request for Discretionary Review.~~

~~STATE OF VERMONT~~

OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

DOCKET NO. 000

**COMMISSIONER OF LABOR AND INDUSTRY, Complainant vs. CHANDLER-
CONCRETE CORPORATION, Respondent**

ORDER DENYING REQUEST FOR DISCRETIONARY REVIEW

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

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

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

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

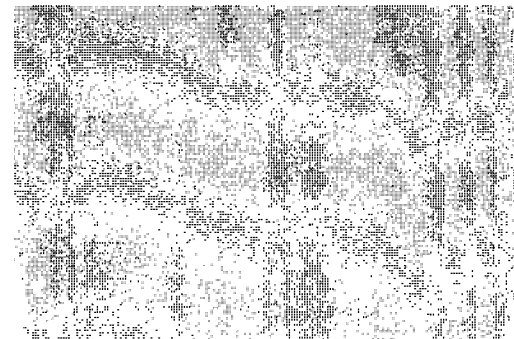
Dated at Montpelier, Vermont this — day of —, 199—

—
XYZ

Chair of the Board

Glossary

- Pleadings** — These are the documents in which the parties or intervenors set out their allegations or defenses. The most common type of pleadings are the Complaint and Answer.
— Pleadings are prohibited in simplified proceedings.
- Complaint and** — Under conventional procedures, after



Commented [A41]: See definitions under Proposed Rule 2200.1

Answer

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

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

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

Discovery

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

Interlocutory Appeals

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

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

Motions

—A motion is an application made to a

hearing officer to obtain an order
directing some act to be done in favor of
the person making the motion.

21 V.S.A. § 230

EFFECTIVE DATE: August 29, 1994 Secretary of State Rule Log # 94-34
AMENDED: April 2007 (to remove duplicate rule 24-050-002)

Clean
Copy

VOSHA Review Board

Rules of Procedure

CVR 3-140-036

Adopted

Table of Contents

SUBPART A— GENERAL PROVISIONS	1
§ 2200.1 Definitions.....	1
§ 2200.2 Scope of Rules; Applicability of Vermont Rules of Civil Procedure and Vermont Administrative Procedures Act; and Construction.	2
§ 2200.3 Use of Gender and Number.	2
§ 2200.4 Computing Time.....	3
§ 2200.5 Extension of Time.....	4
§ 2200.6 Record Address.	4
§ 2200.7 Service, Notice, and Posting.....	4
§ 2200.8 Filing.....	8
§ 2200.9 Consolidation.	10
§ 2200.10 Severance.....	10
§ 2200.11 [Reserved]	10
§ 2200.12 References to Cases.	10
SUBPART B— PARTIES AND REPRESENTATIVES	12
§ 2200.20 Party Status	12
§ 2200.21 Intervention; Appearance by Non-parties.....	12
§ 2200.22 Representation of Parties and Intervenors.....	13
§ 2200.23 Appearances and Withdrawals.....	13
SUBPART C— PLEADINGS AND MOTIONS	15
§ 2200.30 General Rules	15
§ 2200.31 Caption; Titles of Cases.	15
§ 2200.32 Signing of Pleadings and Motions.....	16
§ 2200.33 Notices of Contest.....	16
§ 2200.34 Employer Contests.	17
§ 2200.35 [Reserved]	18
§ 2200.36 [Reserved]	18
§ 2200.37 Petitions for Modification of the Abatement Period.....	18
§ 2200.38 Employee Contests.	19
§ 2200.39 Statement of Position.	20
§ 2200.40 Motions and Requests.	20

§ 2200.41 [Reserved]	21
SUBPART D— PREHEARING PROCEDURES AND DISCOVERY	22
§ 2200.50 [Reserved]	22
§ 2200.51 Prehearing Conferences and Orders.....	22
§ 2200.52 General Provisions Governing Discovery.....	22
§ 2200.53 Production of Documents and Things.....	27
§ 2200.54 Request for Admissions.....	28
§ 2200.55 Interrogatories.....	29
§ 2200.56 Depositions.....	30
SUBPART E— HEARINGS	31
§ 2200.60 Notice of hearing; Location.....	31
§ 2200.61 Submission Without Hearing.....	31
§ 2200.62 Postponement of Hearing.....	31
§ 2200.63 Stay of Proceedings.....	31
§ 2200.64 Failure to Appear.....	32
§ 2200.65 Issuance of Subpoenas; Petitions to Revoke or Modify Subpoenas; Payment of Witness Fees and Mileage; Right to Inspect or Copy Data.....	32
§ 2200.66 Transcript of Testimony.....	34
§ 2200.67 Duties and Powers of the Hearing Officers.....	34
§ 2200.68 Recusal of the Hearing Officer.....	35
§ 2200.69 Examination of Witnesses.....	36
§ 2200.70 Exhibits.....	36
§ 2200.71 Rules of Evidence.....	37
§ 2200.72 Objections.....	37
§ 2200.73 Interlocutory Review.....	37
§ 2200.74 Filing of Briefs and Proposed Findings With the Hearing Officer; Oral Argument at the Hearing.....	38
SUBPART F— POSTHEARING PROCEDURES	39
§ 2200.90 Decisions and Reports of Hearing Officers.....	39
§ 2200.91 Discretionary Review; Petitions for Discretionary Review; Statements in Opposition to Petitions.....	40
§ 2200.92 Review by the Review Board.....	41
§ 2200.93 Briefs Before the Review Board.....	42
§ 2200.94 [Reserved]	43

§ 2200.95 Oral Argument Before the Review Board	43
SUBPART G— MISCELLANEOUS PROVISIONS	46
§ 2200.100 Settlement.....	46
§ 2200.101 Failure to Obey Rules.	47
§ 2200.102 Withdrawal.....	47
§ 2200.103 Expedited Proceeding.	48
§ 2200.104 Standards of Conduct.....	48
§ 2200.105 Ex Parte Communication.....	49
§ 2200.106 Amendments to Rules.....	49
§ 2200.107 Special Circumstances; Waiver of Rules.	49
SUBPART H— SETTLEMENT PART	50
§ 2200.120 Settlement Procedure.....	50
SUBPART M— SIMPLIFIED PROCEEDINGS	54
§ 2200.200 Purpose.	54
§ 2200.201 Application.	54
§ 2200.202 Eligibility for Simplified Proceedings.....	54
§ 2200.203 Commencing Simplified Proceedings.....	55
§ 2200.204 Discontinuance of Simplified Proceedings.....	55
§ 2200.205 Filing of Pleadings.	56
§ 2200.206 Disclosure of Information.	56
§ 2200.207 Pre-hearing Conference.....	57
§ 2200.208 Discovery.....	57
§ 2200.209 Hearing.....	57
§ 2200.210 Review of Hearing Officer’s decision.	58
§ 2200.211 Applicability of subparts A through G.	58

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 226(a) or 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 legal 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 redacted 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 signed 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 may 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 bare 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.

VERMONT **GENERAL ASSEMBLY**

The Vermont Statutes Online

Title 21 : Labor

Chapter 003 : Safety

Subchapter 005 : Occupational Safety And Health

(Cite as: 21 V.S.A. § 230)

§ 230. Occupational Safety and Health Review Board

(a) An Occupational Safety and Health Review Board is created. It shall consist of three members who shall be appointed by the Governor, with the advice and consent of the Senate. The members of the Board shall be appointed for terms of six years, but initially in a manner so that one term expires in two years, one term in four years, and one term in six years. Thereafter, biennially, in the month of February, with the advice and consent of the Senate, the Governor shall appoint a person as a member of such Board for the term of six years, whose term of office shall commence on March 1 of the year in which such appointment is made. The Governor, biennially, shall designate a member of such Board to be its Chair.

(b) With the approval of the Secretary of Administration, the Board may employ such employees as it deems necessary, and may without such approval employ and remove a clerk and a reporter for taking and transcribing testimony in hearings before it and such hearing judges as it deems necessary to hear appeals on behalf of the Board. Compensation for employees of the Board shall be fixed by the Commissioner of Human Resources. The hearing judge appointed by the Board shall hear, and make a determination upon, any proceeding instituted before the Board and any motion in connection therewith, assigned to such hearing judge by the Chair of the Board, and shall make a report of any such determination which constitutes his or her final disposition of the proceedings. The report of the hearing judge shall become the final order of the Board within 30 days after such report by the hearing examiner, unless within such period any Board member has directed that such report shall be reviewed by the Board.

(c) Every official act of the Board shall be entered on record, and its hearings and records shall be open to the public.

(d) The Board is authorized to make such rules as are necessary for the orderly transaction of its proceedings. Unless the Board has adopted a different rule, its proceedings shall be in accordance with the rules promulgated by the Supreme Court for the Superior Courts.

(e) The office of the Board shall be located in Montpelier, but proceedings shall be held at places within the State convenient to persons appearing before it.

(f) The compensation of members of the Board shall be fixed by the Commissioner of Human Resources.

(g) The Board shall be attached to the Governor's office for administrative purposes. (Added 1971, No. 205 (Adj. Sess.), § 1; amended 1973, No. 193 (Adj. Sess.), § 3, eff. April 9, 1974; 1973, No. 214 (Adj. Sess.), § 15; 1981, No. 34, § 1; 2003, No. 156 (Adj. Sess.), § 15.)



Proposed Rules Postings

A Service of the Office of the Secretary of State

- [Vermont.gov](#)
- [Feedback](#)
- [SOS Website](#)
- [APA Site](#)
- [Code of Vermont Rules](#)
- [Recent](#)
- [Search Rules](#)
- [Calendar](#)
- [Subscribe](#)
- [APA Contact Info](#)

Search Rules

Deadline For Public Comment

Deadline: Oct 26, 2020

Please submit comments to the agency or primary contact person listed below, before the deadline.

Rule Details

Rule Number:	20P021
Title:	Vermont Occupational Safety and Health Review Board Rules of Procedure
Type:	Standard
Status:	Proposed
Agency:	Vermont Occupational Safety and Health Administration Review Board
Legal Authority:	21 V.S.A. § 230(d)
Summary:	These rules serve as a guide to the Review Board, its Clerk and Hearing Officers and parties regarding the orderly transaction of its

proceedings regarding contested VOSHA Cases. There are two levels of review available to the parties through the Rules of Procedure. The first is through the Hearing Officer and the second is through discretionary review by the Review Board should a party (or the Review Board on its own motion) want to appeal the Hearing Officer's decision. There are two types of proceedings offered in the Rules (Conventional and Simplified). Simplified Proceedings offer employers (respondents) an easier way to contest that may not necessitate needing an attorney. Rules regarding settlements are offered in the Rules as well as the use of a Settlement Officer.

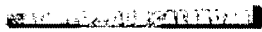
Persons Affected: Department of Labor VOSHA Program; Respondents in contested VOSHA cases which include the Commissioner of Labor and employers who contest their cases.

Economic Impact: Minimal economic impact; the rules are changing to update and clarify Review Board procedures.

Posting date: Sep 16,2020

Hearing Information

Information for Hearing # 1

Hearing date: 10-16-2020 09:00 AM 

Location: Microsoft Teams Online

Address: +1 802-828-7667

City: Conference ID: 950 933 956#

State: VT

Zip: 05633

Hearing Notes: <https://teams.microsoft.com/l/meetup-join>

Contact Information

Information for Contact # 1

Level: Primary

Name: Carolyn Desch

Agency: Vermont Occupational Safety and Health Administration Review Board

Address: 133 State Street
 City: Montpelier
 State: VT
 Zip: 05633-6701
 Telephone: 802-828-2775
 Fax: 802-828-1132
 Email: carolyn.desch@vermont.gov
 Website Address: <https://voshaboard.vermont.gov/>

Information for Contact # 2

Level: Secondary
 Name: Leigh Keyser Phillips
 Agency: Vermont Occupational Safety and Health Administration Review Board
 Address: 133 State Street
 City: Montpelier
 State: VT
 Zip: 05633-6701
 Telephone: 802-864-9891
 Fax:
 Email: lphillip@together.net

Keyword Information

Keywords:
 VOSHA Review Board
 Rules of Procedure
 Rule revision



[Accessibility Policy](#) | [Privacy Policy](#)

A Vermont Government Website Copyright 2020 State of Vermont



(802) 828-2863

MEMORANDUM

OFFICE OF THE SECRETARY OF STATE

Primary Contact: Carolyn Desch, VOSHA Review Board, 133 State Street,
Montpelier, VT 05633-6701 Tel: 802-828-2775 Fax: 802-
828-1132 Email: carolyn.desch@vermont.gov

Secondary Contact: Leigh Keyser Phillips, VOSHA Review Board, 133 State
Street, Montpelier, VT 05633-6701 Tel: 802-864-9891
Email: lphillip@together.net.

URL: <https://voshaboard.vermont.gov/>

From: Louise Corliss, APA Clerk

RE: Vermont Occupational Safety and Health Administration Review Board
Rules of Procedure.

Date 09/14/2020

We received Proposed Rule on 09/08/2020

Final Proposed Rule on

Adopted Rule on

We have assigned the following rule number(s):

Proposed Rule Number: 20P021

Adopted Rule Number:

(Final Proposals are not assigned a new number; they retain
the Proposed Rule Number.)

The following problems were taken care of by phone/should be
taken care of immediately: Proposed Filing: Initially filed 09/04/2020
with defects. Replacement filing received
09/08/2020, hearing information still
incomplete. Hearing information received
09/11/2020. No further action required.

We cannot accept this filing until the following problems
are taken care of:

The notice for this proposed rule appeared/will appear
online on: 9/16/2020 and in the newspapers of record on 9/24/2020.

This rule takes effect on
Adoption Deadline: 05/08/2021

Please note:

If you have any questions, please call me at 828-2863. OR
E-Mail me at: louise.corliss@vermont.gov

cc: Charlene Dindo

OFFICE OF THE SECRETARY OF STATE
VERMONT STATE ARCHIVES & RECORDS ADMINISTRATION
(802) 828-2863

TO: Burlington Free Press Dave Heney (dhenev@freepressmedia.com)	Tel: 863-3441 FAX: 863-4702 Attn: Display Ads
The Caledonian Record Julie Poutré (adv@caledonian-record.com)	Tel: 748-8121 FAX: 748-1613
Times Argus / Rutland Herald The Times Argus (classifieds@timesargus.com) Rick Root (rick.root@rutlandherald.com)	Tel: 802-747-6121 ext 2238 FAX: 802-776-5600
The Valley News (advertising@vnews.com)	Tel: 800-874-2226 or 603-298-6082 FAX: 603-298-0212
The Addison Independent (legals@addisonindependent.com)	Tel: 388-4944 FAX: 388-3100 Attn: Display Advertising
The Bennington Banner / Brattleboro Reformer Lylah Wright (lwright@reformer.com)	Tel: 254-2311 ext. 132 FAX: 447-2028 Attn: Lylah Wright
The Chronicle (ads@bartonchronicle.com)	Tel: 525-3531 FAX: 525-3200
Herald of Randolph (ads@ourherald.com)	Tel: 728-3232 FAX: 728-9275 Attn: Brandi Comette
Newport Daily Express (jsmith@newportvermontdailyexpress.com)	Tel: 334-6568 FAX: 334-6891 Attn:
News & Citizen (lisa@newsandcitizen.com) Irene Nuzzo (irene@newsandcitizen.com and ads@stowereporter.com removed from distribution list per Lisa Stearns.	Tel: 888-2212 FAX: 888-2173 Attn: Lisa Stearns
St. Albans Messenger Ben Letourneau (ben.letourneau@samessenger.com)	Tel: 524-9771 ext. 117 FAX: 527-1948 Attn: Ben Letourneau
The Islander (islander@vermontislander.com)	Tel: 802-372-5600 FAX: 802-372-3025
Vermont Lawyer (hunter.press.vermont@gmail.com)	Attn: Will Hunter

FROM: Louise Corliss, APA Clerk **Date of Fax:** September 16, 2020
RE: The "Proposed State Rules " ad copy to run on **September 24, 2020**
PAGES INCLUDING THIS COVER MEMO: **2**

NOTE 8-pt font in body. 12-pt font max. for headings - single space body. Please include dashed lines where they appear in ad copy. Otherwise minimize the use of white space. Exceptions require written approval.

If you have questions, or if the printing schedule of your paper is disrupted by holiday etc. please contact Louise Corliss at 802-828-2863, or E-Mail louise.corliss@vermont.gov, Thanks.

PROPOSED STATE RULES

By law, public notice of proposed rules must be given by publication in newspapers of record. The purpose of these notices is to give the public a chance to respond to the proposals. The public notices for administrative rules are now also available online at <https://secure.vermont.gov/SOS/rules/>. The law requires an agency to hold a public hearing on a proposed rule, if requested to do so in writing by 25 persons or an association having at least 25 members.

To make special arrangements for individuals with disabilities or special needs please call or write the contact person listed below as soon as possible.

To obtain further information concerning any scheduled hearing(s), obtain copies of proposed rule(s) or submit comments regarding proposed rule(s), please call or write the contact person listed below. You may also submit comments in writing to the Legislative Committee on Administrative Rules, State House, Montpelier, Vermont 05602 (802-828-2231).

Vermont Occupational Safety and Health Administration Review Board Rules of Procedure

Vermont Proposed Rule: 20P021

AGENCY: VOSHA Review Board

CONCISE SUMMARY: These rules serve as a guide to the Review Board, its Clerk and Hearing Officers and parties regarding the orderly transaction of its proceedings regarding contested VOSHA Cases. There are two levels of review available to the parties through the Rules of Procedure. The first is through the Hearing Officer and the second is through discretionary review by the Review Board should a party (or the Review Board on its own motion) want to appeal the Hearing Officer's decision. There are two types of proceedings offered in the Rules (Conventional and Simplified). Simplified Proceedings offer employers (respondents) an easier way to contest that may not necessitate needing an attorney. Rules regarding settlements are offered in the Rules as well as the use of a Settlement Officer.

FOR FURTHER INFORMATION, CONTACT: Carolyn Desch, VOSHA Review Board, 133 State Street, Montpelier, VT 05633-6701 Tel: 802-828-2775 Fax: 802-828-1132 Email: carolyn.desch@vermont.gov URL: <https://voshaboard.vermont.gov/>.

FOR COPIES: Leigh Keyser Phillips, VOSHA Review Board, 133 State Street, Montpelier, VT 05633-6701 Tel: 802-864-9891 Email: lphillip@together.net.

AGENCY

CONCISE

parties

level

an the

owning

files

contest

well as

FOR FU

VT 056

802-8

802-86

802-86