



# WISHA safety investigations: when to seek legal guidance

By Jennifer L. Truong ■ October 20, 2015

## Part 2: Appeal process overview

If your Washington company has just received a citation from the Department of Safety and Health (DOSH), what are your next steps?

If you're unsure what to do, be sure to appeal.<sup>1</sup> The date you receive the citation starts a strict appeal timeline. An appeal leaves you the most options and time to consider the ramifications. The same reasons for engaging counsel during a DOSH investigation are applicable at this stage as well ([click here](#) to read Part 1 of this blog.)

Upon receipt of a citation appeal, DOSH will take one of the following actions: (1) reassume jurisdiction or (2) send the appeal directly to the Board of Industrial Insurance Appeals (Board).

When jurisdiction is reassumed, an informal hearing is held at one of the DOSH area offices. However, the "informal" aspect of the hearing does not make it any less important, as the conversation may be recorded and used in a subsequent hearing, unless certain clarifications are made at the onset of the discussion. Review whether the employer representative has an understanding of how statements made at this level impact potential litigation, has confirmed receipt and full review of the DOSH file and has a clear goal decided in advance for attendance. After the informal hearing, DOSH has 30 days to issue a Corrective Notice of Redetermination (CNR). If you are not satisfied with the findings of the CNR, you must appeal within fifteen business days.<sup>2</sup>

When your appeal reaches the Board, it schedules a mediation conference that is attended by the employer, Industrial Appeals Mediation Judge and an Assistant Attorney General attorney or paralegal representing DOSH. The employer representative should be prepared to address the jurisdictional history, any issues of timeliness, the grounds upon which the employer seeks relief and whether a continued mediation is required or if parties' have reached an impasse and require a hearing.

If resolution cannot be reached at mediation, a hearings judge will hold a subsequent conference to confirm the issues on appeal and establish a litigation schedule that includes witness and discovery deadlines and hearing date(s). It is important to review and comply with the Board's Interlocutory

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## WISHA safety investigations: Part 2 (continued)

Order that sets out relevant dates. A strong consideration for counsel is encouraged at this juncture to level the playing field. DOSH will be represented by an Assistant Attorney General attorney; the Washington Rules of Evidence and Rules of Civil Procedure will be in effect. Once a hearing date is set, the parties' will engage in discovery in the form of written questions and depositions. Participants may exchange preliminary motions.

The hearing typically involves live testimony before the Board unless the judge has allowed testimony presentation via deposition. As DOSH has the prima facie burden of proof they will present their case-in-chief first. Only after DOSH completes its presentation will the employer defense begin. Following the hearing, the judge may allow the parties to submit post-hearing briefs, which are essentially a closing argument that highlights evidence presented in favor of the respective party.

A ruling by the Board can take up to 90 days and be issued in the form of a Proposed Decision and Order (PDO).<sup>3</sup> The party that does not prevail can file a Petition for Review upon which the Board will determine if an appeal is granted or denied.<sup>4</sup> A Final Decision and Order of the Board must be appealed to Washington Superior Court within 30 days.

Engaging counsel for consultation early on may be beneficial to help identify and address potential procedural defects in the issuance of the citation, ensure you have received the complete DOSH inspection file, ensure abeyance requirements and consider available affirmative defenses. The attorneys at Reinisch Wilson Weier are here to assist at any stage. ■

### ***Read also Part 1: Initial inspections***

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<sup>1</sup> WAC 296-900-17005

<sup>2</sup> WAC 296-900-17010

<sup>3</sup> WAC 263-12-140

<sup>4</sup> WAC 263-12-145

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