

803 KAR 50:010. Hearings; procedure, disposition.

RELATES TO: KRS Chapter 338

STATUTORY AUTHORITY: KRS 13B.020(3)(e)2a, 338.071, 338.081, 338.141

NECESSITY, FUNCTION, AND CONFORMITY: KRS 338.071 and 338.081 authorize the Kentucky Occupational Safety and Health Review Commission to hear and rule on appeals from citations, notifications, and variances and promulgate administrative regulations with respect to the procedural aspect of its hearings. According to KRS 13B.020(3)(e)2a, these occupational safety and health hearings are conducted under the authority of KRS 338.071(4), 338.081, and 338.141(3) rather than the hearing procedures in KRS Chapter 13B. This administrative regulation establishes procedures for these hearings and their proper disposition.

Section 1. Definitions.

- (1) "Act" means the Occupational Safety and Health Act of 1972, KRS Chapter 338.
- (2) "Affected employee" or "employee" means an employee of a cited employer who is exposed to the alleged hazard described in the citation, as a result of the employee's assigned duties.
- (3) "Authorized employee representative" means a labor organization which has a collective bargaining relationship with a cited employer and which represents affected employees.
- (4) "Citation" means a written communication issued by the commissioner to an employer pursuant to KRS 338.141.
- (5) "Commission" means the Kentucky Occupational Safety and Health Review Commission.
- (6) "Commissioner" means the commissioner of the Department of Workplace Standards, Labor Cabinet.
- (7) "Day" means a calendar day.
- (8) "Executive director" means the executive director of the commission.
- (9) "Hearing officer" means a hearing officer appointed by the commission pursuant to KRS 338.071(5) and 338.081.
- (10) "Natural person" means an employer whose business is organized as a proprietorship or an affected employee who is not represented by a labor organization.
- (11) "Proceeding" means any proceeding before the commission or before a hearing officer.
- (12) "Representative" means an attorney authorized by a party or intervenor to represent him in a proceeding.
- (13) "Working day" means all days except Saturdays, Sundays, or federal or state holidays.

Section 2. Meetings.

- (1) Regular meetings of the commission shall be held in its offices, Frankfort, Kentucky, on the first Tuesday of each month at 10:00 a.m., unless changed to another date, place, or time by commission action.
- (2) Special meetings shall be held at the times and places as the call directs.
- (3) The commission shall be considered as in continuous session for the performance of administrative duties.

Section 3. Assignment of Hearing; Filings.

- (1) Pursuant to KRS 338.081, cases coming before the commission may be assigned to a hearing officer within the discretion of the commission for a hearing and a finding of facts, conclusions of law, and recommended order. Cases may be withdrawn by agreement, dismissed for cause, or otherwise disposed of before hearing in the discretion

and judgment of the commission. Further, the commission may, upon its own motion or on motion of a party, if granted, hold hearings as provided under KRS 338.071, in which case provisions of this administrative regulation relating to hearing officers and hearings shall apply if applicable.

(2) A recommended order or adjudication by the hearing officer or the initial order of the review commission, if dismissed or disposed of as provided in subsection (1) of this section or if the commission sits for a hearing, shall become the final order of the commission under the provisions of KRS 338.091, appealable to the Franklin Circuit Court forty (40) days from date of issue, unless called for further review pursuant to Section 48 of this administrative regulation. If reviewed by the commission, an order of the commission determinative of issues before it shall become a final order as defined in KRS 338.091(1) upon date of issue.

(3) Prior to the assignment of a case to a hearing officer, all papers shall be filed with the executive director at the commission offices, #4 Millcreek Park, Frankfort, Kentucky 40601. Subsequent to the assignment of the case to a hearing officer, and before the hearing officer issues a decision, all papers shall be filed with the hearing officer at the address given in the notice informing of the assignment. Subsequent to a decision of the hearing officer, all papers shall be filed with the executive director.

(4) Unless otherwise ordered, all filing may be accomplished by first-class mail.

(5) Filing is effective when mailed.

Section 4. Scope of Rules; Applicability of Kentucky Rules of Civil Procedure.

(1) The rules established by this administrative regulation shall govern all proceedings before the commission and its hearing officers.

(2) In the absence of a specific provision, procedure shall be in accordance with the Kentucky Rules of Civil Procedure.

Section 5. Words Denoting Number or Gender.

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

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

Section 6. Computation of Time.

(1) In computing a 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 federal or state holiday, in which event the period runs until the end of the next day not a Saturday, Sunday, or federal or state holiday. If the period of time prescribed or allowed is less than seven (7) days, intermediate Saturdays, Sundays, and federal or state holidays shall be excluded in the computation.

(2) If service of a pleading or document is by mail pursuant to Section 3 of this administrative regulation, three (3) days shall be added to the time allowed by these rules for the filing of a responsive pleading.

Section 7. Extensions of Time. Requests for extensions of time for the filing of a pleading or document shall be received in advance of the date on which the pleading or document is due to be filed.

Section 8. Record Address. The initial pleading filed by a person shall contain the person's name, address, and telephone number. A change in this information shall be communicated promptly to the hearing officer or the commission, as the case may be, and to all other parties and intervenors. A party or intervenor who fails to furnish the information shall have waived the right to notice and service under these rules.

Section 9. Service and Notice.

(1)

(a) Except as provided in paragraph (b) of this subsection, a copy of all pleadings or other documents shall be served by the filing party or intervenor on every other party or intervenor at the time of filing in accordance with this section. Every paper relating to discovery required to be served on a party shall also be served on all parties and intervenors in accordance with this section.

(b) The original complaint, or an amended complaint if filed prior to service of the original complaint, shall be served in accordance with Section 20(3) of this administrative regulation.

(2) Service upon a party or intervenor who has appeared through an attorney shall be made only upon the attorney.

(3) Unless otherwise ordered, service may be accomplished by postage pre-paid first class mail at the last known address, by electronic transmission, or by personal delivery. Service is effective when mailed (if by mail), at the time of receipt (if by electronic transmission), or when personally delivered (if by personal delivery). Documents sent by overnight delivery service shall be deemed personal delivery. Service of documents by electronic transmission shall only be permitted if all parties consent to that method of service in writing. The certificate of service of the electronic transmission shall state that the required consent has been given and the method of transmission.

(4) Proof of service shall be accomplished by a written statement of service which states the date and manner of service. The statement shall be filed with the pleading or document.

(5) If service is accomplished by posting, proof of posting shall be filed not later than the first working day following the posting.

(6) Service and notice to employees represented by an authorized employee representative shall be accomplished by serving the authorized employee representative in the manner prescribed in subsection (3) of this section. If the authorized employee representative has appeared in a proceeding on behalf of the employees it represents, service shall be made upon the attorney for the authorized employee representative.

(7) If there are affected employees who are not represented by an authorized employee representative, the employer shall immediately upon receipt of notice of contest or request for extension or modification of the abatement period post, where the citation is required to be posted by 803 KAR 2:125, Section 1(1), a copy of the notice of contest and a notice informing the affected employees of their right to party status and of the availability of all pleadings for inspection and copying at reasonable times. A notice in the following form shall comply with this paragraph: (Name of employer) Your employer has been cited by the Commissioner of the Department of Workplace Standards for violation of the Occupational Safety and Health Act of 1972. The citation has been contested and will be the subject of a hearing before the Occupational Safety and Health Review Commission. Affected employees are entitled to participate in this hearing as parties under terms and conditions established by the Occupational Safety and Health Review Commission in its rules of procedure. Notice of intent to participate shall be sent to: Kentucky Occupational Safety and Health Review Commission #4 Millcreek Park Frankfort, Kentucky 40601 All papers relevant to this matter may be inspected at: (Place shall be reasonably convenient to employees, preferably at or near work place.)

(8) If appropriate, the second sentence of the notice required by subsection (7) of this section shall be deleted and the following sentence shall be substituted: The reasonableness of the period prescribed by the Commissioner of the Department of Workplace Standards for abatement of the violation has been contested and will be the subject of a hearing before the Occupational Safety and Health Review Commission.

(9) The authorized employee representative, if any, shall be served with the notice required by subsections (7) and (8) of this section and with a copy of the notice of

contest.

(10) 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 the hearing at or near the place where the citation is required to be posted by subsection (7) of this section.

(11) A copy of the notice of the hearing to be held before the hearing officer shall be served by the employer on the authorized employee representative or affected employees in the manner prescribed in subsection (3) of this section, if the employer has not been informed that the authorized employee representative has entered an appearance as of the date the notice is received by the employer.

(12) If a notice of contest is filed by an affected employee or an authorized employee representative, a copy of the notice of contest and response filed in support shall be provided to the employer for posting in the manner prescribed in subsection (7) of this section.

(13) An authorized employee representative who files a notice of contest shall serve any other authorized employee representative whose members are affected employees.

(14) If posting is required by this section, posting shall be maintained until the commencement of the hearing or until earlier disposition.

Section 10. Consolidation. Cases may be consolidated on the motion of a party, on the hearing officer's own motion, or on the commission's own motion if there are common parties, common questions of law or fact, or both, or in other circumstances as justice and the administration of the Act require.

Section 11. Severance. Upon its own motion, or upon motion of a party or intervenor, the commission or the hearing officer may, for good cause, order a proceeding severed with respect to some or all issues or parties.

Section 12. Protection of Trade Secrets and Other Confidential Information.

(1) Upon application by any person, in a proceeding where trade secrets or other matters may be divulged, the confidentiality of which is protected by law, the hearing officer shall issue orders as may be appropriate to protect the confidentiality of those matters.

(2) Interlocutory appeal from an adverse ruling under this section shall be granted as a matter of right.

Section 13. Employer or Employee Contests.

(1) If a notice of contest is filed by an employer contesting a citation or notification issued pursuant to KRS 338.031(1), 338.141(3), or 338.153, an employee or an authorized employee representative may elect party status by a request for intervention at any time before commencement of the hearing or, if no hearing is held, before notice of an executed settlement agreement has been served according to Section 51(3) of this administrative regulation.

(2) If a notice of contest is filed by an employee or by an authorized employee representative contesting a citation or notification issued pursuant to KRS 338.031(1), 338.141(3), or 338.153, the employer may elect party status at any time before commencement of the hearing or, if no hearing is held, before notice of an executed settlement agreement has been served according to Section 51(3) of this administrative regulation.

Section 14. Intervention.

(1) A petition for leave to intervene may be filed at any stage of a proceeding before commencement of the hearing, or if there is a settlement or dismissal, before issuance of a recommended order.

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

(3) The commission or the hearing officer may grant a petition for intervention to the extent and upon those terms as the commission or the hearing officer shall determine.

(4) The caption of all cases where intervention is allowed shall reflect the intervention by adding, to the caption after the name of the respondent, the name of the intervenor followed by the designation intervenor.

Section 15. Representatives of Parties and Intervenors.

(1) Except for natural persons who may represent themselves, a party or intervenor shall appear through an attorney.

(2) A representative of a party or intervenor shall control all matters respecting the interest of the party or intervenor in the proceeding.

(3) Affected employees who are represented by an authorized employee representative may appear only through an attorney for the authorized employee representative.

(4) Affected employees who are not represented by an authorized employee representative may elect party status by filing a request for intervention.

(5) Withdrawal of appearance of a representative may be effected by filing a written notice of withdrawal and by serving a copy of the notice on all parties and intervenors.

Section 16. Variance Contests.

(1) An employer, employee or authorized employee representative who receives notification of an adverse ruling to an application for a variance made pursuant to KRS 338.153 may, within fifteen (15) working days of issuance of the ruling, file a notice of contest with the commissioner. The commissioner shall transmit the notice, together with the complete record in the matter as compiled before the commissioner, to the commission within seven (7) days of receipt, under authority of KRS 338.071(4).

(2) The commission may on its own order or on motion of a party, if granted, consider the matter on the record or may require further hearing or filings of information in the matter.

(3) All pertinent provisions relating to contests of citations, if applicable, shall apply.

Section 17. Request for Extension or Modification of Abatement.

(1) A party adversely affected by a ruling of the commissioner on an application for extension or modification of an abatement period may file an appeal from the notification with the commissioner, if an appeal is filed within fifteen (15) working days from receipt of the notice. The appeal shall be limited to the commissioner's ruling affecting the party's application for extension or modification of the abatement period.

(2) The commissioner shall transmit the appeal to the commission within seven (7) days after its receipt, together with all pertinent and relevant records considered by the commissioner in making the ruling.

(3) The commissioner shall file a response to the appeal within ten (10) days of receipt of notice of the appeal.

(4) The commission may on its own order or on motion of a party, if granted, consider the matter on the record or may require further hearing, pleading, or information in the matter.

Section 18. Form.

(1) Except as provided in this section, there are no specific requirements as to the form of any pleading. A pleading is simply required to contain a caption sufficient to identify the parties in accordance with Section 19 of this administrative regulation which shall include the commission's docket number and a clear and plain statement of the relief that is sought, together with the grounds for the requested relief.

- (2) Pleadings and other documents (other than exhibits) shall be typewritten, double spaced.
- (3) Pleadings shall be signed by the party filing or by the party's representative. Signing constitutes a representation that the signer has read the document or pleading; that to the best of the signer's knowledge, information, and belief, the statements made therein are true, and that it is not interposed for delay.
- (4) The commission may refuse for filing any pleading or document which does not comply with the requirements of subsections (1), (2), and (3) of this section.
- (5) All pleadings shall be filed in duplicate unless otherwise indicated.
- (6) A pleading shall be assumed to be correct as submitted unless a reply or denial is received within ten (10) days of receipt of the pleading.

Section 19. Captions.

- (1) Cases initiated by a notice of contest shall be titled: Commissioner of the Department of Workplace Standards, Complainant v. (Name of Contestant), Respondent.
- (2) Cases initiated from an adverse ruling of the commissioner of the Department of Workplace Standards relative to a variance or by a request for extension or modification of the abatement period shall be titled: (Name of Petitioner), Petitioner v. Commissioner of the Department of Workplace Standards, Respondent.
- (3) The titles listed in subsections (1) and (2) of this section shall appear at the left upper portion of the initial page of any pleading or document (other than exhibits) filed.
- (4) 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 assigned by the commission.

Section 20. Notices of Contest of Citations.

- (1) Any employer, employee or authorized employee representative may contest any citation issued pursuant to KRS 338.141.
- (2) If a notice of contest is received by the commissioner, the original and one (1) copy of the notification of contest shall be transmitted to the commission together with copies of all relevant documents, within seven (7) days of receipt of notice by the commissioner.
- (3) Complaint.
 - (a) The commissioner shall file a complaint with the commission no later than twenty (20) days after receiving the notice of contest.
 - (b) The complaint shall set forth all alleged violations and proposed penalties which are contested, stating with particularity:
 1. The basis for jurisdiction;
 2. The time, location, place, and circumstances of each alleged violation; and
 3. The considerations upon which the period for abatement and the proposed penalty on each alleged violation is based.
 - (c) If the commissioner seeks in the complaint to amend the citation or proposed penalty, the commissioner shall state the reasons for amendment and shall state with particularity the change sought.
 - (d) The commissioner shall ensure that a copy of the complaint is personally served on the employer as required by this paragraph.
 1. An employer who is an individual within the Commonwealth. Service shall be made upon the individual within the Commonwealth, other than an unmarried infant or person of unsound mind, by delivering a copy of the complaint to the person or, if acceptance is refused, by offering personal delivery to the person, or by delivering a copy of the complaint to an agent authorized by appointment or by law to receive service of process for the individual.
 2. An employer who is an infant or person of unsound mind. Service shall be made upon an unmarried infant or a person of unsound mind by serving the person's resident guardian or committee if there is one known to the commissioner or, if

none, by serving either the person's father or mother within the Commonwealth or, if none; by serving the person within the Commonwealth having control of the individual. If there are no persons, application shall be made to the appropriate court to appoint a practicing attorney as guardian ad litem who shall be served.

3. An employer which is a partnership or unincorporated association. Service shall be made upon a partnership or unincorporated association subject to suit under a common name by serving a partner or managing agent of the partnership, or an officer or managing agent of the association, or an agent authorized by appointment or by law to receive service on its behalf.

4. An employer which is a corporation. Service shall be made upon a corporation by serving an officer or managing agent, or any other agent authorized by appointment or by law to receive service on its behalf.

5. An employer which is the Commonwealth or a state agency. Service shall be made upon the Commonwealth or a state agency by serving the attorney general or an assistant attorney general.

6. An employer which is a county, city, public board, or other similar body. Service shall be made upon a county by serving the county judge or, if he is absent from the county, the county attorney. Service shall be made upon a city by serving its chief executive officer or official attorney. Service on a public board or other similar body, except state agencies, shall be made by serving a member.

7. An employer which is an individual out of this state. Service may be made upon an individual out of this Commonwealth, other than an unmarried infant, a person of unsound mind or a prisoner, by certified mail or by personal delivery by someone who is over eighteen (18) years of age as prescribed in paragraph (e) of this subsection.

8. A nonresident employer. Service may be made upon a nonresident individual who transacts business through an office or agency in this Commonwealth, or a resident individual who transacts business through an office or agency in any action growing out of or connected with the business of an office or agency, by serving the person in charge.

(e) Manner of service. The commissioner shall arrange for an authorized person to perform personal delivery or serve the complaint through certified or registered mail.

1. Personal Delivery. The commissioner shall arrange for an authorized person to perform service. Proof of service shall be by affidavit of the person making the service stating the time, place, and the individual who accepted or refused a copy of the complaint on behalf of the employer.

2. Certified or Registered Mail. The commissioner shall send a copy of the complaint to the employer by United States certified or registered mail, return receipt requested with instructions to the delivering postal employee to deliver to the addressee and show the address where delivered and the date of delivery. The return receipt shall be proof of the time, place, and manner of service by registered or certified mail.

3. Service of the complaint is effective upon receipt by the employer. The commissioner shall file proof of service with the commission promptly after service, and, in any event, within the time during which the employer shall respond to the complaint.

(4) Answer.

(a) Within fifteen (15) days after service of the complaint, the party against whom the complaint was issued shall file an answer with the commission.

(b) 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 is admitted.

(c) Failure to file an answer may constitute a default and dismissal of the employer's notice of contest pursuant to Section 23 of this administrative regulation. Prior to the dismissal of a notice of contest for failing to file an answer, the commission shall enter an order requiring the employer to show cause as to why the commission should not declare the employer to be in default. The commission shall serve its order pursuant to Section 9 of this administrative regulation. The order shall provide at least seven (7) days from the date of service for the employer to respond. The commission may dismiss the notice of contest if the employer fails to comply with the show cause.

Section 21. Statement of Position. At any time prior to the commencement of the hearing before the hearing officer, a person entitled to appear as a party, or a person who has been granted leave to intervene, may file a statement of position with respect to any or all issues to be heard.

Section 22. Response to Motions. A party or intervenor upon whom a motion is served shall have ten (10) days from service of the motion to file a response.

Section 23. Failure to File. Failure to file any pleading pursuant to these rules when due may, in the discretion of the commission or the hearing officer, constitute a waiver of right to further participation in the proceedings.

Section 24. Withdrawal of Notice of Contest. At any stage of a proceeding, a party may withdraw his or her notice of contest, subject to the approval of the commission.

Section 25. Prehearing Conference.

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

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

Section 26. General Provisions Concerning Discovery; Methods; Service of Discovery Papers; Scope of Discovery; Protective Orders; Sanctions; Supplementation of Responses.

(1) In conformity with this section, any party may, without leave of the commission or hearing officer, obtain discovery through requests for admissions, interrogatories, and requests for production or inspection as set forth in Section 27 of this administrative regulation. Discovery shall not be available through depositions under Section 28 of this administrative regulation without leave of the commission or hearing officer.

(2) Every paper relating to discovery required to be served on a party shall be served on all parties pursuant to Section 9 of this administrative regulation. Requests for production or inspection, requests for admission and responses, interrogatories and answers, and discovery depositions shall be served upon other counsel or parties, but shall not be filed with the commission or hearing officer. If the interrogatories, requests, answers, responses, or depositions are to be used at the hearing or are necessary to a prehearing motion that might result in a final order on any claim, the portions used shall be filed with the hearing officer or commission at the outset of the hearing or at the filing of the motion if their use can be reasonably anticipated.

(3) The information or response sought through discovery may concern any matter that is not privileged and is relevant to the subject matter involved in the pending case. It shall not be a ground for objection that the information or response sought will be inadmissible at the hearing, if the information or response appears reasonably calculated to lead to the discovery of admissible evidence, regardless of which party has the burden of proof.

(4) Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the hearing officer or commission may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

- (a) That the discovery not be had;
- (b) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;
- (c) That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
- (d) That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
- (e) That discovery be conducted with no one present except persons designated by the commission or hearing officer;
- (f) That a deposition after being sealed be opened only by order of the commission or hearing officer;
- (g) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; or
- (h) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the commission or hearing officer.

(5) A party may apply for an order compelling discovery if another party refuses or obstructs discovery. An evasive or incomplete answer shall be treated as failure to answer. If a hearing officer enters an order compelling discovery and there is failure to comply with that order, the hearing officer or commission may enter appropriate orders that are just, including the following sanctions:

- (a) An order that designated facts shall be taken to be established for purposes of the case in accordance with the claim of the party obtaining that order;
- (b) An order refusing to permit the disobedient party to support or oppose designated claims or defenses, or prohibiting it from introducing matters in evidence;
- (c) An order striking out pleadings or any of its parts, or staying further proceedings until the order is obeyed; or
- (d) An order dismissing the proceeding or any of its parts, or rendering an order by default against the disobedient party.

(6) A party who has responded to a request for discovery with a response that was complete when made shall not have to supplement the response to include information acquired later, except as established by this subsection.

(a) A party shall seasonably supplement the response with respect to any questions directly addressed to:

- 1. The identity and locations of persons having knowledge of discoverable matters; and
- 2. 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.

(b) A party shall seasonably amend a prior response if the party obtains information upon the basis of which:

- 1. The party knows that the response was incorrect when made; or
- 2. The party knows that the response though correct when made is no longer true and under the circumstances, a failure to amend the response is in substance a knowing concealment.

(c) A duty to supplement responses may be imposed by order of the commission or hearing officer, agreement of the parties, or at any time prior to the hearing through a new request for supplementation of prior responses.

Section 27. Requests for Admissions, Interrogatories, Production of Documents and Things.

(1) Requests for Admissions.

(a) At any time after the filing of responsive pleadings, a party may request of any other party written requests for admissions, for the purposes of the pending action only, of the genuineness and authenticity of any document described in or attached to the requests, or of the truth of any specified matter of facts to be made under oath. Each matter of which an admission is requested shall be stated separately. The number of requested admissions shall not exceed twenty-five (25), including subparts, without an order of the commission or hearing officer. The party seeking more than twenty-five (25) requested admissions, 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 requested admissions.

(b) Each admission requested shall be stated separately. The matter shall be admitted unless, within thirty (30) days after service of the request or within a shorter or longer time as the commission or the hearing officer may prescribe, the party to whom the request is directed serves upon the party requesting the admission a written response specifically:

1. Admitting or denying the matter involved in whole or in part;
2. Asserting that it cannot be truthfully admitted or denied and stating in detail the reasons why this is so; or
3. Stating an objection, explaining in detail the reason for the objection. The response shall be made under oath or affirmation and signed by the party or the party's representative.

(c) Any matter admitted under this subsection shall be conclusively established unless the commission or hearing officer on motion permits withdrawal or amendment of the admission. The commission or hearing officer may permit withdrawal or amendment if doing so will subserve the presentation of the merits of the case and the party who obtained the admission fails to satisfy the commission or hearing officer that withdrawal or amendment will prejudice that party in presenting his or her case or defense on the merits.

(2) Interrogatories.

(a) At any time after the filing of responsive pleadings, a party may serve interrogatories upon any other party. The number of interrogatories shall not exceed twenty-five (25) questions, including subparts, without an order of the commission or hearing officer. The party seeking to serve more than twenty-five (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. The following shall not be included in the maximum allowed:

1. Interrogatories requesting the name and address of the person answering;
2. The names and addresses of the witnesses; and
3. Whether the person answering is willing to supplement his or her answers if information subsequently becomes available.

(b) Each interrogatory shall be answered separately and fully in writing under oath or affirmation, unless it is objected to. If objected to, the reasons for objection shall be stated instead of an answer. The answers shall be signed by the person making them and the objections by the party or the party's counsel. The party upon whom the interrogatories have been served shall serve a copy of answers or objections upon all parties within thirty (30) days after service of the interrogatories. The hearing officer may allow a shorter or longer time.

(c) An interrogatory shall not necessarily be objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact.

(3) Production of documents and things.

(a) At any time after the filing of responsive pleadings, a party may serve on any other party a request to:

1. Produce or permit the party making the request, or a person acting on his or her 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; or
2. Permit entry upon the 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 operations on the property.

(b) The request shall state items to be inspected either by individual item or category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing related acts. The party upon whom the request is made shall serve a written response within thirty (30) days after the service of the request. The hearing officer may allow a shorter or longer time. 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. If objected to, the reasons for objection shall be stated.

Section 28. Discovery Depositions.

(1) Except by special order of the commission or the hearing officer, discovery depositions of parties, intervenors, or witnesses shall not be allowed.

(2) A party wishing to take a discovery deposition shall file a written application with the commission or hearing officer and shall serve the application on all other parties and intervenors not less than fourteen (14) days prior to the time when it is desired to take the discovery deposition. The application shall state the reasons why the deposition should be taken and shall contain:

- (a) The name and address of the deponent;
- (b) The scope of questioning expected to be asked of the deponent;
- (c) The time and place proposed for the taking of the deposition; and
- (d) The name and address of the officer before whom it is desired that the deposition be taken.

(3) If the commission or the hearing officer grants an application for the conduct of discovery depositions, the order shall state appropriate scope and time limits for the discovery.

(4)

- (a) Except as provided in paragraph (b) of this subsection, the procedure for taking the deposition shall be governed by Section 40(3) of this administrative regulation.
- (b) A discovery deposition transcript shall not be delivered to the executive director as required by Section 40(3) of this administrative regulation.
- (c) The officer before whom the deposition is taken shall meet the requirements of Section 40(2) of this administrative regulation.

Section 29. Issuance of Subpoenas; Petitions to Revoke or Modify Subpoenas; Right to Inspect or Copy Data.

(1) A member of the commission shall, on the application of a party directed to the commission, forthwith issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence, including relevant books, records, correspondence or documents in the witness's possession or under the witness's control. Applications for subpoenas, if filed subsequent to the assignment of the case to a hearing officer, may be filed with the hearing officer. A hearing officer shall grant the application on behalf of any member of the commission. Applications for subpoenas may be made ex

parte. The subpoena shall show on its face the name and address of the party at whose request the subpoena was issued.

(2) A person served with a subpoena, whether ad testificandum or duces tecum, shall within five (5) days after the date of service of the subpoena upon him move in writing to revoke or modify the subpoena if he does not intend to comply. Motions to revoke or modify shall be served on the party at whose request the subpoena was issued. The hearing officer or the commission, as the case may be, 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 hearing officer or the commission, as the case may be, shall make a simple statement of procedural or other grounds for the ruling on the motion to revoke or modify. The motion to revoke or modify, any answer filed in response, and the ruling on the motion shall become a part of the record.

(3) Persons compelled to submit data or evidence at a public proceeding may retain or, on payments of lawfully prescribed costs, procure copies of transcripts of the data or evidence submitted by them.

(4) Upon the failure of any person to comply with a subpoena issued upon the request of a party, the party seeking to enforce the challenged subpoena shall initiate proceedings in the Franklin Circuit Court or appropriate circuit court to enforce the subpoena if, in its judgment enforcement would be consistent with law and with policies of the Act.

Section 30. Notice of Hearing.

(1) Notice of the time, place, and nature of a hearing shall be given to the parties and intervenors at least ten (10) days in advance of the hearing, except as otherwise provided in Section 52 of this administrative regulation.

(2) Copy of notice of hearing shall be served by the employer on affected employees or the affected employees' representative as provided in Section 9(9) and (10) of this administrative regulation, if no information has been received by the employer as to the employee intervention in the case before the commission. Notice of hearing shall be given by the commission to any party or intervenor.

(3) The hearing officer shall secure or cause to be secured a location for the hearing and secure a reporter for the taking of proof at any hearing.

Section 31. Postponement of Hearing.

(1) Postponement of a hearing ordinarily shall not be allowed.

(2) Except in the case of an extreme emergency or in unusual circumstances, a request shall not be considered unless received in writing at least three (3) days in advance of the time set for the hearing.

(3) Postponement of hearing not in excess of thirty (30) days may be granted in the discretion of the hearing officer. One (1) additional postponement not in excess of thirty (30) days may be granted by the hearing officer in extreme emergency or under unusual circumstances. An additional postponement shall not be granted without commission approval.

Section 32. Failure to Appear.

(1) Subject to the provisions of subsection (3) of this section, the failure of a party to appear at a hearing shall be a waiver of all rights except the rights to be served with a copy of the decision of the hearing officer and to request commission review pursuant to Section 48 of this administrative regulation.

(2) Requests for reinstatement shall be made, in the absence of extraordinary circumstances, within five (5) days after the scheduled hearing date.

(3) The commission or the hearing officer upon a showing of good cause may excuse the failure to appear. If excused, the hearing shall be rescheduled.

Section 33. Payment of Witness Fees and Mileage; Fees of Persons Taking Depositions. Witness fees and mileage shall be paid by the party at whose instance the witness appears, and the person taking a deposition shall be paid by the party at whose instance the deposition is taken.

Section 34. Reporter's Fees. Reporter's fees shall be borne by the commission, except as provided in Section 33 of this administrative regulation.

Section 35. Transcript of Testimony. Hearings shall be transcribed verbatim. A copy of the transcript of testimony taken at the hearing, duly certified by the reporter, shall be filed with the hearing officer before whom the matter was heard. The hearing officer shall promptly serve notice upon each of the parties and intervenors of the filing. Participants desiring copies of transcripts may obtain them from the official reporter after paying the transcript fees.

Section 36. Duties and Powers of Hearing Officers. The hearing officer shall conduct a fair and impartial hearing to assure that the facts are fully elicited and to adjudicate all issues and avoid delay. The hearing officer shall have authority with respect to cases assigned to him, between the time he is designated and the time he issues his decision, subject to this administrative regulation, to:

- (1) Administer oaths and affirmations;
- (2) Issue authorized subpoenas;
- (3) Rule upon petitions to revoke subpoenas;
- (4) Rule upon offers of proof and receive relevant evidence;
- (5) Take or cause depositions to be taken if the needs of justice would be served;
- (6) 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;
- (7) Hold conferences for the settlement or simplification of the issues;
- (8) Dispose of procedural requests or similar matters including motions referred to the hearing officer by the commission and motions to amend pleadings; to dismiss complaints or portions of them; and to order hearings reopened or, upon motion, consolidated prior to issuance of his decision;
- (9) Call and examine witnesses and to introduce into the record documentary or other evidence;
- (10) Request the parties at any time during the hearing to state their respective positions concerning any issue in the case or theory in support of their positions;
- (11) Adjourn the hearing as the needs of justice and good administration require; and
- (12) Take any other action necessary and authorized by this administrative regulation.

Section 37. Disqualification of Hearing Officer.

- (1) A hearing officer may withdraw from a proceeding if disqualification is warranted.
- (2) A party may request the hearing officer at any time, following his designation and before the filing of his decision, to withdraw on grounds of personal bias or disqualification by filing with him promptly upon the discovery of the alleged facts an affidavit setting forth in detail the matters alleged to constitute grounds for disqualification.
- (3) If, in the opinion of the hearing officer the affidavit referred to in subsection (2) of this section is filed with due diligence and is sufficient on its face, the hearing officer shall forthwith disqualify himself and withdraw from the proceeding.

(4) If the hearing officer does not disqualify himself and withdraw from the proceedings, he shall so rule upon the record, stating the grounds for his ruling, and shall proceed with the hearing; or, if the hearing has closed, he shall proceed with the issuance of his decision in accordance with Section 47 of this administrative regulation.

Section 38. Examination of Witnesses. Witnesses shall be examined orally under oath. Opposing parties shall have the right to cross-examine any witness whose testimony is introduced by an adverse party.

Section 39. Affidavits. An affidavit may be admitted as evidence in lieu of oral testimony if the matters contained in the affidavit are otherwise admissible and the parties agree to its admission.

Section 40. Deposition in Lieu of Oral Testimony; Application; Procedures; Form; Rulings.

(1)

(a) An application to take the deposition of a witness in lieu of oral testimony shall be in writing and shall state the reasons a deposition should be taken. The application shall contain:

1. The name and address of the witness;
2. The matters the witness is expected to testify about;
3. The time and place proposed for the taking of the deposition; and
4. The name and address of the officer before whom it is desired that the deposition be taken. The officer shall meet the requirements of subsection (2) of this section.

(b) The application shall be filed with the commission or the hearing officer, as the case may be, and shall be served on all other parties and intervenors not less than seven (7) days (when the deposition is to be taken elsewhere) prior to the time when it is desired that the deposition be taken.

(c) If good cause has been shown, the commission or the hearing officer shall make and serve on the parties and 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. The officer may or may not be the officer specified in the application.

(2) The deposition may be taken before an officer authorized to administer oaths by the laws of Kentucky or of the place where the examination is held. If the examination is held in a foreign country, it may be taken before a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States.

(3) At the time and place specified in the order, the officer designated to take the deposition shall permit the witness to be examined and cross-examined under oath by all parties appearing, and the testimony of the witness shall be reduced to typewriting by the officer or under his direction. All objections to questions or evidence shall be waived, unless made at the examination. The officer shall not have power to rule upon any objection, but he shall note them upon the deposition. The testimony shall be subscribed by the witness in the presence of the officer who shall attach his certificate stating that the witness was duly sworn by him; 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 nor interested in the proceeding. If the deposition is not signed by the witness because he is ill, dead, cannot be found, refuses to sign it, or will be unavailable to sign the typed deposition and it is so stated by agreement, the 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 of the transcript, together with his certificate, in person or by certified mail to the Executive Director, Kentucky Occupational Safety and Health Review Commission, #4 Millcreek Park, Frankfort, Kentucky 40601.

(4) The hearing officer shall rule upon the admissibility of the deposition or any part of it.

(5) Errors or irregularities in compliance with the provisions of this section shall be waived unless a motion to suppress the deposition or some part of it is made with reasonable promptness after the defect is, or with due diligence might have been, discovered.

(6) If the parties 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.

Section 41. Exhibits.

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

(2) 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 hearing officer pursuant to Section 42 of this administrative regulation.

(3) Unless the hearing officer finds it impractical, a copy of each exhibit shall be given to the other parties and intervenors.

(4) All exhibits offered but denied admission into evidence shall be identified as in subsection (1) of this section and shall be placed in a separate file designated for rejected exhibits.

Section 42. Rules of Evidence. Hearings before the commission and its hearing officers insofar as practicable shall be governed by the Kentucky Rules of Evidence.

Section 43. Burden of Proof.

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

(2) In proceedings commenced by a request for extension or modification of the abatement period, the burden of establishing the necessity for the extension or modification shall rest with the petitioner.

(3) In all proceedings commenced by appealing from an adverse ruling on a variance application, the burden of proving the inequity of the ruling of the commissioner of the Department of Workplace Standards shall rest on the petitioner-complainant.

Section 44. Objections.

(1) An objection with respect to the conduct of the hearing, including an objection to the introduction of evidence or a ruling of 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. An objection shall not be waived by further participation in the hearing.

(2) If evidence is excluded from the record, the party offering the evidence may make an offer of proof, which shall be included in the record of the proceeding.

Section 45. Interlocutory Appeals; Special; as of Right.

(1) Rulings by the hearing officer shall not be appealed directly to the commission except by its special permission.

(2) Request to the commission for special permission to appeal from a ruling shall be filed in writing within five (5) days following receipt of the ruling and shall state briefly the grounds relied on.

(3) Interlocutory appeal from a ruling of the hearing officer shall be allowed as of right if the hearing officer certifies that:

(a) The ruling involves an important question of law concerning which there is substantial ground for difference of opinion; and

(b) An immediate appeal from the ruling will materially expedite the proceedings. An appeal shall also be allowed in the circumstances set forth in Section 12 of this

administrative regulation.

(4) Neither the filing of a petition for interlocutory appeal nor the granting thereof as provided in subsections (2) and (3) of this section shall stay the proceedings before the hearing officer unless a stay is specifically ordered by the commission.

Section 46. Filing of Briefs and Proposed Findings with the Hearing Officer; Oral Argument at the Hearing.

(1) Any party shall be entitled, upon request, to a reasonable period at the close of the hearing for oral argument, which shall be included in the stenographic report 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. The hearing officer may fix a reasonable period of time for the filing, but the initial period shall not exceed thirty (30) days from the receipt by the party of the transcript of the hearing or the date the hearing officer designates by order of his receipt. The complainant shall have fifteen (15) days to file, the respondent ten (10) days and the complainant five (5) days for reply, unless a shorter period is agreed on by all parties. Intervenors shall have until the 25th day of the thirty (30) day period in which to file briefs.

(2) A brief shall be filed within the time fixed and the hearing officer or the commission may refuse to consider any brief filed after the deadline. Application for extension of time to file briefs shall be made to the hearing officer or commission before whom the hearing was held.

(3) Briefs shall be accompanied with notice showing service upon all other parties; in addition to the original filed, three (3) copies of each document shall be furnished to the commission.

Section 47. Decisions of Hearing Officers.

(1) The decision of the hearing officer shall include findings of fact, conclusions of law, and a recommended order disposing of all issues before the hearing officer.

(2) The hearing officer shall sign the decision and forward to the executive director. The executive director shall then date and issue the decision, sending a copy to all parties of record and to each commission member. Upon issuance of the recommended order, jurisdiction shall rest solely in the commission, and all motions, petitions, and other pleadings filed subsequent to its issuance shall be addressed to the commission.

(3) The recommended order of the hearing officer may be called for further review by any commission member or by the commission as a whole at any time within a forty (40) day period. If the recommended order is not ordered for further review, it shall become the final order of the commission forty (40) days after date of issuance. If a recommended order is called for review by a commission member or the commission on its own order, parties shall be advised in order that briefs may be submitted if desired. The commission shall set the briefing time.

Section 48. Discretionary Review; Petition.

(1) A party aggrieved by the decision of a hearing officer may submit a petition for discretionary review.

(2) The petition shall be received by the commission at its offices in Frankfort, Kentucky on or before the 25th day following receipt by the commission of the hearing officer's decision.

(3) A petition shall contain a concise statement of each portion of the decision and order to which exception is taken and may be accompanied by a brief of points and authorities relied upon. The original and three (3) copies shall be filed with the commission.

(4) Statements in opposition to petitions for discretionary review may be filed at any time during the review period, if received by the commission on or before the 35th day from

date of issuance of the recommended order. The statement shall contain a concise statement on each portion of the petition for discretionary review to which it is addressed.

(5) The commission while reviewing a case may request briefs on any point, and shall set the time for filing.

(6) The original and three (3) copies of all briefs or statements provided for under this section and Section 47 of this administrative regulation shall be furnished for use of the commission.

(7) Failure to act on any petition for discretionary review in the review period shall be a denial of the petition.

Section 49. Stay of Final Order.

(1) A party aggrieved by a final order of the commission may, while the matter is within the jurisdiction of the commission, file a motion for a stay.

(2) The motion shall state the reasons a stay is sought and the length of the stay requested.

(3) The commission may order a stay for the period requested or for a longer or shorter period as it finds appropriate.

Section 50. Oral Argument Before the Commission.

(1) Oral argument before the commission ordinarily shall not be allowed.

(2) If the commission desires to hear oral argument with respect to any matter, it shall advise all parties to the proceeding of the date, hour, place, time allotted, and scope of argument at least ten (10) days prior to the date set.

Section 51. Settlement or Dismissals.

(1) Settlement is encouraged at any stage of the proceedings if a settlement is consistent with the provisions and objectives of the Act.

(2) Settlement agreements submitted by the parties shall be accompanied by an appropriate proposed order. The settlement agreement shall detail the basis for settlement, either by order or a stipulated agreement properly signed by all parties.

(3) If parties to settlement agree upon a proposal, it shall be served upon represented and unrepresented affected employees in the manner set forth in Section 9 of this administrative regulation. Proof of service shall accompany the proposed settlement when submitted to the commission or the hearing officer showing the notice to employees or authorized employee representative ten (10) days before submission to the hearing officer or the commission.

(4) In an action on a citation on motion of either party for dismissal, the motion shall state the reason for dismissal and show posting for ten (10) days as required for settlement agreements by subsection (3) of this section. If dismissal is moved by the respondent, respondent shall also show abatement of cited violation and payment of any penalty, if applicable.

Section 52. Expedited Proceeding.

(1) Upon application of a party or intervenor, or upon a commissioner's own motion, a commission member may order an expedited proceeding.

(2) If an expedited proceeding is ordered, the executive director shall notify all parties and intervenors.

(3) The hearing officer assigned in an expedited proceeding shall make necessary rulings, with respect to time for filing of pleadings and with respect to all other matters, without reference to times required by this administrative regulation, shall order daily transcripts of the hearing, and shall do all other things necessary to complete the proceeding in the minimum time consistent with fairness.

Section 53. Standards of Conduct. Persons appearing in a proceeding shall conform to the standards of ethical conduct required in the courts of the Commonwealth of Kentucky.

Section 54. Ex Parte Communication.

(1) There shall not be ex parte communication, with respect to the merits of any case not concluded, between the commission, including a member, officer, employee, or agent of the commission who is employed in the decisional process, and a party or intervenor.

(2) If an ex parte communication occurs, the commission or the hearing officer may make orders or take action as fairness requires. Upon notice and hearing, the commission may take disciplinary action as is appropriate in the circumstances against any person who knowingly and willfully makes or solicits the making of a prohibited ex parte communication.

Section 55. Restrictions as to Participation by Investigative or Prosecuting Officers. In a proceeding noticed pursuant to this administrative regulation, the commissioner shall not participate or advise with respect to the report of the hearing officer or the commission decision.

Section 56. Inspection and Reproduction of Documents.

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

(2) Costs shall be borne by the requesting person.

Section 57. Restrictions with Respect to Former Employees.

(1) A former employee of the commission or the commissioner (including a member of the commission or the executive director) shall not appear before the commission as an attorney for a party in a proceeding or other matter, formal or informal, in which the former employee participated personally and substantially during the period of employment.

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

Section 58. Amendments to Rules. The commission may at any time upon its own motion or initiative, or upon written suggestion of an interested person stating reasonable grounds in support, amend or revoke any of the rules contained in this administrative regulation, in compliance with KRS Chapter 13A.

Section 59. Special Circumstances, Waiver of Rules. In special circumstances not contemplated by this administrative regulation, or for good cause shown, the commission may, upon application by a party or intervenor, or on its own motion, after three (3) days notice to all parties and intervenors, waive any rule or issue orders as justice or the administration of the Act Requires.

Section 60. Penalties. All penalties assessed by the commission are civil.

(KOSHRC-Proc.-1; 1 Ky.R. 349; eff. 2-5-1975; 2 Ky.R. 288; eff. 2-4-1976; 6 Ky.R. 62; eff. 9-5-1979; 23 Ky.R. 191; eff. 9-11-1996; 40 Ky.R. 1440; 2695; eff. 7-7-2014; 45 Ky.R. 780, 1193; eff. 12-7-2018.)