

REGULATION SUMMARY

Section 5067 (Applications to Reopen):

This section deals with two areas of interest: 1) A party appeals an ALJ's decision dismissing the appeal for a number of reasons under section 5066, the most common being that the appellant failed to appear at the hearing; and, 2) A party appeals an ALJ's order denying an application to vacate under section 5068 or denying an application to reinstate a withdrawn appeal under section 5050 due to the party's nonappearance at the hearing on the application. The current regulation requires such an appeal be handled by an ALJ as application to reopen even if the party does not give a reason for the nonappearance or, if the application is late, for the delay. If no reason is given, the ALJ has two options: A) Send a letter asking for the reason or, more commonly, B) Set the matter for a hearing on the application. If the appellant misses the hearing on the application and files another appeal, the appeal is treated as yet another application to reopen. Under the current regulation, there is no limit to the number of nonappearances and additional applications to reopen a party may make and we have seen cases involving as many as 5 applications to reopen. This procedure ties up valuable hearing slots for parties who repeatedly are not diligent in pursuing their appeal or reopening rights.

The proposed changes to the regulation seek to preserve valuable hearing slots by allowing the ALJ to deny an application to reopen without a hearing if the applicant gives no reason for the nonappearance or, if the application is untimely, the applicant gives no reason for the delay. The Notice To Parties attached to the ALJ's decision already advises the parties that if they missed a scheduled hearing or have filed a late application, they must give a reason. The Notice will be strengthened to advise that the application will be denied if no reasons are given. Further, the proposed regulation will cap the number of applications to reopen that a party can make to just one. Any subsequent appeals will be treated as a board appeal unless the party gives reasons showing good cause for the prior nonappearances or late applications, in which case the application would be set for a hearing.

Section 5068 (Applications to Vacate)

Section 5068 involves situations where the respondent (the party that received the favorable EDD determination) does not appear at the hearing and receives an adverse ALJ decision on the merits (DOM). The party's appeal of the DOM is treated as an application to vacate the DOM. The current regulation presents the same issues involved under section 5067 with respect to the party not giving a reason for the nonappearance or for an untimely application and having multiple nonappearances and applications. To complicate matters further, if a party misses a hearing on an application to vacate under section 5068, a further appeal is treated as an application to reopen under section 5067, not under section 5068. The proposed changes to the section 5068 has 3 components: 1) all appeals where there has been a DOM will now be handled under section 5068, not under section 5067; 2) the ALJ has the authority to deny the application if no reasons are given for the nonappearance or for the late application; and 3) the number of applications is limited to one and any further appeals will be treated as a board appeal unless the party gives reasons showing good cause for the nonappearances or late applications, in which case the application will be set for hearing.

Section 5050 (Withdrawals and Reinstatements)

This section deals with parties that withdraw an appeal and then make an application for the appeal to be reinstated. The current regulation requires the party to give reasons for why the appeal should be reinstated and, if late, for the delay. The proposed regulation change parallels the changes to sections 5067 and 5068 by giving the ALJ the authority to deny an application to reinstate if no reasons are given for the nonappearance or, if applicable, for a late application.

Sections 5103 (Withdrawal and Reinstatement of Board Appeals) and 5104 (Board untimely documents)

The proposed regulation changes affecting the Board's processes are similar to proposed regulation changes affecting the processes of the Field Offices. In addition to existing options, an ALJ would have the option to dismiss an untimely filed board appeal or document or to deny an application to reinstate a withdrawn board appeal if no reasons are given for the untimely board appeal, untimely document or application to reinstate. These changes are consistent with practices the Board is already following.

Section 5062(p) Electronic Evidence

Currently, there is no regulation governing the presentation of evidence at a hearing in an electronic format (such as DVD, surveillance tape, cell phone camera picture, etc). Parties are unaware of how to present such evidence and Field ALJs are inconsistent on how they handle presentation of such evidence. This proposed regulation gives notice to the parties that they must present such evidence in a CD that is in a format compatible with Windows Media Player. This will allow the ALJ to view the evidence at the hearing and preserve it in a format the Board can review in a board appeal.

Section 5071 Decision or Order without a Hearing

This proposed change incorporates a procedure currently used by the Tax Unit with tax cases. It allows an ALJ to decide some cases based on the evidence present in the file without a hearing. The ALJ may send a notice to the parties of his or her intention to decide a case without a hearing. The parties have the right to object to this procedure and, if they do, a hearing will be scheduled. The types of cases where this procedure would be appropriate requires some discussion but it is intended to be used in cases where there is no dispute of material facts or the appealing party has a misunderstanding of the law. In cases involving a misunderstanding of the law, the ALJ would include with the notice a previously prepared explanation of the law that might help the parties understand the law such that they would either withdraw the appeal or allow the ALJ to make a decision consistent with the explanation of the law. Examples of situations where this proposed procedure might be used include Identity cases where a party produces trustworthy documents with the appeal that need to be sent back to EDD to verify a claimant's identity; Extension benefit cases where the party produces base period wages not previously known to EDD that need to be referred to EDD for further investigation; clear mistakes by EDD in not relieving the employer's reserve account where relief is allowed by law (e.g. 1030/1032 of the UIC); and ruling cases where the appellant's appeal is based on a misunderstanding of the law, etc.

5067, title 22, CCR amended:

- (a) The appellant, petitioner, or applicant may file an application to reopen the appeal, petition or application within 20 days after service of an order:
- (i) Dismissing an appeal or petition on any of the grounds specified in rule 5066;
 - (ii) Denying an application for reinstatement, ~~or reopening, or vacating a decision for failure to specify the reason for the application or, if applicable, the reason the application is untimely,~~ or for failure to comply with a 10 day notice to specify the reason for the application or, if applicable, the reason the application is untimely;
 - (iii) Denying an application for reinstatement, ~~or reopening, or vacating a decision~~ for failure to appear in the hearing on such an application;
 - (iv) Dismissing an untimely petition for failure to comply with a 20 day notice to specify the reason the petition is untimely; or,
 - (v) Denying a hearing on a petition for failure to apply for a hearing within 20 days after service of a notice of intention to render a decision or order on the petition without a hearing.
 - (vi) ~~Denying a hearing on an appeal for failure to apply for a hearing within 10 days after service of a notice of intention to render a decision or order on the appeal without a hearing.~~
- (b) The application shall specify the reason for reopening. If the application is untimely, it shall also specify the reason for the delay.
- (c) If the application fails to specify the reason for reopening, or, if applicable, for ~~it's the untimeliness-filing,~~ an administrative law judge may ~~serve notice requiring the applicant to specify the reason by filing it within 10 days after service of such notice. If the applicant fails to comply, an administrative law judge may~~ order reopening denied. ~~Alternatively, if the untimely application fails to specify a reason, an administrative law judge may serve notice requiring the applicant to specify the reason by filing it within 10 days after service of such notice. If the applicant fails to comply, an administrative law judge may order reopening denied.~~
- (d) If the reason specified by the applicant shows that there is no good cause for reopening, or, if applicable, for the untimely application, an administrative law judge may order reopening denied.
- (e) An application for reopening that is not otherwise denied, ~~or processed as a board appeal,~~ in accordance with this rule shall be scheduled for hearing. If the applicant shows good cause for reopening, and, if applicable, for the untimely application, the matter shall be ordered reopened; otherwise reopening shall be denied.
- (f) If an applicant for reopening fails to appear in the hearing on reopening, an administrative law judge may order reopening denied.
- (g) If a party that has grounds to file an application to reopen pursuant to subsection (a)(i), (a)(iv), (a)(v), or (a)(vi), files what purports to be a board appeal, it shall be treated as an application to reopen, unless the application or the party clearly states to the contrary.

- (h) If a party files an application to reopen pursuant to subsections (a) (ii)-(iii), or files what purports to be a board appeal, it shall be treated as a board appeal , unless the application provides grounds to find good cause for reopening.
- (i) An applicant may file a board appeal in accordance with rule 5008 to the order denying an application to reopen within 20 days after service of the order. An order granting reopening is appealable to the board only upon service of an adverse decision or order on the appeal or petition.

2/17/11

5068, title 22, CCR amended:

- (a) If a party fails to appear in any day of a hearing and an administrative law judge issues a decision on the merits adverse to that party's interest, the party may file an application to vacate the decision within 20 days after service of the decision. The application shall specify the reason for vacating the decision. If the application is untimely, it shall specify the reason for the delay.
- (b) If the application fails to specify the reason for vacating the decision, or, if applicable, for its ~~untimeliness- filing~~, an administrative law judge ~~may order the application to vacate the decision denied. may serve notice requiring the applicant to specify the reason by filing it within 10 days after service of such notice. If the applicant fails to comply, an administrative law judge may order the application to vacate the decision denied.~~ Alternatively, an administrative law judge may serve notice requiring the applicant to specify the reason by filing it within 10 days after service of such notice. If the applicant fails to comply, an administrative law judge may order the application to vacate the decision denied.
- (c) If the reason specified by the applicant shows that there is no good cause for vacating the decision, or, if applicable, for the untimely application, an administrative law judge may order the application to vacate the decision denied.
- (d) An application to vacate a decision that is not otherwise denied in accordance with this rule shall be scheduled for hearing. If the applicant shows good cause for vacating the decision, and, if applicable, for the untimely application, the decision shall be ordered vacated; otherwise the application to vacate the decision shall be ordered denied.
- (e) If an applicant fails to appear in the hearing on an application to vacate a decision, an administrative law judge may order the application denied.
- (f) If a party that has grounds to file an application to vacate a decision files what purports to be a board appeal, it shall be treated as an application to vacate the decision, unless the application or the party clearly states to the contrary.
- (g) ~~Except as provided in subsection (h) of this rule, u~~ Upon service of an order denying an application to vacate a decision, the applicant shall be deemed to have filed a board appeal of the denial of the application to vacate, and also of the original adverse decision which was the subject of the application to vacate.
- (h) ~~A party may file an application to reopen an order denying an application to vacate issued under subsections (b) or (e) of this rule within 20 days after service of the order. The application to reopen shall specify the reason for reopening and, if applicable, for its untimely filing. If the application provides grounds for finding good cause to reopen or, if applicable, for the untimely filing, the application shall be scheduled for a hearing. If the applicant shows good cause for reopening the decision, and, if applicable, for the untimely filing, the application shall be reopened; otherwise, an administrative law judge shall order the application denied. If the application does not provide grounds~~

for finding good cause to reopen or, if applicable, for the untimely filing, the application shall instead be processed as a board appeal and be deemed part of the board appeal specified in subsection (g) of this rule.

- (i) An order vacating a decision is appealable to the board only upon service of an adverse decision or order on the appeal or petition.

(2-01-11)

5050 Withdrawal and Reinstatement

- (a) An appellant or petitioner may apply to withdraw an appeal or petition before the decision of the administrative law judge is served.
- (b) Upon such an application, an administrative law judge shall order the appeal or petition dismissed.
- (c) An applicant may apply to withdraw an application for reinstatement, reopening or vacating a decision before the order of the administrative law judge on the application is served.
- (d) Upon such an application to withdraw, an administrative law judge shall order the application for reinstatement, reopening, or vacating dismissed.
- (e) The appellant, petitioner, or applicant may file an application for reinstatement within 20 days after service of an order dismissing an appeal, petition or application due to withdrawal. The application shall specify the reason for reinstatement. If the application is untimely, it shall also specify the reason for the delay.
- (f) If the application fails to specify the reason for reinstatement or, if applicable, for its **untimeliness filing**, an administrative law judge may **order reinstatement denied**. Alternatively, an **administrative law judge may** serve notice requiring the application to specify the reason by filing it within 10 days after service of such notice. If the applicant fails to comply, an administrative law judge may order reinstatement denied.
- (g) If the reason specified by the applicant shows that there is no good cause for reinstatement, or, if applicable, for the untimely application, an administrative law judge may order reinstatement denied.
- (h) An application for reinstatement that is not otherwise denied in accordance with this rule shall be scheduled for hearing. If the applicant shows good cause for reinstatement, and, if applicable, for the untimely application, the appeal or petition shall be ordered reinstated; otherwise reinstatement shall be ordered denied.
- (i) If an applicant for reinstatement fails to appear in the hearing on reinstatement, an administrative law judge may order reinstatement denied.
- (j) **An order granting reinstatement is appealable to the board only upon service of an adverse order or decision on the appeal or petition.**

(2-01-11)

5103 WITHDRAWAL AND REINSTATEMENT OF BOARD APPEAL

- (a) A Board appellant may file an application to withdraw a board appeal before the board decision is served.
- (b) Upon receipt of such an application, the board shall order the board appeal dismissed.
- (c) The board appellant may file and serve an application for reinstatement of the board appeal within 20 days after service of such a dismissal order. The application shall specify the reason for reinstatement. If the application is untimely, it shall also specify the reason for the delay.
- (d) Within 10 days after service of an application for reinstatement of a board appeal, any other party may file and serve a response to it.
- (e) If the application fails to specify the reason for reinstatement, or, if applicable, for its untimeliness, the board may **order the application denied. Alternatively, the board may** serve notice requiring the applicant to specify the reason by filing and serving it within 10 days after service of such notice. If the applicant fails to comply, the board may order reinstatement denied.
- (f) Within 10 days after service of such a specification of a reason, any other party may file and serve a response to it.
- (g) If the applicant shows good cause for reinstatement, and, if applicable, for the untimely application, the board appeal shall be ordered reinstated; otherwise reinstatement shall be ordered denied.

5062(p) Electronic Evidence

Recorded audio or video evidence shall be offered on compact disk (CD) in a format compatible with Windows Media Player.

5071. Decision or Order on Appeal Without Hearing

On his or her own motion, or on the application of a party, an administrative law judge may serve notice of intention to render a decision or order on an appeal without a hearing. Within 10 days after service of such a notice, any party may file and serve an application for a hearing. A hearing shall be granted upon such an application. If no such application is filed and served within that time, an administrative law judge may proceed to render a decision or order on the appeal without a hearing. The evidence of record in the proceeding and matters officially noticed in the proceeding shall be identified in the audiovisual record or the case register.

5104 Untimely Documents

- (a) Any untimely document filed in a proceeding before the board, including an untimely board appeal, shall specify the reason for the delay.
- (b) If an untimely document fails to specify the reason for the delay, the board may **dismiss the board appeal or deny acceptance of a document**. Alternatively, the board may serve notice requiring the party that filed it to specify the reason for the delay by filing and serving the reason within 10 days after service of such order. If the party that filed the untimely document fails to comply with such a notice, the board may order an untimely board appeal dismissed, or may deny late filing or service of any other untimely document.
- (c) Within 10 days after service of such a specification of a reason, any other party may file and serve a response to it.
- (d) If the party that filed an untimely document shows good cause for the delay, the untimely document shall be allowed **or the board appeal accepted**; otherwise an untimely board appeal shall be **shall be** ordered dismissed, or late filing or service of any other untimely document shall be denied.

(2-01-11)