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WORKSAFE OSH Appeals Board
safety, health, and justice for workers

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Occupational Safety and Health Appeals Board:

Worksafe and California Rural Legal Assistance submit the following comments to the proposed rule change to the Rules of Practice and Procedure of the Occupational Safety & Health Appeals Board, Title 8, C.C.R. Chapter 3.3 for discussion at its September 17, 2012 public meeting. We are in agreement with the newly added language in subsection (c) of §354 which clarifies party status for representatives of deceased employees.

We disagree, however, with the newly added language of subsection (b), which changed the original language of the regulation from "authorized representative" to "an authorized employee representative, as defined in section 347." This is not a clarification; in fact, the amended §354(b) violates the Administrative Procedures Act since §347(d) conflicts with the portion of Labor Code §6309 which more broadly defines an "employee's representative." Labor Code §6309 defines what is a formal complaint – that is one which is filed by "an employee" or "employee's representative," and goes on to define that representative as "including, **but not limited to**, an attorney, health or safety professional, union representative," [Emphasis added.]

OSHAB's proposed language must be stricken in that it does not account for amendments made to Labor Code §6309. Labor Code §6309 was amended after 8 CCR §347(d) was promulgated, and §347(d) was not updated to conform to the newer and overriding statutory language which defined representative more broadly. It would be inappropriate to compound this oversight now by referring to a definition that conflicts with a statute. The proposed language references California Code of Regulations (C.C.R.) §347(d), which more narrowly defines an "authorized employee representative" as a "labor organization which has a collective bargaining relationship with the cited employer and which represents affected employees or an employee organization, which has been formally acknowledged by a public agency as an employee organization that represents affected employees or an employee organization which has been formally acknowledged by a public agency as an employee organization that represents affected employees of the public agency." We submit that 8 CCR §347(d) should be either stricken immediately or amended to conform to the changes made in Labor Code §6309.

Not only does the proposed regulation conflict with the law, but also the amended language for §354(b) violates the Administrative Procedures Act because it creates an inconsistency by permitting OSHAB to deny party status to the very same representatives granted the right to file a formal complaint – a significant right in that it requires the Division to conduct an inspection. The representatives involved in the investigatory process could then find themselves shut out of the OSHAB process due to this conflict with the law.

Until the inconsistency between §347(d) and Labor Code §6309 is reconciled, other regulations should not refer to §347(d).

In addition, this new language results in our California program being not as effective as the Federal OSHA program. Specifically, the comparable federal standard to §347(d), 29 Code of Federal Regulations ("C.F.R.") §2200.1(h), specifies that a "representative" is authorized to represent employees in front of an OSHARC proceeding and can be "*any person*, including an authorized employee representative, authorized by a party or intervenor to represent him at a proceeding." (Emphasis added). Moreover, 29 C.F.R. § 2200.22 provides that any party can appear before OSHARC "through an attorney, or through another representative who is not an attorney" with no restriction with regard to whom the non-attorney representative can be. 29 C.F.R. §2200.22(a). See *Secretary of Labor v. Georgia-Pacific Corp.*, 1991 WL 132732, at *2 (O.S.H.R.C.).

Additionally, throughout the federal rules regarding OSHA appeals, discussions of representation efforts on behalf of employees refer broadly to "representatives" of the employee without limiting it to a representative that has a recognized collective bargaining agreement. See e.g. 29 C.F.R. §§ 2200.23 (Appearances and withdrawals); 2200.32 (Signing of pleadings and motions); 2200.37(c)(2) (Petitions for modification of the abatement period).

This is not a matter of our advocating that the California regulations must mirror the federal program. Rather, the changes being proposed for California really weaken our program as compared to the federal program. The OSHA Review Commission has been recognized for fostering a litigation environment that is friendly to *pro se* litigants, which includes authorizing non-attorneys to represent parties in proceedings. See *Alternative Dispute Resolution And The Occupational Safety And Health Review Commission: Settlement Judges And Simplified Proceedings*, 5 Admin. L.J. 555, 636 (1991). This is essential to a properly functioning occupational safety and health enforcement scheme and thus these broader policy considerations should be afforded deference.

Conclusion

In conclusion, not only does the newly added language conflict with a statute, which is impermissible under the Administrative Procedures Act, but also the federal program establishes a broader definition of a "representative" which California's program must meet to be as effective as the federal program.

Respectfully submitted,

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