

WORKSAFE

safety, health, and justice for workers

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OSH Appeals BoardBY EMAIL & FASCIMILE: oshab@dir.ca.gov & (916) 274-5785

Occupational Safety and Health Appeals Board:

We, the below signed organizations, submit the following comments concerning the proposed changes to the proposed amendment of §354(b) of Title 8 of the California Code of Regulations ("8 CCR"). We appreciate the Occupational Safety and Health Appeals Board's recent revisions in response to comments received from the public.

We believe, however, that the proposed regulatory language, as written, fails in that it does not meet the requirements of the Administrative Procedures Act. Among other things, (1) the regulatory language is not clear, and (2) the proposed language, which references the phrase "affected employees," is in conflict with existing law. The language is unclear because the word "or" is used in §354(b) joining the two categories of representatives addressed by the regulation. This would allow for a construction that the Board need only grant party status to one or the other of those representatives, but not both. It is our position that both organizations that represent workers who may be exposed to the hazard *AND* representatives of an individual employee who may have been injured or killed as a result of the hazard must have the right to party status. The language is also unclear because the definition of "affected employees" does not distinguish between an employee who may be exposed to the hazard and an employee who is actually injured or killed. Finally, the regulation conflicts with the Labor Code because the referenced definition of "affected employees" focuses only on citations issued to the employer of a particular employee; this excludes an affected employee who is employed by an employer who was not cited although that employee may have been exposed to a hazard for which a citation was issued to another employer pursuant to Labor Code §6400(b) pertaining to multi-employer liability.

Moreover, as stated in the comments that we submitted on September 17, 2012, the proposed language still 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. That is the proposed language 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 representatives more broadly. The proposed language still references the term an "authorized employee representative" which is more limiting than what is allowed under Labor Code §6309.

Respectfully submitted,

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Southern California Coalition
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