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OSH Appeals Board

September 17, 2012

Occupational Safety and Health Appeals Board
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Dear Members of the Occupational Safety and Heath Appeals Board,

On behalf of its 86,000 registered nurse members, the California Nurses Association is pleased to be able to comment on the proposed rulemaking of the Occupational Safety and Health Appeals Board (OSHAB). Our members work in a number of settings where occupational injury and occupational exposure to toxic substances and communicable diseases is a daily threat to their health, well-being and their ability to continue to work in their chosen profession. CNA was the sponsor of recent legislation, AB 1136 (Swanson) Chapter 554, Statutes of 2011, the Hospital Patient and Health Care Worker Injury Protection Act, a bill that addresses illness and injury related to occupational musculoskeletal disorders. Although the law only went into effect January 1, 2012 and CalOSHA is currently developing implementing regulations, the first health facility citation and fine has already been issued by DOSH on 8/24/2012 to Kaiser Foundation Hospital in Walnut Creek.

CNA is the authorized representative of our registered nurse members and have an interest in reviewing rulemaking proposals for this important Board.

The Initial Statement of Reasons (ISR) gives the rationale for the language changes in Section 354 (b), in relevant part, as:

> "This proposed change also allows both an affected employee (living or deceased) and a union representative to participate in the same appeal. The union representative currently is afforded party status, but the rule does not allow both a union representative and the affected employee to appear in the same proceeding. By making this change, **union representatives can continue to participate as parties, but there is no longer a competition between a union and its affected employee** to be the first to file for party status." (emphasis added)

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> "The Board anticipates the benefit resulting from the proposed change to be that employee and union participation will increase. By removing procedural hurdles that are not required by the OSH Act, Unions and affected employees **who want to participate can do so.**" (emphasis added)

CNA has concerns about the wording of part of the proposed changes to Section 354(b) below:

> (b) An affected employee or authorized representative of an affected employee shall be made a party to a proceeding upon motion made ~~move to participate as a party to a proceeding by filing a motion~~ in accordance with Section 371. If the interests of justice require, both an affected employee and an authorized employee representative, as defined in section 347, may be granted party status in the same proceeding.

The goal of the rulemaking in this subsection, according to the ISR, is essentially to level the playing field for affected employees so that they may have equal access to party status without having to compete with their union. We agree that the union has an advantage in the wording of the current language because the union is more knowledgeable about appeal proceedings and would be more likely to anticipate an employer's response to citations and fines for unsafe working conditions. As a result the employee is disadvantaged when it comes to timelines for motion and filings if party status is granted to only an earlier filing authorized employee representative. As an authorized representatives of employees who may be injured at work, we do not think the current language is unjust but we also do not have objections to a change in language that expands access **to include both the union and the employee**.

However, we do not think the qualifying language that precedes the second sentence, "If the interests of justice require..." guarantees this expanded access to include both the union and the employee equally. "If the interests of justice require" implies that there will be an arbiter that determines what is in "the interest of justice" prior to the appeal process and a judgment made whether or not both parties may participate equally in the appeal hearing. CNA is not impugning the integrity of any individual representing the OSHAB it is simply that the qualifying language does not appear to fully accomplish the stated goal that both the employee and the union representative shall be made a party to a proceeding upon motion made. Up to this point in time either the employee or the union representative would be granted party status based on the timing of the motion and on no other factor. Is seems logical that when language to expand access to party status to both the employee and their authorized representative is considered, it should actually expand it to include both the employee and the authorized representative equally without resorting to any additional ALJ proceeding(s). A proceeding to determine whether party status for the employee or the authorized representative of the employee fails to meet some undefined "interest of justice" standard could potentially prolong the appeal process and ads to the work of the Board or the ALJ.

CNA respectfully suggests that the goal would still be met by eliminating the conditional language as follows:

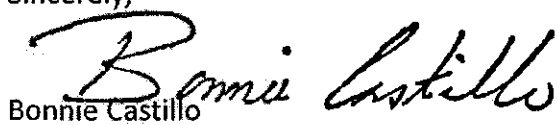
(b) An affected employee or authorized representative of an affected employee shall be made a party to a proceeding upon motion made ~~move to participate as a party to a proceeding by filing a motion~~ in accordance with Section 371. ~~If the interests of justice require, both~~ **Both** an affected employee and an authorized employee representative, as defined in section 347, may be granted party status in the same proceeding

CNA agrees with the specificity of the OSHAB language of Section 354 (c) that lists and prioritizes who would assume the rights of a deceased employee who is a party in an appeal. In it's October 5, 2009 letter to the OSHAB, the California Labor Federation, Worksafe and the California Rural Legal Assistance Foundation submitted language making the recommendation that this specific issue be considered by the OSHAB. We are pleased to see that the recommendation was acted upon.

CNA has reviewed the other proposed amendments that include § 371.2 Amendments, §373(b) Expedited Abatement, §376.1(f) Continuance at hearing and §386(b) Amendment by administrative law judge after submission. We have no comments or specific concerns on these sections. The Initial Statement of Reasons fully explains the rationale for changes requiring amendment(s) to these sections and subsections of *Title 8: Division 1, Chapter 3.3, Article 1.* , Article 3 and Article 4.

Thank you for the opportunity to comment on these proposed changes.

Sincerely,



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