

DEPARTMENT OF INDUSTRIAL RELATIONS
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

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FINAL STATEMENT OF REASONS

CALIFORNIA CODE OF REGULATIONS
TITLE 8: Chapter 3.3, Articles 1, 3 and 4
Sections 354, 371.2, 373, 376.1, and 386

Changes to the Occupational Safety and Health Appeals Board's
Rules of Practice and Procedure Pertaining to Party Status, Amendment of the Citation or
Appeal, Continuances at Hearing, and Expediting Appeals.

The Occupational Safety and Health Appeals Board (Board) is charged with adjudicating appeals from citations issued by the Division of Occupational Safety and Health. Labor Code section 148.7 authorizes the Board to adopt rules of practice and procedure to fulfill its mandate. Labor Code section 6603 identifies some limitations on the rulemaking authority of the Appeals Board by identifying specific portions of the Government Code with which the Board's Rules of Practice and Procedure must be consistent. The Board supplements and amends its rules of practice and procedure as needed.

ADDITIONAL DOCUMENTS RELIED UPON OR INCORPORATED BY REFERENCE

None.

DETERMINATION OF MANDATE

The proposed changes to the Rules of Practice and Procedure do not impose a mandate on local agencies or school districts, as indicated in the Initial Statement of Reasons.

DETERMINATION OF ALTERNATIVES

The Board has determined that no reasonable alternatives it considered or that have otherwise been identified and brought to its attention would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

MODIFICATIONS AND RESPONSE TO COMMENTS RESULTING FROM THE 45-DAY
PUBLIC COMMENT PERIOD

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The modifications to the information contained in the Initial Statement of Reasons are limited to the following non-substantive, and substantive, sufficiently related modifications that are the result of public comment and Board evaluation.

Section 354:

Non-substantive modifications:

In the originally proposed changes to section 354, a typographical error appeared. The word “may” in the second line of subsection (b) was underlined, indicating a proposed addition. However, the word “may” should have been in strike-through type because it is part of the existing language in that location, immediately before the word “move”. This has been corrected in the final text adopted by the Agency and included in this record. And, when the Board published its Notice of 15-day comment period regarding an additional proposed modification to section 354, this typographical error was corrected.

Substantive, sufficiently related modifications:

In response to comments received from the public during the comment period, the Board opted to remove the phrase “In the interests of justice” and to replace it with reference to the existing discretion provided to Administrative Law Judges in the existing rules to make orders that further the purposes of the Occupational Safety and Health Act. s Permitting more than one affected employee or more than one authorized employee representative to participate as a party in the proceeding is still achieved by this modified proposal. This reference to the existing discretion of judges is sufficiently related to the original proposed language (“in the interest of justice”) that the regulated community could have anticipated the use of this different term. Both phrases describe and preserve the judges’ discretion to grant or deny requests for additional parties.

Summary and Response to Oral and Written Comments received during the 45-day public comment period published in the California Regulatory Notice Register dated August 3, 2012

Section 354(b): Party Status

The Board received written comments on the proposed change to this regulation.

1. Ms. Bonnie Castillo commented on behalf of the California Nurses Association (CNA). Ms. Castillo wrote that the phrase “if the interests of justice require” does not appear to accomplish the goal of allowing both the union representative and the employee to participate as parties in the same appeal. Ms. Castillo commented that the phrase seems to indicate that, prior to the appeal hearing, an intermediary would evaluate the “interests of justice” and determine whether the union representative or the employee may participate in the proceeding, and that this would eliminate the goal of dual participation. CNA also feels that such an additional procedure to determine if the interests of justice require both the employee and the union to participate as parties could lengthen the appeals process and result in increased work for the Appeals Board.

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RESPONSE: The Board thanks Ms. Castillo for her comment. In response to this comment, the Board proposed further changes and noticed an additional 15 day comment period. The Board's proposed change removed the phrase "in the interests of justice" and replaced it with language stating that if more than one affected employee or more than one authorized employee representative qualified for party status, each may be granted party status in accordance with the discretion given an Administrative Law Judge under Board regulation 350.1. The change also removed the proposed inclusion of the reference to the definition of "affected employee representative" as such was unnecessary. Under principles of statutory construction, defined terms must be applied even without a specific reference to the definitional section of the enactment. Neither the initial nor subsequently proposed changes alter who can be a party. This language states that both the affected worker and a union representative of the affected worker could be granted party status in the same proceeding. Current Appeals Board Regulation 354(b) states that one or the other may make a motion for party status. Although the "or" may be interpreted as allowing either the affected employee or the union representative to participate without preclusive effect, in practice the Board has read the word "or" to mean only one or the other of the two potential parties may be a party. The intention of this amended language is to allow both to participate. The Board does not foresee the need for an additional hearing to determine eligibility of a union representative or employee, or both, to participate in the appeal process. Currently, party status motions are administered without the need for additional hearings, and this practice would continue. Labor Code section 6603 states that the Rules of Practice and Procedure shall provide affected employees or their representatives an opportunity to participate. Allowing both an affected employee and a union to participate is permitted by the enabling legislation. Each must be given the opportunity to participate, but each is not automatically a party. Joint participation is permissible, and this amendment implements that permission.

2. The Board received further comment, authored jointly by Ms. Jora Trang of Worksafe, Ms. Cynthia Rice of California Rural Legal Assistance and Ms. Frances Schreiber of Kazan, McClain, Lyons et. al.

Speaking on behalf of their organizations, the commenters took exception to the language "authorized employee representative, as defined in section 347," in that they believe it is in conflict with Labor Code section 6309, which they feel contains the governing definition of "employee representative". They further assert that it is a change regarding who may currently appear as a party in Board proceedings.

Additionally, the commenters felt that the new language causes the CalOSHA program to be not as effective as the Federal OSHA program in that it reduces the access to the Board for pro se litigants.

These written comments were repeated orally by Angelo Mathay of Worksafe at the public hearing.

RESPONSE:

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The Board thanks Worksafe, California Rural Legal Assistance and Ms. Schreiber for their commentary. The Board disagrees that Labor Code section 6309 provides the governing definition of an “authorized employee representative” who may be a party to an appeal proceeding as used in the proposed amendment. Labor Code section 6309 defines who may report an alleged unsafe workplace to the Division of Occupational Safety and Health such that an investigation is then required by the Division. It states “employees” and “representatives of employees” may report alleged violations to the Division of Occupational Safety and Health. Since the Appeals Board does not receive complaints or investigate alleged violations, section 6309 does not apply to the Appeals Board.

Labor Code section 6603 applies to Appeals Board proceedings. That statute defines who may participate as a party in Board proceedings and is the enabling legislation for these Rules of Practice and Procedure. This enabling legislation states that an “affected employee or representatives of affected employees” shall be afforded an opportunity to participate in Board proceedings as parties. Labor Code section 6309 and section 6602 are distinct provisions, in separate chapters of the OSH act (Chapters 1 and 7); directing different state agencies (Division of Occupational Safety and Health (the “Division”) and Cal/OSHA Appeals Board) to undertake different tasks (investigate and adjudicate).

Moreover, the very terms are different among the two provisions. Section 6603 states that “affected employees” or “representatives of affected employees” shall be afforded the opportunity to obtain party status. Section 6309 states that any “employee” or “an employee’s representative, including but not limited to, an attorney, health and safety professional, union representative, or government agency, or an employer of an employee directly involved in an unsafe place of employment,” may report an unsafe working condition. Thus, the Division is obligated to investigate under section 6309 whenever any employee or other person on the list (either explicitly or within the meaning of “not limited to” the examples on the list) of designated representatives reports an unsafe condition. The reporting employee need not be affected by the alleged violative condition; and any employee representative, in the sense of a legal or de facto representative such as an employee’s attorney, may also report suspected unsafe workplaces, even if those they represent are not affected by the condition reported.

In contradistinction to whose report triggers an investigation by the Division, once the violation has become the subject of an investigation, a citation, and then an appeal, only “affected employees” or “representatives of affected employees” may participate as parties per Labor Code section 6602. These two Labor Code sections are easily read consistently with one another, and there is no conflict between them. Each addresses a different situation. As such, the language in this amendment is not in conflict with the California Labor Code, as asserted by the commenters.

The Board recognizes that there may be confusion created by the existing use of the word “authorized” in two distinct regulatory contexts: Title 8, Cal. Code of Regulations section 347, subsections (d) (definition of union as party, entitled “Authorized Employee Representative”) and (x) (defining “Representative” as a person authorized by a party to represent it in board proceedings.). First, we note the word “authorized” appears only in the regulations and not in the enabling legislation. Second, these definitional sections have been in place since 1984. Third, this confusion was considered during the several stakeholder meetings in which this

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amendment was developed. Using the phrase “authorized employee representative” clarifies that the Board is not changing the existing definition of who may request and obtain party status as “representatives of affected employees” allowed by Labor Code section 6603.

The Board did not change longstanding definitional sections which have led to no administrative difficulties. In response to the comments regarding the use of the word “authorized”, the Board proposed additional changes to the initially proposed language and noticed an additional 15-day comment period. These additional changes removed the reference to the definitional section and retained the already defined term, “authorized employee representative.” The definition of who may obtain party status remains unchanged by either the initially proposed language or the subsequent proposed changes to the initial proposal.

The Board does not, nor has it ever, construe the term “representatives of affected employees” in Labor Code section 6603 or regulation section 354 to be referring to an affected employee’s lawyer or authorized ad litem representative. The commenters make an argument for greatly expanding the kind of person who may be a party to a proceeding before the Appeals Board. However, as explained, the commenters’ reference to Labor Code section 6309 is not relevant authority with regard to who may participate as a party in a proceeding before the Board. Rather than narrow the existing rule, as the commenters assert, the amendment proposed here retains the current rule. All that is changed is that party status requested by an affected employee or his union will be automatically granted, and if both request party status, both may participate as parties. Should the commenters wish to change the current definition of “Authorized Employee Representative,” they may petition the Board for that rule change. This amendment, however, merely endeavors to allow both an affected employee and an authorized employee representative to appear in the same proceeding, as opposed to the continuation of current practice, which is to allow either an affected employee or an authorized employee representative (i.e., union representative), but not both, to appear as parties in a board proceeding.

In addition, the Board disagrees that an amendment to Labor Code section 6309, occurring after the enactment of Board regulation section 347(d), effectively amends or repeals by implication the specific terms of the enabling legislation, section 6603, for the regulatory section implementing 6603. Since inception of the OSH program in California, the term “representatives of affected employees” in Labor Code section 6603 has been interpreted in the regulation to mean the union that represents employees at the cited employer. That is the only provision in the OSH Act defining who may be a party to Board proceedings. Section 6309 does not mention Appeals Board proceedings or party status and is directed at the enforcement agency, not the adjudicatory agency within the OSH program. There is no textual support for the interpretation offered by the commenter, and it would be beyond the Board’s rulemaking authority to implement any portion of Chapter 1 of part 1 of Division 5 of the Labor Code, where section 6309 is located. The rulemaking authority of the Appeals Board is only in Chapter 7 of Part 1 of Division 5 of the Labor Code.

The Board also does not consider the term “employee’s representative” as used in Labor Code section 6309 as the defining term to use for all Occupational Safety and Health purposes. Rather, the use of that term in section 6309 is an open ended list of many potential reporters of violations. This serves the enforcement purpose of encouraging many reports of unsafe working

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conditions. It would be inappropriate to apply that definition of “representative” to the party status definition of “representatives” contained in Labor Code section 6603. The purpose of section 6603 is not to encourage many reports or to encourage and permit all potentially concerned people or entities to participate. The purpose of section 6603 is to allow an affected employee or the representatives of affected employees (i.e., an authorized union) to participate as parties. If those parties wish to hire or otherwise engage a representative to appear on their behalf, they may do so under existing rules such as 355(c), which allows a party to appoint a hearing representative to appear on its behalf and 347(x), which defines who may appear on behalf of a party.

Finally, the commenter agrees that the California regulations need not mirror the federal procedures but asserts that the federal program is superior in that it fosters a friendly environment for pro se litigants, which includes authorizing non-attorneys to represent parties. We direct the commenter to Board regulation 347(x) which defines representative as “a person authorized by a party or intervenor to represent that party or intervenor in a proceeding.” This is nearly identical to the rule the commenter asserts should apply in Board proceedings, 29 C.F.R. 2200.1(h) (“representative means any person, including an authorized employee representative, authorized by a party or intervenor to represent him in a proceeding.”) This rule allows attorneys and non-attorneys to represent an employer, an employee-party, a union representative-party, or an intervenor, in the proceedings. The current rule is as liberal as the federal rule in allowing pro-se litigants to hire a non-lawyer representative to represent them in the appeal proceedings.

Other concerns in this written comment regarding the limited scope of Labor Code section 6603, which only requires “affected employees and representatives of affected employees” be given the opportunity to participate as parties, are beyond the scope of this rulemaking. The Board did not change in any way who may be granted party status. Through this amendment, the Board has only changed its current practice of allowing only one or the other (of the two types of parties defined in the Board’s regulation 347) to obtain party status in a single proceeding. No usage in the federal program cited in the written comments clarifies that an affected employee’s attorney can become a party or that a union without a collective bargaining agreement with the employer can become a party. Our rules are consistent with the federal rules in this regard, though such is not required.

Therefore any concern that the proposed amendment language may cause the Cal/OSHA appeals program to be not as effective as the federal program is unfounded.

Section 371.2: Amendments

Section 373: Expedited Hearing

Section 376.1: Conduct of Hearing

Section 386: Post-Submission Amendments

The Board received oral comments regarding proposed changes to Section 371.2, Section 373, Section 376.1 and Section 386.

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Kevin Bland, representing the California Framing Contractors' Association, thanked the Board for its efforts in organizing advisory committees to facilitate a collaborative effort on the part of labor and management in drafting the proposed changes. Mr. Bland also commented that he believed the language of the proposed regulatory changes is a consensus of input by both labor and management. He then thanked the board for holding the public hearing to allow parties to comment further.

Ms. Marti Fisher, representing the California Chamber of Commerce, commented that her organization was "very supportive" of the language presented for all of the proposed regulatory changes and that she believed the process to be thorough and "consensus driven". Ms. Fisher noted that the Chamber is "especially pleased" with proposed changes to Section 373 regarding expedited appeal processing, in light of the success of the Board's previous expedited appeal pilot project.

RESPONSE:

The Board thanks Mr. Bland and Ms. Fisher for their comments.

MODIFICATIONS AND RESPONSE TO COMMENTS RESULTING FROM THE 15-DAY NOTICE OR PROPOSED MODIFICATIONS

Comments Received during 15-day comment period to proposed additional changes to section 354 and Responses thereto are set forth by commenter except when combined as noted.

1. California Chamber of Commerce, through its representative Marti Fisher, submitted comments. Also, the Construction Employers Association, through its representative Dana Lahargoue, commented similarly to comment 2 made by the California Chamber of Commerce. These comments and the Board's responses are combined here.

COMMENT 1: An unlimited number of parties with the same interests is unnecessary and strays from the purpose of the hearing, stated as providing employers a venue for a fair hearing.

RESPONSE: The Board thanks the California Chamber of Commerce for this comment. While multiple parties with similar interests may, in a particular case, be unnecessary, the Labor Code requires the Appeals Board to allow for the participation of affected employees or their union representatives in addition to providing an administrative hearing for employers to contest citations. (Labor Code section 6600, 6603.) Thus, allowing multiple parties does not stray from the purpose of a hearing. The necessity of multiple participants was established by the Labor Code when it imposed the obligation on the Appeals Board to allow such people and entities to participate. Also, the regulation does not require an unlimited number of parties. Typically, one affected employee and one authorized employee

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representative would be all that would join as parties. Additional parties may be granted party status at the discretion of the ALJ who is empowered by Section 350.1 to “issue such interlocutory and final orders . . . as may be necessary to further the purposes of the California Occupational Safety and Health Act.” This amendment does not alter, expand or diminish the discretion currently afforded an ALJ.

COMMENT 2: Both the California Chamber of Commerce and the Construction Employers’ Association commented that multiple employee parties will unduly burden the Board and create a backlog.

RESPONSE: The Board thanks the California Chamber of Commerce and the Construction Employers’ Association for their comment. The Board is unaware of any statistical support for the assertion that a backlog is caused by multi-party cases. Several years ago the Board successfully eliminated its backlog and has not developed a new backlog. Throughout the analysis of the cause for the backlog, multi-party cases were not identified as a cause. For this reason, the Board disagrees that an increase in multi-party cases, should they occur, will create a backlog.

COMMENT 3: The California Chamber of Commerce commented that the intervenor proceeding is sufficient for additional employee parties.

RESPONSE: The Board thanks the California Chamber of Commerce for its comment. The Board disagrees that the intervenor and the party status rule are interchangeable and can provide the same level of participation to affected employees and union representatives. The intervenor rule states the Administrative Law Judge may permit any level of participation suitable to providing a fair hearing. However, parties have the right and obligation to participate in discovery (sections 372 et seq.) and to present and cross-examine witnesses, among other things. (Section 376.1). By contrast, a person granted intervenor status may participate only to the extent consistent with the terms of the order granting intervention. (Section 354.1). Limiting affected employees or their unions to intervenor status is inconsistent with Labor Code section 6603, which states that such participants shall be provided the opportunity to participate as parties.

COMMENT 4: The California Chamber of Commerce commented that the initial purpose of the rule change was only to allow deceased affected employees to be represented by family members in a hearing, and this proposal improperly expands that purpose.

RESPONSE: The Board thanks the California Chamber of Commerce for its comment. The Initial Statement of Reasons includes a statement that the purpose of the rule was to allow deceased affected employees to participate as parties through a surviving representative. The Initial Statement of Reasons also contains several paragraphs describing the intent and effect of the proposed amendment as clarifying that both an affected employee (or his or her survivor) as well as his or her union representative have the right to participate as parties in the same proceeding. The Board thus disagrees that the purpose of the proposed change was limited to addressing the situation of a deceased affected employee. The Board directs the commenter’s attention to the language initially proposed and deleted in this subsequent

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proposal, which states that “both an affected employee and an authorized employee representative” may be granted party status in the same proceeding. Initially, dual participation was intended. This proposed subsequent change removes the undefined phrase “the interests of justice require.” The phrase is replaced by reference to the current authority of ALJs to make orders necessary to further the purposes of the Occupational Safety and Health Act. ALJs thus retain their current authority to control the hearing process. This effect was intended initially, and after reviewing comments regarding this phrase, the Board believes the reference to existing ALJ authority better effectuates that intent. Both the initial proposed language and the subsequently proposed language permit multiple parties in a single proceeding.

2. United Contractors, through its representative Mallori Spilker, commented on January 24, 2013, that the phrase “shall be made a party to a proceeding upon motion made” would have a detrimental effect on employers. This comment is not responsive to the changes for which the 15-day comment period was provided but refers to changes in the original proposal. The comment period for such proposed change closed on September 17, 2012, and therefore this comment was submitted outside of the comment period. A response is not required.

3. Worksafe, through its representative Jora Trang, Francis Schreiber of Kazan McClain, and the Southern California Coalition for Occupational Safety and Health commented jointly. The comments are summarized and responded to jointly.

COMMENT 1: The proposed changes are not clear and the use of the phrase “affected employee” is contrary to law.

RESPONSE: The Board thanks the commenters for their comments. The Board disagrees that the language is unclear. The language gives specific direction to the ALJ regarding how to proceed when either more than one affected employee or more than one union representative seek party status in the same proceeding. The ALJ is to use the discretion granted in Board regulation 350.1 to make any order needed to further the purpose of the Occupational Safety and Health Act. The ALJ may grant or deny additional party status requests in any individual case by using that existing guideline. And, rather than being contrary to existing law, the use of the phrase “affected employee” is entirely consistent with the enabling legislation, Labor Code section 6603, which also uses the phrase “affected employee.”

COMMENT 2: These commenters assert that both organizations that represent workers who may be exposed to the hazard and representatives of an individual employee who has been killed must have the right to party status.

RESPONSE: The Board thanks the commenters for their comment. The original proposed changes state clearly that both an affected employee and his or her union representative have a right to participate in a hearing as a party. The additional proposed change merely gives direction to the ALJ and the regulated community for the situation in which multiple affected employees, or multiple union representatives (i.e., “authorized employee

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representatives”) seek party status in the same proceeding.

COMMENT 3: These commenters assert that 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, which excludes employees exposed to hazards that are the responsibility of another employer on a multi-employer worksite.

RESPONSE: The Board thanks the group for their comments. The Board refers the commenters to the Initial Statement of Reasons at the bottom of page two and the top of page three, which states, “The definitions of “affected employee” and “authorized employee representative” appear in section 347 and are unchanged by this proposed amendment.” Any concerns regarding the definition of these terms are outside the scope of this rulemaking and are unaffected by the proposed changes.

COMMENT 4: These commenters reiterate the comment submitted during the original 45-day comment period. They assert that the definition of “authorized employee representative” conflicts with Labor Code section 6309. The response to that earlier comment is incorporated here by this reference.