

STATE OF NEVADA
Minutes for the
Nevada Occupational Safety and Health Review Board
Las Vegas, NV

August 9, 2023

Rodd Weber (Management)
Frank Milligan (Public at Large)
William Spielberg (Labor)
Jorge Macias (Management)
Scott Fullerton (Labor)

On August 9, 2023, a meeting of the Nevada Occupational Safety and Health Review Board was convened. The meeting was duly noticed in compliance with the Nevada Open Meeting Law to take place at the Division of Industrial Relations, 3360 West Sahara Avenue, Suite 175, Las Vegas, Nevada 89102. The Board convened at the Division of Industrial Relations offices located at 3360 West Sahara Avenue, Suite 175, Las Vegas, Nevada 89102. In accordance with the Nevada Open Meeting law, each Board member participating in the meeting either had before him all written materials to be considered during the deliberations or was obliged to refrain from voting if not in possession of the materials.

1. Roll Call.

Chairman Weber called roll: Rodd Weber, Chairman, William Spielberg, Secretary, and Board members Frank Milligan, Jorge Macias and Scott Fullerton, were personally present and in attendance. As all the of the Board were present for the meeting, including two members representing labor and one member representing management, a quorum was present for the Board to conduct its business on this date.

Also present were Salli Ortiz, Esq., Legal Counsel to State OSHA, and Charles R. Zeh, Esq., The Law Offices of Charles R. Zeh, Esq., Legal counsel to the Board of Review.

The Notice of Meeting was duly provided under Chapter 618 of the Nevada Revised Statutes and in accordance with NRS Chapter 241 of the Nevada Open Meeting Law. A copy of the Notice is attached to these Minutes and made a part hereof as though fully set forth herein.

Notice of the meeting was posted or published, electronically or otherwise, consistent with the requirements of the Nevada Open Meeting Law as amended by AB 253.

Notice was posted at the following locations:

The Law Offices of Charles R. Zeh, Esq.
50 West Liberty Street, Suite 950
Reno, Nevada 89501

Division of Industrial Relations
3360 West Sahara Avenue, Suite 175
Las Vegas, Nevada, 89102

This Notice was also posted at the following website addresses:

State of Nevada, Department of Business and Industry, Industrial Relations (DIR)
website at <https://dir.nv.gov/Meetings/Meetings>

Nevada Public Notices at <https://notice.nv.gov>

Each Notice was timely posted.

2. Public Comment.

Chairman Weber called this item to be heard. No public comment was offered at the meeting and no public comment had been submitted to Board Counsel's office.

3. Contested Case Hearings.

The first contested case that was called to be heard by Chairman Weber was LV 21-2061, *Chief Administrative Officer of the Occupational Safety and Health Administration of the Division of Industrial Relations of the Department of Business and Industry, State of Nevada vs. The Dillinger Group, LLC dba The Dillinger*. The complainant, the State, was represented by Salli Ortiz, Esq. The respondent, The Dillinger Group, LLC, was represented by a lay advocate, Grant Turner, a non-lawyer and owner of The Dillinger Group. The State's complaint is that the Dillinger Group was in violation of NRS 618.375(2), Nevada's general duty clause, alleging that the respondent had failed to adequately provide for the health and safety of its workforce. The State alleges that the respondent failed to enforce the mask requirement for employees and the patrons of The Dillinger Group establishment, a bar and restaurant, in the face of the Covid-19 pandemic.

The Governor of the State had imposed restrictions on the operations of bars and restaurants, such as The Dillinger, requiring face masks to be worn by employees and patrons of the establishment as a means of protecting individuals and the community from the Covid-19 pandemic. The Dillinger Group defended on the grounds that face masks ultimately, The Dillinger Group claimed, proved to be an ineffective antidote to Covid-19 and actually an unhealthy threat to face mask wearers. Mr. Turner claimed that it would be un-American and contrary to his First Amendment Rights to require him to force the wearing of face masks on his patrons and employees when he knew and argued that face masks were ineffective and possibly a health threat, in and of themselves. Mr. Turner's proof, such as it were, was anecdotal or

conclusory allegations of legal counsel. The Board found his defense wanting and concluded that the State had proven a violation of NRS 618.375(2), Nevada's general duty clause. It was accordingly moved by Frank Milligan, seconded by William Spielberg, to sustain the citation in the complaint and affirm the levy of the fine in the amount of \$4,858. **The motion was adopted.**

Vote: 5-0

Next, Chairman Weber called to be heard case LV 23-2203, *Chief Administrative Officer of the Occupational Safety and Health Administration of the Division of Industrial Relations of the Department of Business and Industry, State of Nevada vs. Edward Homes, Inc.* The State was represented in this matter by Salli Ortiz, Esq. Edward Homes, Inc., was represented by Plinio Brito, a non-lawyer, lay advocate and in charge of safety for Edward Homes, Inc. This complaint was brought pursuant to 29 CFR 1926.501(b)(1), wherein the State alleged a failure to require the personal protective equipment when employees were working adjacent an open leading edge more than six feet above the lower level.

An employee, Julio Ramirez, was removing a cross brace at the second level or second floor of the apartment house complex within six feet from the leading edge, without wearing any personal protective equipment. Mr. Ramirez was supplied personal protective equipment but on the day in question, when seen working approximately six feet from the open leading edge more than six feet above ground, his personal protective equipment was home.

The State called to testify Williams Membrano, an employee of Edward Homes, Inc. He testified that anyone working within ten feet of an open leading edge was unsafe unless using personal protective equipment to prevent against a fall. Chairman Weber pointed out that in the safety policy manual of Edward Homes, Inc., it stated that there is no safe distance from an open, leading edge. The complaint in this case was also a repeat offense. Approximately two years prior to this incident, a very similar complaint was sustained for a violation of 29 CFR 1926.501(b)(1). A repeat offense multiplier was, therefore, properly applied. The defense in this matter on behalf of Edward Homes, Inc., was somewhat obscured and seemed to focus on a claim that there was a greater emphasis on safety once Mr. Brito became employed to manage safety at Edward Houmes, Inc., a noble notion but not relevant to the defense to the allegations in this complaint.

Accordingly, it was moved by Scott Fullerton, seconded by William Spielberg, to uphold the citation, finding a violation of 29 CFR 1926.501(b)(1) and sustaining the fine levied in this matter in the amount of \$13,654. The vote was 5-0 in favor of the motion. **The motion was adopted.**

Chairman Weber then called for hearing case LV 18-1952, *Chief Administrative Officer of the Occupational Safety and Health Administration of the Division of Industrial Relations of the Department of Business and Industry, State of Nevada vs. Westcor Construction.* This matter was a hearing on the objections raised by Westcor Construction to the proposed Finding of Facts, Conclusions of Law and Final Order drafted by the State, as required of the prevailing party in the matter before the Board.

Westcor Construction was represented by Raymond Perez, II, Esq., of Jackson Lewis P.C. The State was represented by Salli Ortiz, Esq. The parties were given 15 minutes a side to argue their position, with Mr. Perez also given 10 minutes to argue in reply. The Board questioned counsel for both parties, in addition to the time allowed to argue their position with the Board.

The only issue before the Board at this time was whether or not the proposed Findings of Fact, Conclusions of Law and Final Order drafted as proposed by the State were consistent with the Board's written decision that had been entered and approved previously by the Board. The Board concluded that Mr. Perez's argument or challenge to the draft proposed Findings of Fact, Conclusions of Law and Final Order was more a claim, the Board was mistaken in some of its findings contained in its decision, rather than an objection based upon a claim that the State's proposed Findings of Fact, Conclusions of Law and Final Order, deviated from the content of the Board's decision in this case. Mr. Perez's argument was that which should be argued at another time and in another place, such as on appeal or in a motion for a new trial. He levied no challenge that the State's proposed Findings were inconsistent with the Board's decision. Both counsel for complainant and respondent, however, agreed that the Board's decision erroneously reflected a fine of \$10,000 when the correct amount should have been \$7,000.

Accordingly, it was moved by Frank Milligan, seconded by Jorge Macias to deny the motion of Westcor Corporation for the Board to adopt Westcor Corporation's suggested changes to the State's proposed Findings of Fact, Conclusions of Law and Final Order, save and accept that the penalty amount shall be amended to reflect the correct amount of a fine levied at \$7,000 for Citation 1, Item 2. **The motion was adopted. Vote: 5-0 in favor of the motion.**

Chairman Weber then called both LV 17-1874 and LV 17-1907, Performance Builders, Inc., to be heard. LV 17-1874 is captioned, *Chief Administrative Officer of the Occupational Safety and Health Administration of the Division of Industrial Relations of the Department of Business and Industry, State of Nevada vs. Performance Builders, Inc.* LV 17-1907 is captioned, *Chief Administrative Officer of the Occupational Safety and Health Administration of the Division of Industrial Relations of the Department of Business and Industry, State of Nevada vs. Performance Builders, Inc.*

Both motions were precipitated by a hearing on the proposed Findings of Fact, Conclusions of Law and Final Order in each case drafted by the State as the prevailing party. Respondent claimed that the cases should be dismissed because it had taken the State nearly five years to submit for review a proposed set of Findings of Fact, Conclusions of Law and Final Order in each case. Performance Builders asserted that this delay in the drafting and circulation of the proposed Findings of Fact, Conclusions of Law and Final Order were untenable and highly prejudicial to Performance Builders. Consequently, both should therefore be dismissed.

The two cases were consolidated for purposes of arguing the motions to dismiss as they were identical motions arguing on the same grounds for dismissal. True, in both instances, the matters were tried and decided in favor of the State. Respondent wanted the cases dismissed because of the tardy circulation of proposed Findings of Fact, Conclusions of Law and Final Order. In both cases, it argued that under Rule 41(b), NRCP, the Board should dismiss a matter

that had not finished being tried within two years. After five years, dismissal was mandatory. As indicated, Performance Builders argued additionally that it was highly prejudicial to Performance Builders to have to wait nearly five years before these matters were concluded by the entry of Findings of Fact, Conclusions of Law and Final Order. Performance Builders argued that the Board had inherent authority to dispose of each of these two cases by dismissal in light of the nearly five year time frame they had been pending.

The Board was unconvinced. First, there was no proof of actual prejudice, only the naked claim by counsel of prejudice. It is well settled that the naked claim of counsel is not evidence. Additionally, the pandemic associated with Covid-19 created untenable barriers. And, previous counsel for Performance Builders and Ms. Ortiz had communicated about the logistical problems Ms. Ortiz's office was experiencing to get a handle on the work load. In response, prior counsel for Performance Builders told her "no worries." That was the last communication in writing between respondent and Ms. Ortiz concerning the proposed Findings of Fact, Conclusions of Law and Final Order until Performance Builders sought dismissal of the cases in early January, 2023. At no point did Performance Builders make a demand that the draft proposed Findings of Fact, Conclusions of Law and Final Order be circulated or a motion to dismiss by reason of the delinquent pendency of the matter would be filed until January 2023, when the instant motions to dismiss were filed. As pointed out during the course of the hearing, no action could have been taken on the motions to dismiss during the period of January 1, 2023 through June 13, 2023, as the Board was out of business for this six month period through no fault of its own.

Accordingly, it was moved by Scott Fullerton, seconded by Jorge Macias, to deny the motions to dismiss and vacate the disposition of the matter in both cases, LV 17-1874 and LV 17-1907. **The Vote was 5-0 in favor. The motion was unanimously adopted.**

Because of the lateness of the hour, Chairman Weber announced that the Board would conclude its business for the day. As required by the Open Meeting Law, the Chairman asked if there was any public comment. There was no public comment offered at the hearing and no public comment had been received since the commencement of the meeting by Board counsel's office.

Chairman then called for a motion to adjourn. It was moved by Frank Milligan, seconded by Scott Fullerton, to adjourn the meeting. **The vote was 5-0 in favor. The motion was adopted.** The meeting was adjourned.

The Board will reconvene on August 10, 2023, to conduct the remaining business on the August Agenda of the Board.

STATE OF NEVADA
Minutes for the
Nevada Occupational Safety and Health Review Board
Las Vegas, NV

August 10, 2023

Rodd Weber (Management)
William Spielberg (Labor)
Jorge Macias (Management)
Scott Fullerton (Labor)

1. Roll Call. Chairman Weber called to order the continuation of the Board of Review meeting that began on August 9, 2023 and was noticed to be conducted on August 9, 2023 and if necessary, on August 10, 2023. Since the Board did not conclude its business on August 9, 2023, the Board reconvened to finish the business of the August 2023 Agenda.

Those members personally in attendance at the meeting were, Chairman Rodd Weber, Secretary William Spielberg, and members Jorge Macias and Scott Fullerton. Member Frank Milligan was absent to do a work related conflict on his schedule. A quorum remained present to conduct the Boards' business.

Also attending were Charles R. Zeh, Esq., The Law Offices of Charles R. Zeh, Esq. and Sally Ortiz, Esq.

2. Public Comment.

There was none offered at the meeting and none received by Board Counsel.

4. Administrative Meeting.

The Chairman called the administrative meeting to order.

a. Approval of the previous Review Board meeting minute of July 12, 2023.

It was moved by Scott Fullerton, seconded by William Spielberg, to approve the minutes of July 12, 2023, as read. **Motion adopted.**

Vote: 4-0.

b. The Chairman then called to be heard the contested case settlement, motions, draft decisions, or procedural issues pending on status report, for approval and issuance of final orders:

i. RNO 21-2092, Lifestyle Homes, Inc.

Chief Administrative Officer of the Occupational Safety and Health Administration of the

Division of Industrial Relations of the Department of Business and Industry, State of Nevada vs. Lifestyle Homes, Inc.

The Board reviewed the terms and conditions of the settlement agreement and found them satisfactory. It was moved by Scott Fullerton, seconded by William Speilberg, to approve the settlement dismissing this matter in accordance with the terms of the settlement agreement. The total amount of penalty as pled in the complaint was the sum of \$10,324. After settlement, the penalty was reduced to \$4,313.40. This matter is withdrawn and dismissed with prejudice, subject to the payment of this civil fine and terms and condition of the settlement agreement.

The Chairman then called item number ii, next to be heard.

- ii. LV 20-2048, MCA Cheyenne, LLC (Fatality).

Chief Administrative Officer of the Occupational Safety and Health Administration of the Division of Industrial Relations of the Department of Business and Industry, State of Nevada v. MCA Cheyenne, LLC.

This was a fatality case, involving 29 CFR 1910.28(b)(1)(i), concerning unprotected sides and edges and 29 CFR 1910.28(b)(3)(i), governing work around holes. An employee fell through one of the skylights to the concrete surface below. The fall resulted in multiple blunt force injuries to the head and neck to the employee which resulted in the employee's death. Both Citation 1, Item 1 and Citation 1, Item 2, alleged serious violations. The settlement being proposed for Citation 1, Item 1 and Citation 1, Item 2, was to reduce the Citation classifications from Serious to Other-than-Serious and the fines from \$6,246 to \$1,000 in total. The rationale for settlement was because MCA Cheyenne, LLC, no longer owned the building in question. The State also explained the settlement was reasonable because prior to selling the building, MCA Cheyenne, LLC, made minium improvements in the building that they were selling. Considerable discussion ensued on this matter following the presentation of it for the Board's deliberation. The Board disagreed that a matter of this gravity should be settled on these grounds.

Accordingly, it was moved by Jorge Macias, seconded by Scott Fullerton, to reject the settlement on the proposed justification or grounds and to remand the matter back to the parties for further consideration of the rationale justifying settlement of this fatality case and for re-submission to the Board to consider if appropriate. **The motion was adopted on a Vote of 4-0.**

Next, the Chairman called to be heard iii. LV 21-2087, 300 West Sahara, LLC dba Ahern Hotel aka Ahern Hotel and Convention Center.

- iii. LV 21-2087, 300 West Sahara, LLC dba Ahern Hotel aka Ahern Hotel and Convention Center.

Chief Administrative Officer of the Occupational Safety and Health Administration of the Division of Industrial Relations of the Department of Business and Industry, State of Nevada vs. 300 West Sahara, LLC dba Ahern Hotel aka Ahern Hotel and Convention Center.

In this case, there was one cause of action based upon NRS 618.375(2), Nevada's version of the General Duty Clause. There were four incidents recited that comprised Citation 1, Item 1, the only Citation in the Complaint. They revolved around the alleged failure to maintain proper social distancing as well as to allow more than 50 persons to congregate in an indoor area of the respondent's convention and meeting facilities. One of the events at issue had an attendance of approximately 716 guests and another event had an attendance of approximately 200 guests. Guests and employees were allegedly in close proximity to each other, *i.e.*, less than six feet. Pursuant to the settlement agreement, Citation 1,

Item 1, General Duty shall be reclassified from Serious to Other-than-Serious with the proposed penalty of \$10, 930 reduced to \$0, and the complaint withdrawn by State OSHA. Pursuant to the settlement terms, the Nevada OSH Review Board complaint is to be dismissed with prejudice in Docket No. LV 21-2087, relating to Inspection No. 1487295, with each party bearing its own costs and fees.

It was moved by Jorge Macias; seconded by Scott Fullerton, to approve the settlement, as written. **The motion was adopted.**

Vote: 4-0.

c. Consent Agenda

The Chairman then called the Consent Agenda, Item 4.c. to be considered. All items under the Consent Agenda may be approved together with a single motion to be taken out of order and/or heard and discussed individually. The items under this section are as follows:

- i. RNO 21-2075, Southwest Gas Corporation.
- ii. RNO 21-2068, O'Reilly Auto Enterprises, LLC dba O'Reilly Auto Parts.
- iii. LV 21-2088, Bombard Mechanical, LLC.
- iv. LV 21-2089, Bombard Electric, LLC.
- v. LV 21-2074, W.A. Richardson Builders.
- vi. LV 21-2085, Titan Systems, Inc.
- vii. LV 20-2015, Las Vegas Paving Corporation

The Board members reviewed the information provided on each of these cases and determined that all of the consent items may be approved together with a single motion. Accordingly, it was moved by Jorge Macias, seconded by Scott Fullerton, to approve the Consent Agenda Item under one motion. Each of the seven Consent Agenda Items accordingly were withdrawn and dismissed with prejudice. **The motion to approve the Consent Agenda was adopted. Vote 4-0.**

Chairman Weber then called Item 4.d.

(d) General administration and/or procedural issues.

- i. General matters of import to Board members.

There were no general matters of import discussed by the Board members.

- ii. Old and New Business.

There was no old or new business raised.

- iii. Discussion of case load and disposition of matters before the Board in aftermath of 6 month pause in Board proceedings; possible direction to Board Counsel; possible procedural suggestions from Board Counsel; review of steps already taken to address caseload.
 1. During the course of the hearing, limiting the number of times the parties may examine and cross examine witnesses (the back-and-forth solution);

Board members agreed that the disposition of cases could be expedited on a case-by-case basis by limiting the number of times the parties may examine and cross examine the witnesses (the back-and-forth solution). Chairman Weber advised he would be pleased to be reminded of the judicious use of cross examination as a means of expediting disposition of a case.

2. Extending the length of the Board meetings to 10 hours starting at 8:00 a.m. and ending at 6:00 p.m.

The Board was advised by Tori Carreon that her employees begin the work day as 8:00 a.m., but their work day concludes at 5:00 p.m., raising overtime and logistical issues if hearings extended past 5:00 p.m., when starting at 8:00 a.m. She was in accord with commencing meetings in the future at 8:00 a.m. For the foreseeable immediate future, Board meetings will now commence at 8:00 a.m., and continue to conclude by 5:00 p.m.

3. Adding a third day each month to hear cases.

This suggestion also presented logistical problems, but it was agreed that on a case-by-case basis, the Board could meet on a third day of a month to dispense with Administrative matters.

4. Continuing the use of hybrid/virtual hearings.

In this electronic age, it was deemed feasible that the continued use of virtual hearings would be appropriate.

5. Scheduling 10-12 contested cases for each two day session of the Board.

Again, this presented some logistical problems for both counsel for the State and for Board Legal counsel. Tori Carreon also advised that adding more cases to be heard in the two sessions or adding a third day or extending the duration of the hearing day could create budget problems for the funding of contracts that the Board has to sustain its operation. Item 5 was, therefore, tabled.

6. Advising parties that their case will be heard in a set or limited number of hours.

It was pointed out that it is difficult to determine in advance the amount of time a case might require in order to be fully heard and decided. Therefore, it was concluded, it should be handled in order with the back and forth solution of Item 1, above.

7. Discussing the length of Board Counsel's contract to represent the Board as the Board did not want to go through the extended and unfortunate/delay process for retaining it's legal counsel it experienced in connection with the current contract for the Board's legal counsel.

As the Board did not want to go through the protracted and disagreeable process of retaining its legal counsel that it experienced in connection with the current contract for the Board's Legal Counsel, Board members stated first, that Board Counsel's contract should be at least a two year contract, instead of one year. Previously, the contract was let for at least two years. Board members also did not want to wait until the current contract was about to expire to

begin the process of contracting with Board Counsel. They do not want to wind up with another six month pause while the contract is negotiated and executed, as just experienced. Board members then advised Tori Carreon that they wanted her to determine whether the present contract for Board Counsel could simply be extended without having to go through another protracted contracting process. The Board wants her to look into the contract extension or execution of a new contract now rather than waiting until the last minute as occurred in 2022, resulting in a six month pause in the Board's operation. She advised, she would investigate and report back to the Chairman and Board. The Board also restated that the choice of legal counsel was their's to make.

- iv. Discussion of the appointment of alternative members to the Board and also Board replacement.

The Board Chairman understood that an alternative member had submitted an application to be appointed and wanted to know from Tori Carreon whether that had occurred. She said she would check and report back to the Board on the appointment of an alternative Board Member.

Chairman then called Item 4(e) to be considered. The meetings for the Board for October 11 and 12, 2023, November 8 and 9, 2023 and December 13 and 14, 2023 shall be conducted in Las Vegas. The meeting of September 13 and 14, 2023, has been scheduled for and will be conducted in Reno, Nevada. Also, the first meeting of 2024 in January will be held in Reno, Nevada, assuming a sufficient number of cases will have been accumulated to make a hearing in Reno appropriate.

5. Public Comment.

Chairman Weber then called Item 5, Public Comment, to be heard. He advised there was no public comment offered from the public in attendance at the Board meeting. Board counsel advised that no public comment had been received by his office during the course of the meeting, this date.

6. Adjournment.

The Chairman then called to be heard, Item 6, Adjournment. It was moved by Scott Fullerton, seconded by William Spielberg, to adjourn the meeting. **Motion adopted.**

Vote: 4-0.

Dated this 11th day of October, 2023.

/s/Charles R. Zeh, Esq.
Charles R. Zeh, Esq., Board Legal Counsel