

MINUTES OF THE MEETING OF
THE NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

Held at DEPARTMENT OF OCCUPATIONAL
SAFETY & HEALTH
4600 Kietzke Lane, Building B, Suite 111
Reno Nevada on
Wednesday, April 11, 2018
Commencing at 9:00 o'clock a.m.

PRESENT

Steve Ingersoll (labor)
James Halsey (labor)
Sandra Roche (management)
Rodd Weber (management)
Frank Milligan (public at large)
Fred Scarpello, Esq., Legal Counsel

The Nevada Occupational Safety and Health Review Board convened the scheduled meeting at approximately 9:00 a.m., April 11, 2018. The Chairman called the Board to order. 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. Chairman Ingersoll announced the meeting would be limited to only administrative matters subject of the published agenda. He noted for the record that contested case hearings require personal attendance of members for appropriate consideration of sworn testimony and submittal of documentary evidence.

On roll call, the Chairman announced his personal presence and recognized the telephonic appearance of the members identified above as present.

The Chairman also noted the personal attendance of Mr. Jess Langford, Chief Administrative Officer of NVOSHES, Ms. Salli Ortiz, OSHES legal enforcement counsel Mr. Ray Fierro, the DIR Deputy Administrator and Mr. Joe Adams. Mr. John Wiles participated telephonically.

The Chairman noted the contested case hearing calendar was continued due to the inability to confirm a quorum of members to be present as required for the Board policy to assure a fair and impartial public hearing process.

The Chairman identified matters subject of the agenda as follows:

A. The previous minutes of the Review Board were approved as distributed on motion, second and unanimous vote of all members present.

B. The Board members acknowledge receipt of the current scheduled hearing calendar of pending contested cases, and the most recent weekly status report as distributed.

C. The Board reviewed the case settlements submitted for approval and consideration for the issuance of final orders. The Board determined the supporting documented rationale met the required criteria in compliance with NRS 618 and NAC 618. On motion, second and unanimous vote, the following settlements were approved with instructions for counsel to Final Orders to the Chairman signature, return and service on all parties: **IV 18-1911**, Occupational Safety and Health Administration, Division of Industrial Relations of the Department of Business and Industry, vs. MLJ 12, LLC, **RNO 18-1932**, Occupational Safety and Health Administration, Division of Industrial Relations of the Department of Business and Industry, vs. Universal Framing and **RNO 18-1927**, Occupational Safety and Health Administration, Division of Industrial Relations of the Department of Business and Industry, vs. Sears Outlet.

D. The Chairman identified the principal matter for discussion on the subject agenda as item D, status of the new legal counsel services contract. The Chairman reviewed the current status reflecting lack of the contract processing by BI and DIR as the funding arm for the James Barnes legal services contract. The Chairman identified repeated meetings over the past months, including his personal meeting with BI Director, Manthe and Assistant Director, Reynolds. He further reported Jim Barnes had met on at least three separate occasions with the BI Director to attempt to reach resolution of the matter. The BI Director advised that while she would like to support Barnes fee rate as agreed upon by he and the Board, and previously approved in the contract prepared and submitted by DIR, and executed by Administrator Decker, that she is informed by the state budget office there are insufficient funds budgeted to pay the Barnes higher fee rate. Chairman Ingersoll further reported that BI Director requested Mr. Barnes consider accepting a reduced fee rate. Mr. Barnes explained that he carefully considered the original agreed fee rate but could not provide the services required at the significant reduction proposed by the BI Director. He explained his fee rate includes absorbing all office operating expenses, increased insurance rates, legal secretarial assistance, and related costs.

Chairman Ingersoll reported the previously executed Barnes contract was again not submitted by DIR to the BOE by the submittal deadline of April 3, 2018.

The Chairman again noted that the current legal counsel extended contract will expire on May 31, 2018. He identified the situation as very serious and requested discussion and an immediate plan of action from Board members. He noted that if the approved

Barnes contract could not be immediately confirmed the alternative for the Board would be to suspend the continued processing and hearing of contested cases by May 31, 2018, or sooner if so determined by the members.

Board members each raised various points and issues in continued discussions of the matter. Counsel confirmed that employment of James Barnes as new legal counsel was effectuated by the Board in furtherance of NRS 618.585, et.seq., NAC 333.150, et.seq., and NRS 241, and duly completed in accordance with applicable law and procedures. The Chairman noted the only identified current issue obstructing the processing of the Barnes contract is the continued rejection of submittal to BOE by DIR at the Board authorized fee rate. The DIR Administrator has continually advised, and confirmed by email, that the state contracting process can only proceed through DIR. There have been no supporting details for rejection other than DIR and BI asserting the two year budget potentially not sufficient for the Barnes increased hourly fee rate.

Chairman Ingersoll noted the Barnes contract had been previously prepared, approved and signed by DIR Administrator Decker, then submitted to the Board of Examiners for approval in November 2017. The contract budgeted amount was apparently determined sufficient by DIR at that time. The DIR Administrator then advised that a decision of potential budget shortfall was made by state budget personnel, and he was instructed to withdraw the contract from the BOE agenda.

Current counsel commented that the very least that should occur would be for BI/DIR to process the contract as the designated state agency "funding arm," because Mr. Barnes employment had been duly approved in accordance with the Nevada State (OSHA) Plan and applicable law. Further, even if any potential future shortfall actually occurred, although not expected under the dollar amounts provided by BI/DIR in the original contract document itself, as compared to past year operations for legal expenses, a request could be made to Interim Finance, or other intermediate action taken.

Board members commented it is not reasonable nor appropriate to expect governor appointee members to hear and adjudicate contested cases without competent, "OSHA qualified" legal counsel. The Board members raised various issues and exchanged thoughts and ideas for resolution of the impasse.

Comments were offered from members of the public, identified as former Review Board Chairman, Joe Adams; and former NVOSHES senior legal counsel, John Wiles. Both urged all processes to confirm the Barnes legal services contract be pursued to maintain continuity of the statutory appellate hearing process.

Board counsel commented that it is imprudent and unreasonable to withhold processing a contract for the statutory mandated NVOSHA program for the appellate hearing tribunal when there are substantial reserved funds currently available. The budgeted balance identified by DIR in the contract document it drafted and signed would support the Board anticipated required legal services for an extended period. The budget could be regularly monitored, studied and analyzed through the year. If any actual shortfall appeared realistic, it would be many months away, allowing sufficient time to review any potential need for interim finance committee funding; and/or adjustments made to the contested hearing calendar. To cause suspension of Review Board operations because of a mere "potential" shortfall months from now, creates too great a negative impact on employers, employees, and the citizens of Nevada who expect the NVOSHA statutory appellate hearing tribunal to process and hear contested cases in a timely fashion.

Mr. Wiles identified and explained the sources of revenue to support the NVOSHA program. From his past experience as senior DIR legal counsel, he commented the monies are not state general fund revenue; but rather derived through the statutory structure under the Nevada State Plan as comprised of federal fundings and from a percentage of premiums collected on workman's compensation policies sold throughout the State of Nevada. He stated his experience was that NVOSHA would often seek additional funding from the state interim finance committee for various needs.

Combined motions by Chairman Ingersoll and Secretary Weber, were made. After discussion, it was moved, seconded and unanimously approved: the Board schedule a meeting with the BI Director and any other state government representatives who may assist in removal of the impasse to effectuate the immediate processing of the Board authorized legal services contract with attorney James Barnes. If there is no resolution at a forthcoming meeting with the appropriate state officials, the Board must, although reluctantly, suspend the contested hearing, scheduling and processing of further cases on expiration of the current legal counsel services contract, May 31, 2018.

There being no further business before the Board, on motion, second and unanimous vote, the meeting of the Nevada Occupational Safety and Health Review Board was adjourned at approximately 10:15 a.m.



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Occupational Safety and
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