

STATE OF NEVADA

**Minutes for the
Nevada Occupational Safety and Health Review Board
Las Vegas, Nevada**

December 11, 2019

**Rodd Weber (Management)
James Halsey (Labor)
Lance Semenko (Management)**

On December 11, 2019, 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 offices of the Department of Occupational Safety and Health, 3360 West Sahara Avenue, Suite 175, Las Vegas, NV 89102. Participating in person were Board Secretary Rodd Weber and members James Halsey and Lance Semenko. Chairman Steve Ingersoll and Frank Milligan were absent. 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.

Participating in person were Board Secretary Rodd Weber and members James Halsey and Lance Semenko. Chairman Steve Ingersoll and Frank Milligan were absent. As three members of the Board participated in the meeting, including a representative of labor and a representative of management, a quorum was present to conduct the Board's business.

Also, personally in attendance were Salli Ortiz, Esq., counsel to the 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 and Board of Review Counsel, and Charles R. Zeh, Esq., The Law Offices of Charles R. Zeh, Esq. Various members of the public were also present.

As the Chairman was absent, Rodd Weber, Board Secretary, chaired the meeting by calling it to order at approximately 9:10 a.m.

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.

2. Public Comment.

There was no public comment.

3. Contested Case Hearings.

Acting Chairman Weber (herein after Chairman or Chair) Weber called this item to be heard and asked Board counsel to update the Board. Board counsel advised that the hearings scheduled for Items 3.a., 3.d., 3.e., and 3.f., had been vacated as these items were either settled or pulled from the Agenda in advance of the meeting. Items 3.b., LV 20-2003, 3.c., LV 20-2007, and 3.g., LV 19-1997 had not settled and remained on the stacked calendar, with LV 19-1997, scheduled to be heard, first, on December 11, 2019. Because of quorum issues, the Board will hold hearings only on December 11, 2019, with the hearing date of December 12, 2019, vacated in advance by the Board Chairman, Steve Ingersoll.

b. LV 19-1997, Capriati Construction Corp., Inc.

Chairman Weber then called LV 19-1997, Capriati Construction Corp., Inc., to be heard. This matter was being reported by a court reporter *via* teleconferencing, with the court reporter, Susan Keiger, being situated in the State OSHA offices in Reno, Nevada, while the parties, legal counsel, Board, Board Counsel and witnesses were personally present and participating from the State hearing facilities located at 3360 West Sahara, Suite 175, Las Vegas, Nevada.

The State was represented by Salli Ortiz, Esq., and the respondent, Capriati Construction Corp., (Capriati) was represented by Whitney Selert, Esq., of Garg Golden Law Firm.

The issue in this case revolved around whether employees or workers, if not employees, of Capriati, were working in an exposed and allegedly hazardous ditch, more than six feet in depth. A hazardous condition is one in which the potential for injury includes death or serious physical injury. 29 CFR § 1926.652(a)(1) provides that:

[e]ach employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section except when (i) Excavations are made entirely in stable rock; or (ii) Excavations are less than 5 feet (1.5m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

In this case, it was reported that workers had been laboring in this ditch of depths in excess of six feet for two to three weeks, without any shoring or protective measures being implemented to guard against cave-ins that might result in death or serious injury. As of the date and time that Nevada OSHA inspected the ditch or trench, Capriati had not employed any one of sufficient expertise to opine upon the safety conditions of the trench being dug on this residential housing project. That same day of the OSHA inspection, however, after Nevada OSHA had departed the premises after inspection following the referral, a professional engineer with geotechnical expertise inspected the trench and opined that it was not a hazard, was a safe place

to work, and did not require any shoring or other precautions to be taken to provide for a hazard-free work environment, given the depth of the trench. For the three weeks prior to this inspection, however, by the professional engineer retained by Capriati, Capriati did not know and had obtained no expert opinion that the ditch was a safe place to work without shoring or other safety measures being taken.

Capriati's defense was (a) that there was no hazardous condition as established by Capriati's expert geotechnical engineer, (b) the workers in the ditch were not Capriati's employees and, therefore, Capriati owed a lesser duty of safety towards these workers, and (c) there was no hazardous situation that would put Capriati on notice of a danger to the workers that it must remedy or remediate. Thus, there should be no citation for a serious violation, as there was no hazardous condition to guard against in the first place. The workers were always working in a non-hazardous environment.

The Board disagreed. Whether or not Capriati was the actual employer in the sense that the exposed workers were on Capriati's payroll, the contract between Summex, LLC, the entity upon whose payroll, the exposed workers' names could be found, gave Capriati so much authority over the laborers that Capriati was the *de facto* employer. Capriati owed the same duty to these laborers in the trench as if they were on Capriati's payroll. Additionally, these employees had been working in the trench/ditch and hence sent into the trench/ditch by Capriati before Capriati took steps to determine whether it was safe to work in the trench without shoring or other protective conditions. The workers were, therefore, exposed to conditions which 29 CFR § 1926.652 was intended to prevent.

Accordingly, the Board concluded that the State had proved a *prima facie* case for a hazardous condition and, thus, a serious violation. It was, therefore, moved by James Halsey, seconded by Lance Semenko, to uphold the State's Citation, Item 1 pursuant to 29 CFR § 1926.652(a)(1), finding a serious violation and upholding the fine of \$4,100.

During the course of the hearing on this matter, it became clear that the disposition of Capriati would consume most, if not all of the day. Accordingly, during the recesses, it was determined that the two remaining contested cases would not be heard, and the representatives for those matters, LV 20-2003, M.J. Dean Construction, Inc. and LV 20-2007, Total Western, Inc., were excused. The hearings on these matters will be rescheduled at the mutual convenience of the Board and parties.

4. Administrative Meeting.

a. Approval of previous Review Board Minutes of September 11 and 12, 2019.

Chairman Weber next called this item to be considered, the minutes for the Board meeting of September 11 and 12, 2019. Board counsel advised that there was not a quorum present, this date, of members who were eligible to vote upon the minutes for September 11 and 12, 2019. Consideration of the minutes were tabled.

- b. Review contested case settlements, motions, draft decisions, or procedural issues pending on status report, for approval and issuance of final orders:**
 - i. RNO 14-1684, Sierra Packaging and Converting, LLC**
 - ii. RNO 19-1988, Sierra Products, Inc.**
 - iii. RNO 19-1989, Sierra Products, Inc.**
 - iv. LV 19-1976, Hirschi Masonry, LLC**

Chairman Weber called these items to be heard, the disposition of settled cases and also, item 4.b(i), the review and approval of the decision in Sierra Packaging and Converting, LLC, RNO 14-1684. Once again, the Board did not have present, enough members eligible to vote on these matters and, therefore, all four items were continued.

- c. General administration and/or procedural issues.**

- i. General Matters of Import to Board Members.**
- ii. Old and New Business.**

Chairman Weber next called this item to be heard, matters of concern to the Board members and old and new business. No Board member had a comment.

- iii. Board Counsel's contract renewal.**

Board legal counsel stated, it appeared the contract matter was resolved and Board legal counsel expected to continue representation of the Board for the next two years. Board counsel expressed gratitude for the Board's support. The Board members expressed satisfaction and relief that this was now an issue behind for the Board to function and get on with its business as scheduled instead of having to deal with this distraction.

- d. Schedule of hearings on pending cases, calendar and status report.**

The Board has scheduled the following meetings. - **For Possible Action.**

- * **January 28 and 29, 2020**, 3360 West Sahara Avenue, Suite 175, Las Vegas, Nevada 89102.
- * **February 11 and 12, 2020**, 25 E. Shelbourne Avenue, Las Vegas, Nevada 89123.
- * **March 11 and 12, 2020**, 4600 Kietzke Lane, Building G, Suite 160, Reno, Nevada, 89509.
- * **April 8 and 9, 2020**, 3360 West Sahara Avenue, Suite 175, Las Vegas, Nevada 89102.
- * **May 13 and 14, 2020** - *Location to be determined.*
- * **June 10 and 11, 2020** - *Location to be determined.*
- * **July 8 and 9, 2020** - *Location to be determined.*
- * **August 12 and 13, 2020** - *Location to be determined.*
- * **September 9 and 10, 2020** - *Location to be determined.*

- * **October 14 and 15, 2020** - 4600 Kietzke Lane, Building G, Suite 160, Reno, Nevada, 89509.
- * **November 11 and 12, 2020** - *Location to be determined.*
- * **December 9 and 10, 2020** - *Location to be determined.*

5. Public Comment.

There was no public comment.

6. Adjournment.

Chairman Weber called this matter next to be heard. It was moved by Lance Semenko, seconded by James Halsey, to adjourn the meeting. **Motion adopted.**

Vote: 3-0.



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

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