

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

November 9, 2022

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

On November 9, 2022, a meeting of the Nevada Occupational Safety and Health Review Board was convened by acting Board Chairman William Spielberg. He called the meeting to order at approximately 9:03 a.m. 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.

Board members present were: William Spielberg, acting Chairman, Frank Milligan, Scott Fullerton and Jorge Macias. Member Fullerton appeared by electronic means. Chairman Rodd Weber was absent from the meeting. As four members 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.

Also present by Webex was Charles R. Zeh, Esq., The Law Offices of Charles R. Zeh, Esq., Board of Review Legal Counsel, who appeared electronically. Salli Ortiz, Esq., Legal Counsel to the Administrator, was present in person. Additionally participating at various times throughout the meeting were Lindsey Dibler, Esq., Perry Poff, Esq., and Matthew Hughes, Esq. Each appeared electronically.

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 <http://dir.nv.gov/Meetings/Meetings>

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

Each Notice was timely posted.

2. Public Comment.

Acting Chairman Spielberg called this item to be heard. Board Counsel advised that his office had not received any public comment in writing for consideration by the Board at this meeting. Victoria Carreon appeared electronically. She said that the contract for Board Legal Counsel will not be finished by December 31, 2022, and, therefore, being that the Board would be without legal counsel, she was recommending cancellation of the January 2023 meeting of the Board. She also said that the Board meeting had to be cancelled because the State contract with the court reporter firm recording these matters also expired and it was unlikely that a new contract would be in place for a court reporter in January. She explained further the Board could not meet without a court reporter recording the proceedings. Ms. Carreon had nothing further to state at this time. Ms. Carreon had not discussed the situation with the Board legal counsel or any member of the Board before making this announcement to the Board. No advance notice was given by her.

There was no further "Public Comment."

3. Contested Case Hearings.

Acting Chairman Spielberg called Item 3 on the Agenda to be heard, the contested case docket. Board Counsel advised that all matters with the exception of LV 22-2177, Solar Star LLC dba Vegas Solar, had been settled or vacated and, therefore, only the Solar Star, LLC matter was left to be heard on the contested docket for this date. The acting Chairman called Solar Star, LLC, therefore, to be heard.

The State was represented in this matter by Salli Ortiz, Esq., Division legal counsel. Solar Star, LLC, was represented by the owner, Stanley Popeck. Ms. Ortiz offered into evidence her exhibit packet consisting of two parts, documents numbered 1 through 80 and documents numbered 81 through 106. The State had failed, however, to provide Board Counsel with electronic copies of these exhibits in advance of the hearing as ordered by the Board.

Stanley Popeck, owner of the business, and a non-attorney, represented himself and his business in connection with this hearing before the Board. As the State's exhibits were not provided Board Legal Counsel, at least three days in advance of the hearing as ordered, a recess was taken to e-mail copies of the State's exhibit packet to be emailed to Board Counsel. Similarly, inasmuch as the State's evidence packet was being distributed for the first time to Board members at the commencement of this hearing, a copy of the exhibit packet had to be emailed to Scott Fullerton because he was appearing electronically and, therefore, could not receive by hand delivery his copy of the State's exhibits at the hearing.

Mr. Popeck offered Exhibit A, Exhibit B, and Exhibit C. He also was producing these for the first time at the commencement of the hearing. Consequently a recess had to be taken to email his exhibits to Board Counsel and Mr. Fullerton, as well. The Solar Star evidence packet consisted of 29 pages. Ms. Ortiz advised that upon review of Mr. Popeck's 29 page of exhibits, she had an objection to the addendum to Exhibit B, but not to any of the other pages of Mr. Popeck's 29 pages of exhibits. The Acting Chairman let Mr. Popeck's entire packet into evidence.

Mr. Popeck had no objection to the admissibility of exhibits 1 through 116 on behalf of the State. Those exhibits were admitted into evidence by the Acting Chairman without objection. Ms. Ortiz advised the Board that she had one witness, Eric Hill, who was the investigator on this referral case to the State OSHA. Mr. Popeck advised that other than himself, he had no witnesses that he would be calling to testify or state the case on behalf of Solar Star.

Ms. Ortiz called Mr. Hill who testified. At the conclusion of his testimony, Mr. Popeck had no questions, whereupon Ms. Ortiz advised that she was resting on behalf of the State.

Mr. Popeck advised that he had no witnesses and that his main defense was that he was a small company and he wanted the State to provide his people with training. He also wanted a reduction in the fine because fines represented 20% of his income according to the tax returns he produced as a part of his exhibit packet. That was in essence, Mr. Popeck's case. Ms. Ortiz advised, however, when given the opportunity, that the failure to utilize personal fall protection, as alleged in the complaint, had not be abated even though over a year had past between the citations in this case and the hearing on this date. Consequently, as the fines being sought were already reduced by 80% from the maximum, they should not be reduced any further.

The Board took the matter under submission and immediately deliberated on the disposition of this case. Scott Fullerton analyzed the case for the Board members, stating that, at bottom, he saw that the penalty being assessed was fair in that it was an 80% reduction from the maximum that could have been assessed for the violations/citations levied against Mr. Popeck's

company. Each of the remaining Board members said they concurred with member Fullerton's analysis of the case and the conclusion that the size of the fines being levied was reasonable. It was moved by Scott Fullerton, seconded by Jorge Macias, to uphold each of the citations, the fine being levied, and the requirement that the violations be promptly abated. **Motion adopted.** Respondent was accordingly levied a fine in the amount of \$7,642.00.

Vote: 4-0.

4. Administrative Meeting.

Acting Chairman Speilberg called this item to be heard, beginning with subsection 4 (a), the approval of the previous Review Board meeting minutes of October 12, 2022. It was moved by Scott Fullerton, seconded by Frank Milligan, to approve the minutes as read. **Motion adopted.**

Vote: 4-0.

Acting Chairman Speilberg then called Item 4(b) to be heard, the review of contested case settlements, motions, draft decisions, or procedural issues.

- i. (1). LV 21-2060, Pole Fitness Studio, LLC. Board counsel advised that the matter before the Board was the written decision for review and approval by the Board if the draft decision was consistent with what the Board perceived was its decision and the rationale for the determination made by the Board. That is to say, this was not noticed to re-argue the case.

Board counsel pointed out that only three Board sat to hear this matter. They were Frank Milligan, William Speilberg and Chairman Rodd Weber. Board counsel pointed out that the day before the hearing on this item, counsel for Pole Fitness submitted a 17 page memo challenging the draft decision before the Board for consideration. The memo was an attempt to re-argue the case.

Board counsel pointed out to the Board members that there is no provision in the Board's procedures for a party to submit such a memo the day before the hearing on whether to approve the draft decision of the Board. As indicated, argument at this stage over the case is concluded and the only issue was whether the Board's decision was consistent with what the Board believes was the decision it rendered and the rational behind the decision. Board counsel then pointed out that in light of Pole Fitness' memo challenging, once again, the merits of the Board's decision, this memo from Pole Fitness was a harbinger of things to come in this matter, namely an appeal of the decision to the District Court. Board counsel urged caution and suggested it was best if the three Board members who heard and decided the case, decided whether or not the draft decision was consistent with their determination. Board counsel recommended, therefore, continuing this matter to the December meeting when Board Chairman, Rodd Weber, will be

present and all three members of the Board that heard this case could deliberate and dispose of it appropriately.

Lindsey Dibler, Esq., and the owner of the business, F. Monday, were present. Board counsel also reiterated for their benefit that the Pole Fitness memo would be made a part of the record but would not be considered unless a motion for Pole Fitness was filed asking the Board to accept and consider the respondent's challenge to the decision and the motion was granted. It was then moved by Frank Milligan, seconded by Scott Fullerton, to continue the hearing on the draft decision. **Motion adopted.**

Vote: 4-0.

Acting Board Chairman Speilberg next called item 4(b)(i)(2) to be heard, the draft decision for RNO 20-2025, Valley Joist LLC. This draft decision did not have the problems associated with the Pole Fitness matter. It was moved, accordingly, by Frank Milligan, seconded by Scott Fullerton, to approve the draft Valley Joist decision because it accurately reflected disposition of the case. A quorum was present because all Board members were provided a copy of the transcript and results of the case. **Motion Adopted.**

Vote: 4-0.

Acting Board Chairman Speilberg then called Item 4(b)(ii)(1), LV 21-2120, Mesquite Gaming LLC dba Virgin River Hotel and Casino to be heard. The State was withdrawing the complaint in this matter for consideration by the Board and asked for an Order of Dismissal. It was moved by Frank Milligan, seconded by Jorge Macias, to approve the withdrawal and dismissal of the complaint with prejudice. **Motion Adopted.**

Vote: 4-0.

Acting Board Chairman Speilberg then called the next item to be heard, 4(b)(ii)(2), LV 20-2007, Total Western, Inc. This matter also was a withdrawal where the State is asking the Board to approve its withdrawal of the complaint and dismissal with prejudice upon the withdrawal. It was moved by Frank Milligan, seconded by Jorge Macias to approve the withdrawal of this case and the dismissal of the complaint with prejudice. Mr. Perry Poff was present for Total Western. He was advised that the motion by the Board was a Final Order. **Motion Adopted.**

Vote: 3-1 (Speilberg dissenting).

Board counsel next advised that Items 3 and 4 under this heading of 4(b)(ii) were also matters wherein the approval of the withdraw of the complaint was being sought but the filings in both matters, RNO 20-2017 and RNO 20-2018, were incomplete in that there was no acknowledgment of the withdraw by the respondent. Board counsel advised that these matters be continued until the December 2022 or January 2023 meeting of the Board. It was moved by Frank Milligan, seconded by Scott Fullerton to continue these two items, RNO 20-2017 and

RNO 20-2018, to the Board's meeting of either December 2022 or January 2023. **Motion Adopted.**

Vote: 4-0.

Acting Chairman Speilberg then called Item 4(c) to be heard, the Consent Agenda. Jorge Macias advised that Martin-Harris Construction, LLC, the first item on the Consent Agenda, was his employer and, therefore, he would be recusing himself from voting on this particular item. Acting Chairman Speilberg, therefore, bifurcated the Martin-Harris matter from the remaining five items on the Consent Agenda. The Martin-Harris matter was bifurcated from the rest of the Consent Agenda and taken up first. It was moved by Frank Milligan, seconded Scott Fullerton to approve the withdraw of the complaint and dismissal of the matter with prejudice as set forth in the proposed final order of LV 20-2007. **Motion Adopted.**

Vote: 3-0-1 (Macias abstaining for the reasons stated).

Acting Board Chairman Speilberg then called for the remaining Items ii through vi be taken up on the Consent Agenda. No member of the Board called for the removal or continuation or special consideration of the remaining five items on the Consent Agenda. It was accordingly moved by Frank Milligan, seconded by Scott Fullerton, to approve the remaining item ii through vi of the Consent Agenda. **Motion Adopted.** As a result of this motion, the following dispositions took place:

- ii. RNO 20-2045, Lennar Reno, LLC. The Board approved the withdrawal of the complaint and dismissal with prejudice of this matter consistent with draft final order prepared to be executed in this matter.
- iii. RNO 21-2097, Express Messenger Systems, Inc. dba Ontrac. The Board approved the withdrawal of the complaint and dismissal with prejudice of this matter consistent with draft final order prepared to be executed in this matter.
- iv. RNO 21-2105, Costco Wholesale Corporation dba Costco Wholesale #646. The Board approved the withdrawal of the complaint and dismissal with prejudice of this matter consistent with draft final order prepared to be executed in this matter.
- v. LV 21-2113, Tarkanian Basketball Academy, Inc. The Board approved the withdrawal of the complaint and dismissal with prejudice of this matter consistent with draft final order prepared to be executed in this matter.
- vi. LV 21-2143, DRI Tech Corporation. The Board approved the withdraw of the complaint and dismissal with prejudice of this matter conditional with draft final order prepared and to be executed in this matter.

The Board duly notes that the face value of these cases wherein the State had decided to withdraw the complaint and decline to prosecute these matters amount to a waiver of fines totaling \$55,283.00.

4(d) General administration and/or procedural issues.

Acting Board Chairman Speilberg called this matter to be heard.

i. General Matters of import to Board members.

Scott Fullerton advised the Board that he would not be in attendance at the December 14, 2022 session of the Board but he would be in attendance on December 15, 2022. Then, the logistics for Board members to make travel arrangements for their travel to Reno or Las Vegas to participate in Board meetings came on for discussion. Scott Fullerton wanted to know if the flight arrangements had been changed or if the process remained the same in light of the fact that a new person was the contact for making flight arrangements. Tori Carreon advised that the person to contact is Kim Toledo if the Board members have questions about their accommodations, flights and the logistics for making flight arrangements.

ii. Old and New Business.

There was none.

iii. Discussion about Board Legal Counsel's Contract, Select and Employment of Board Legal Counsel.

The Board first took up the statement by Tori Carreon at the beginning of this meeting that the Board meeting of January 2023 would be cancelled due to the lack of Board counsel and a court reporter. Board members unanimously took umbrage of this suggestion. Board counsel pointed out that life goes on even if the Board is not meeting or conducting business as cases need to be filed, motions may be filed, answers need to be filed and there needs to be a place for the Board to continue to operate because of the transactions initiated in response to the filing of complaints before the Board. The Board members were in agreement that business should not be curtailed as business continues. Board counsel also pointed out that he had a phone conversation Terry Reynolds, the Director of Department of Business and Industry, the umbrella agency over the Division of Industrial Relations. Terry Reynolds informed Board counsel that it is the Board's decision to select its own legal counsel to represent it in all matters of Board business and to be general counsel to the Board. Board Counsel also advised that he will contact Terry Reynolds to discuss the notion of discontinuing Board business in January, 2023, given that Board business actually continues. There should be options for recording the business of the Board in January, 2023. After a vigorous questioning of the utility of the cancellation of Board business for the reasons sprung on the Board by Ms. Carreon, it was moved by, Frank Milligan, seconded by Scott Fullerton to defer any decision regarding the cancellation of the January Board meeting to a further discussion of this situation at the December meeting of the Board. **Motion adopted.**

Vote: 4-0, unanimous vote of the Board.

- iv. Discussion of Board Status Report, Disposition of Decisions and Findings of Fact.

This matter was continued to the next meeting of the Board.

- v. Discussion of request by Salli Ortiz, Esq., to change the February 8 and 9, 2023 meeting to a different date because of a conference on that date of Government attorneys.

It was moved by Scott Fullerton, seconded by Frank Milligan, to grant Ms. Ortiz's request and as a result the February 2023 Board meeting shall be moved to February 15 and 16, 2023.

Motion adopted.

Vote: 4-0.

- vi. Discussion of utilization of scheduled dates to the fullest.

This item was continued to this Board meeting because it was thought that a full complement of Board members should be on the discussion on this item. Unfortunately, one of the Board members was absent so it seemed advisable to continue this item to December 2022 when all the Board members will be present. Also, it seemed advisable that this discussion would be consolidated with the discussion about Board Legal Counsel's contract and Ms. Carreon's claim that the Board couldn't meet without a court reporter and that she couldn't contract with one in time. It was moved by Scott Fullerton, seconded by Frank Milligan, to continue this Item to the December meeting and to consolidate the discussion of this item with the discussion of Board Legal Counsel's contract situation, the court reporter situation and the "suggestion" by Ms. Carreon that the January 2023 meeting should be cancelled.

- 4(e) Schedule of hearings on pending cases, calendar and status report.

The Board approves the schedule of cases set forth in the Agenda with the exception of the February 8 and 9, 2023 meeting, which will be changed to February 15 and 16, 2023, in Las Vegas.

5. Public Comment.

Acting Chairman Speilberg indicated that there was no additional public comment originating from the Board meeting. Board counsel advised that his office had not received any written correspondence in the form of public comment during the course of the meeting. Matthew Hughes, Esq., however, wanted to know whether the disposition of his matter on the consent agenda amounted to a final order. He was advised that his matter, Martin-Harris, was concluded as of this date.

6. Adjournment.

It was moved Frank Milligan, seconded by Scott Fullerton, to adjourn the meeting.
Motion adopted.

Vote: 4-0.

At the conclusion of the meeting Board members wished each other a happy Thanksgiving.

Dated this 21st day of November, 2022.

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

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