

**STATE OF NEVADA**

**Review Board for the  
Nevada Occupational Safety and Health**

**Meeting Minutes for October 10 and 11, 2018**

**Present**

Steve Ingersoll (labor)  
Rodd Weber (management)  
James Halsey (labor)  
Sandra Roche (management)  
Frank Milligan (public at large)

On October 10, 2018, at approximately 10:03 a.m., Chairman Ingersoll, called the meeting to order of the Nevada Occupational Safety and Health Review Board. The Board meeting took place at the Las Vegas-Clark County Library District, Enterprise Library, 25 East Shelbourne Avenue, Las Vegas, Nevada.

**1. Roll Call.**

Chairman Ingersoll called the roll of the Board. Those Board members present in person at the commencement of the meeting were Chairman Ingersoll, Board Secretary, Rodd Weber, and members James Halsey, Sandra Roche, and Frank Milligan. As all five members of the Board were present, and at least one member of the Board from labor and one member of the Board from management were present, a quorum of the Board was established to conduct the Board's business.

Also present at the meeting was the Board's legal counsel, as well as attorneys, witnesses, and members of the public.

Notice of the meeting was posted, published or served electronically consistent with the requirements of the Nevada Open Meeting Law as shown by the Notice/Agenda attached hereto.

**2. Public Comment.**

The Chairman called this item to be heard. There was no public comment.

**3. Contested Cases.**

Genesis Gaming Solutions, item 3.a., Case No. LV 18-1936, and Arizona Partsmaster, Inc., item 3.d., Case No. LV 18-1950, were continued before the hearing upon Order of the Chairman at the request of the respondent's counsel in each case. These matters will be rescheduled to be heard at a later meeting of the Board.

**c. LV 18-1948, Pier Construction & Development**

Thus, Chairman Ingersoll called the Pier Construction & Development matter, LV 18-1948, to be heard first under this heading. The Chief Administrator Officer of the Occupational Safety and Health Administration, Division of Industrial Relations of the Department of Business and Industry, State of Nevada (the State or complainant) was represented by Salli Ortiz, Esq., DIR deputy Division legal counsel. Eric Zimbelman, Esq., of the law firm of Peel Brimley, LLP, appeared on behalf of the respondent, Pier Construction & Development, LLC. The State offered into evidence at the outset of the hearing, its evidence packet, labeled Exhibits A-C and stamped one through 186. Similarly, Mr. Zimbelman, on behalf of the respondent, produced its evidence packet labeled Exhibits A through E and consisting of pages Bate stamped 000001 through 000459. Both packets of exhibits were admitted into evidence without objection.

The State, through Salli Ortiz, put on its case in chief, she called as witnesses, William Gardiner, Dwayne Powell, Nick LaFronz, Robert Wilson, the injured NV Energy employee, Robert Keane and Ramses Rangel. The State then rested. The Respondent, through Mr. Zimbelman, put on its defense, calling John Fehner and Sean Burke, all employees of Pier Construction, as a part of its case in chief. Mr. Zimbelman also vigorously cross-examined the State's witnesses, as did Ms. Ortiz the respondent's witnesses.

During the course of the hearing, the respondent also offered an additional exhibit, a photograph labeled F-1, which was admitted into evidence without objection. During Mr. Fehner's testimony, the defense also played a portion of a video of the accident scene in the general vicinity of the hole into which the NV Energy employee fell, precipitating the charges brought against the Respondent pursuant to 29 CFR § 1926.501(b)(4)(ii). This video was also admitted into evidence without objection as a part of the original evidence packet submitted by the Respondent. A CD disk of the video is a part of the record.

At the conclusion of Mr. Burke's testimony, the defense rested, thereby concluding the evidentiary portion of the hearing on this matter. By then, it was nearly 5:00 p.m., and given that the Board could only use the hearing room until 5:00 p.m., the parties stipulated to conduct oral argument at the outset of the Board's hearing scheduled to continue, tomorrow, on October 11, 2018. The hearing on this matter was concluded for October 10, 2018, and continued to resume with oral argument, on October 11, 2018, as the first matter to be heard on the stacked calendar.

Due to the lateness of the hour, the Chairman skipped to item 5, of the Agenda.

**5. Public Comment.**

None.

**6. Adjournment.**

It was moved by Rodd Weber, seconded by James Halsey, to adjourn the meeting of the Board and to reconvene the hearing the next day, October 11, 2018. **Motion adopted.**

**Vote: 5-0.**

**Thursday, October 11, 2018**

The Board reconvened on October 11, 2018, when Chairman Ingersoll called the meeting to Order at approximately 10:00 a.m. Chairman Ingersoll, called the meeting to order of the Review Board for the Nevada Occupational Safety and Health. The Board meeting took place at the Las Vegas-Clark County Library District, Enterprise Library, 25 East Shelbourne Avenue, Las Vegas, Nevada.

**1. Roll Call:**

Chairman Ingersoll called the roll of the Board. Those Board members present in person at the commencement of the meeting were Chairman Ingersoll, Board Secretary, Rodd Weber, and members James Halsey, Sandra Roche, and Frank Milligan. As all five members of the Board were present, and at least one member of the Board from labor and one member of the Board from management were present, a quorum of the Board was established to conduct the Board's business.

Also present at the meeting were the Board's legal counsel and attorneys, witnesses, and members of the public.

**2. Public comment.**

The Chairman called this item to be heard. There was no public comment.

**3. Contested Case Hearings (continued from October 10, 2018):**

**c. LV 18-1948, Pier Construction & Development**

Chairman Ingersoll called the Pier Construction & Development, LLC, matter, LV 18-1948, to be heard first under this heading as it had been stipulated and agreed between the parties to continue the hearing on this case to this date for closing argument. Salli Ortiz, Esq., again appeared on behalf of the State and Eric Zimbelman, Esq., appeared again for the respondent, Pier Construction & Development, LLC. As the State has the burden, Ms. Ortiz went first and presented her closing argument. Mr. Zimelman then followed. Oral argument, combined, consumed about one hour, with the lion's share of the time going to Mr. Zimbelman. At the conclusion of closing arguments, both parties rested. Chairman Ingersoll informed the parties that the Board would take the matter under advisement, and the Board would issue its written decision within 90 days of this day's date. Pier Construction then vacated the hearing room.

**b. LV 18-1935, Walker Specialty Construction, Inc.**

Chairman Ingersoll next called this item to be heard, Walker Specialty Construction, Inc., Case No. LV 18-1935. The Chief Administrator Officer of the Occupational Safety and Health Administration, Division of Industrial Relations of the Department of Business and Industry, State of Nevada (the State or complainant) was represented by Salli Ortiz, Esq., DIR deputy Division legal counsel. Walker Specialty Construction, Inc., (Walker Specialty) was represented by Shan Davis, Esq., of the law firm of Davis/Stibor. At the outset of the hearing, the parties stipulated to the admission into evidence of the State's packet of documents consisting of pages 1 through page 162. They also stipulated to the admission into evidence of Walker Specialty's packet of documents consisting of Bate stamped pages W001 through W111. Then, during the course of the hearing, Walker Specialty offered for admission into evidence, a packet of 6 photos, identified, collectively, as W112. All exhibits were admitted into evidence without objection.

The State called one witness, John Hutchison, the DIR Industrial Hygiene Supervisor. Walker Specialty called only one witness, as well, Brett Unbedacht, Walker Specialty's Operations Manager-District Manager. Both witnesses were examined and cross examined, after which, both sides rested with the presentation of only one witness, each. Walker Specialty's legal counsel advised at the outset of the hearing that his young daughter was playing in her first orchestra concert that evening and if the hearing ended by 4:00 p.m., he could attend her first concert. He would like for that to happen.

At the conclusion of the evidentiary portion of the hearing, both sides presented oral argument. The hearing was then closed by the Chairman, who advised that the hearing was concluded, the Board would take the matter under advisement and a written decision would be provided the parties in 90 days of this day's date.

A brief recess was taken, so that the parties, their witnesses, and documents and records could be cleared from the room, if the parties chose to leave.

When the Board reconvened, it took up disposition of the two cases it had just heard, starting with Walker Specialty, Case No. LV 18-1935. This case involved for the first citation, Citation 1, Item 1, REGULATORY, NAC 618.918(1) a failure to give notice of a project for the abatement of asbestos, with reference to several rooms of the complex, where it was alleged that asbestos was to be removed and no notice was given for the rooms in question containing asbestos. Walker Specialty was also cited for a failure to give 10 days written notice of the removal of asbestos, before commencing the act of removal. *See*, Citation 1, Item 2, REGULATORY, NAC 618.954(2).

Walker Specialty's defense was that there was no proof of the presence of asbestos and since there was no asbestos present, Walker Specialty could not have intended to remove the asbestos. Thus, according to Walker Specialty, there could be no violation inasmuch as intent to remove asbestos is a necessary element of the citation. Walker Specialty argued this had to be the case because of NAC 618.851, which defines the word abatement used in NAC 618.918(1) and NAC 618.954(2), the two regulations that

Walker Speciality was charged with violating, as “...any act which is *intended* to reduce, eliminate or encapsulate asbestos or materials containing asbestos.” Since the State, according to Walker Specialty, could not show the presence of any asbestos, Walker Specialty could not have intended to remove asbestos, and, therefore, the regulations were irrelevant to the conditions present on the job. The regulations afforded no basis for a citation against Walker Specialty.

The Board disagreed. The presence or absence of asbestos does not preclude a finding of intent to remove asbestos, the trigger for application of the two regulations. The room clean up contract or proposal from Walker Specialty, W001, is entitled, “...Asbestos Containing Room Cleanup.” The work to be performed for the rooms was quoted as a lump sum price per room for “...the Asbestos Containing Room Cleanup Work.” W001. The price per unit or room was \$2,220.00. The proposal was based upon “wet wiping and hepa vacuuming...” The contract is dated August 8, 2017. W001.

Walker Specialty also offered a second proposal or entered into a contract for “...Asbestos Containing Dumpster Cleanup.” It, too, is dated August 8, 2017. The contract price was for the clean up of two dumpsters was \$4,600.00. W002.

According to the testimony of Brett Unbedacht, the District Manager, and the author of the two contracts at issue, when Walker Specialty bids a job and starts clean up work, the company always *presumes* asbestos is present in the premises they are contracting to clean. Thus, at the outset or start of the job, the presence of asbestos is always presumed. That is, in other words, the company’s mindset. Then, the two contracts, above, are loaded with references to asbestos. They also describe that with reference to the rooms, the cleaning consisted of a wet wipe and a hepa vacuuming of the rooms. This was the work that justified the price tag, above, of \$2,220.00 per room.

According to Mr. Unbedacht, the rooms were already spotless. If that was the case, why was Walker Specialty there in the first place? What, then, was the purpose for wet wiping and for hepa vacuuming the rooms, if they were already spotless, unless it was, as stated in both contracts, the cleaning up of dust laden asbestos or at least the expectation of cleaning/removing dust laden asbestos.

Walker Specialty clearly wasn’t present at \$2,220.00 per room, to polish faucets or clean toilets or polish woodwork around the doors. The testimony, facts, and contracts belie the claim that Walker Specialty did not approach this job with the intent that they were there to clean up and encapsulate asbestos. The requisite and timely notices should have been given. They were not.

Accordingly, for Citation 1, REGULATORY, NAC 618.918(1), it was moved by Jim Halsey, seconded by Rodd Weber, to affirm the State’s citation and penalty of \$2,100,00. Motion approved. Vote: 4-1 (Roche dissenting).

It was then moved by Frank Milligan, seconded by Steve Ingersoll, for Citation 1, Item 2, REGULATORY, NAC 618.952(2), to affirm the State's citation and penalty of \$225.00.  
**Motion adopted.**

**Vote: 4-1 (Roche dissenting).**

The Board next took up Pier Construction & Development (Pier Construction) case. For this matter, there was one citation, only, Citation 1, Item 1, SERIOUS, 29 CFR § 1926.501(b)(4)(ii) with a penalty of \$2,160.00. The charge involved the case of a controlling employer in a multi-employer situation. Pier Construction was the general contractor. An employee of NV Energy, Robert Wilson, fell down a hole in the ground with a depth in excess of six feet. Almost immediately upon arriving on the site of the job, Mr. Wilson stepped onto a pallet purportedly covering a hole that was more than six feet deep from the surface of the ground to the lower level. He was injured from the fall.

Pier Construction conceded that it was a controlling employer with control over the conditions of the work site, sufficient to make it responsible for such conditions like the problem here. Hole safety, with the ability to warn and to prevent employees from falling into such holes, was concededly within its purview. Holes like the one that the injured worker fell into were drilled throughout the job site. There were a total of at least 54 in number that had been drilled at the time of the incident. The use of pallets was the chosen method of fall protection. That is a permissible use of pallets.

According to the employer's legal counsel, however, the only purpose of a pallet was to warn the employees of the presence of a hazard, namely, a hole more than six feet deep. Pallets were not there to prevent the fall, itself. In fact, the purpose of the cover of the hole by pallet was to prevent a fall from taking place as the pallets must be designed to withstand, without failure, at least twice the weight of employees, equipment and materials that may land on the cover. In addition, the cover is to be anchored when installed to prevent accidental dislodgment by the wind, equipment, and employees. 29 CFR § 1926.502(i)(1)-(4). These provisions of the Regulations make clear that the purpose of the pallets is not only to warn but to be sturdy and secure enough to protect from a fall, if the warning is missed or the employee trips, for example, when in the vicinity of a hole protected by a pallet supplied as the method of cover to mitigate against the presence of the hazard, the hole in the ground.

The question the case presents, then, is whether the condition of the pallets used was substandard and whether the threat that they posed as substandard was so pervasive and obvious, Pier Construction knew or should have known of their substandard and dangerous condition in order to mitigate the problem of substandard pallets, posing an unacceptable hazard at the work site. This is the point since Pier Construction concedes it was a controlling employer, with authority over such conditions at the work site.

The Board concluded that the pallets and their placement were substandard, the substandard nature of the pallets was obvious to the naked eye and from the multiple photos of these patently substandard pallets, it was clear this was a pervasive condition

throughout the work site. Pier Construction knew or should, therefore, have known of the hazardous condition posed by these improperly covered holes and cured the condition or required the condition to be cured throughout the work place before this incident occurred. It did not. Accordingly, for Citation 1, Item 1, SERIOUS, 29 CFR § 1926.501(b)(4)(i), it was moved by Rodd Weber, seconded by Frank Milligan, to affirm the State's complaint and proposed penalty of \$2,160.00. **Motion approved.**

**Vote: 4-1(Roche, dissenting).**

This concluded consideration of agenda item 3., Contested Case Hearings.

**4. Administrative Meeting.**

**a. Approval of the previous Review Board minutes of September 12, 2018.**

After a recess of 10 minutes, the Chairman reconvened the meeting with the same quorum being present to next consider this item, the minutes for the meeting of September 12, 2018. It was moved by James Halsey, seconded by Sandra Roche, to approve the minutes of September 12, 2018, as read. **Motion approved.**

**Vote: 5-0.**

**b. Review contested case settlement, motions, draft decision, or procedural issues pending on status report, for approval and issuance of final order:**

- i. LV 18-1919, The Original Roofing Company.**
- ii. LV 18-1920, The Original Roofing Company.**
- iii. RNO 18-1922, D7 Roofing Services, Inc.**
- iv. RNO 18-1947, Scougal Rubber Corporation.**
- v. RNO 18-1937, Savage Services Corp.**
- vi. RNO 14-1684, Sierra Packaging and Converting, LLC.**

Chairman Ingersoll next called this matter to be heard. He asked the Board to consider the first four cases for dismissal, acceptance of the settlements and closing, as these were the reasons they were before the Board at this time. Accordingly, it was moved by Frank Milligan, seconded by Rodd Weber, to accept the settlements, approve the cases for dismissal, approve the closing of these matters and to direct the Board Chairman to execute the appropriate orders to carry out the effect of this motion for cases LV 18-1919, the Original Roofing Company, LV 18-1920, the Original Roofing Company, RNO 18-1922, D7 Roofing Services, Inc., and RNO 18-1937, Scougal Rubber Corporation, items 4.b(i)-(iv). **Motion adopted.**

**Vote: 5-0.**

**v. RNO 18-1937, Savage Services Corp.**

Chairman Ingersoll called this item to be heard, RNO-18-1937, Savage Services Corp. This is a non-action, information only item. Board counsel explained that the respondent in this case filed a pleading that is a motion to dismiss for the want of jurisdiction or in the alternative, for permission to conduct discovery. As the motion to dismiss would require disposition first, of the jurisdictional question and as the conduct of discovery in these cases has heretofore been an infrequent occurrence, the Board Chairman signed an order requiring the parties to file simultaneous briefs on these two issues by November 1, 2018, and directing that the parties orally argue their position before the Board at the Board's December 12, 2018 meeting in Reno as this is a Reno case. Depending upon the outcome of the hearing on December 12, 2018, the case may be set for hearing in 2019.

**vi. RNO 14-1684, Sierra Packaging and Converting, LLC.**

Chairman Ingersoll called this item to be heard, RNO 14-1684, Sierra Packaging and Converting, LLC. This is another non-action item for discussion, only. Board counsel explained that this case has been returned to the Board for further deliberations. The Nevada Court of Appeals reversed the decision of the Board on grounds that the Board applied an incorrect legal standard when deciding the case. The Court of Appeals then enunciated the correct legal standard and remanded it back to the District Court for remand back to the Board to apply the correct legal standard to the existing, already established record in this case. That is, the Court of Appeals did not remand the case for a *de novo* hearing where the Board would take evidence all over again as if there had been no hearing and disposition in the first place. The Board is to examine the existing record against the new legal standard enunciated by the Court of Appeals and decide the case on that basis.

Board legal counsel explained that as this is a matter on remand for consideration of the existing record against the correct legal standard, the Board members will be sent the complaint, answer, any and all documentation and records admitted into evidence and the transcript of the hearing for the Board to review prior to deciding the case against the Court of Appeals' new legal standard for disposing of the case. This does not, however, preclude the Board from allowing the parties to present oral argument in favor of their respective positions and, in fact, it is recommended that the Board allow the parties 20 minutes a side to inform the Board how it should decide the case when applying the new legal standard.

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

The Chairman called this item to be heard. The only matter discussed was the fact that the next Board meeting will be held at the State office campus located at 3360 West Sahara Avenue, Las Vegas, Nevada.

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

The Chairman called this item for discussion. Given the lateness of the hour, the question of a quorum was raised regarding the next meeting of the Board to be held on November 14 and 15, 2018. Member Frank Milligan and Chairman Ingersoll are unavailable those dates. Secretary Rodd Weber is available to chair the meeting, at least on November 15, 2018. As members Sandra Roche and James Halsey will attend, the quorum requirement for the Board will be satisfied.

**5. Public Comment.**

There was no public comment.

**6. Adjournment.**

Chairman Ingersoll called this matter next to be heard. It was moved by Frank Milligan, seconded by James Halsey, to adjourn the meeting. **Chairman Ingersoll then adjourned the meeting.**

**Vote: 5-0.**



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Charles R. Zeh, Esq., Board Legal Counsel

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