

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

September 8 and 9, 2021
Via teleconferencing and audio conferencing (WebEx)

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

On September 8, 2021, a meeting of the Nevada Occupational Safety and Health Review Board was convened.

The Board elected to exercise its option under AB 253 in light of the COVID-19 pandemic and conducted the meeting of the Board exclusively by use of a remote technology system. There was no physical site available for the conduct of this meeting. The public was advised that the Complainant, Respondents, Witnesses, Attorneys, Board members, and legal counsel and any other participants in the meeting would be participating by electronic means.

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.

Those present at the meeting were Chairman Rodd Weber, Vice-Chairman William Spielberg, and Members Frank Milligan, Jorge Macias and Scott Fullerton. As five members participated including representatives of labor and management, a duly constituted quorum was present to conduct the business of the Board. Also present was Charles R. Zeh, Esq., The Law Offices of Charles R. Zeh, Esq. Board Member Milligan had to depart the meeting early because of a prior business commitment, work-related.

Also present were Salli Ortiz, Esq., counsel to the State of Nevada OSHA, and Michael P. Mersch, General Counsel to Focus Framing, Door & Trim, LLC.

The meeting of the Board was conducted by video conferencing. The public had the option of participating also by telephone. The hearing on this date was reported by Court Reporter Kathy Jackson, who appeared virtually.

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, as

modified or amended through Governor Sisolak's Emergency Directives and AB 253. 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.

2. Public Comment.

Chairman Weber called this matter to be heard. No public comment was offered during the course of the meeting and Board Legal Counsel advised that his office had received no written comment from the public in connection with this meeting.

3. Contested Hearings.

Chairman Weber next called this item to be heard, the contested cases for disposition by the Board.

LV 21-2108, Focus Framing, Door & Trim, LLC.

Chairman Weber called to be heard Focus Framing, Door & Trim, LLC, the first of two remaining cases to be heard on the stacked docket for the Board. Focus Framing, Door & Trim was represented by Michael P. Mersch, General Counsel to Focus Framing, Door & Trim, LLC. The complainant, State of Nevada, was represented by Salli Ortiz, Esq.

Witnesses were called, exhibits were admitted into evidence, and at the end of the day, complainant and respondent had called all of their witnesses and presented their complaint and response. Following the mid-day break, Frank Milligan departed the meeting because of his prior work-related commitment. He returned to the meeting at the conclusion of the hearing on this matter. He did not participate in the deliberation and disposition of the case because he had missed a portion of the proceedings.

The Board deliberated and at approximately 6:00 o'clock p.m., the Board concluded its deliberations. It was thereupon moved by Jorge Macias, seconded by Scott Fullerton, to uphold in its entirety the citation in this case, including the assessment of a fine. At the outset of the hearing, however, the State voluntarily dismissed the claim of willful or indifferent conduct, thereby reducing the matter to a serious offense with a fine of \$10,603. The motion to uphold the citation also included the finding that the respondent had not proved its sole affirmative defense offered, that of an unavoidable employee misconduct or a rogue employee defense. The motion was adopted.

Vote: 4-0 (Milligan abstaining for the reason stated).

After the vote on Focus Framing, Scott Fullerton advised that a matter came up during the course of the hearing of concern which he believed required some examination by the Board. The meeting was briefly adjourned so that Board counsel could confer with Scott Fullerton

regarding his concern. This meeting between Board Counsel and Mr. Fullerton took place outside the presence of the remaining Board Members. At the conclusion of the consultation between Member Fullerton and Board Counsel, the Board meeting was reconvened and the Board Counsel advised that the discussion he had with Member Fullerton could be addressed at the part of Administrative portion of the Agenda for the September 8 and 9, 2021, meeting of the Board.

Given the lateness of the hour, the Chairman determined that the rest of the Agenda should be carried over to the next day, September 9, 2021, at which time the Board will pick up with the hearing on Tarkanian Basketball Academy, Inc., Docket No. LV 21-2102. Member Milligan advised that he would be able to participate throughout on the hearing of this matter, if it was taken up at 9:30 a.m., the following day. Accordingly, Chairman Weber advised that the Board would take care of Administrative matters on the Agenda on the next day starting at 9:00 a.m., and then move to convene on Tarkanian Basketball Academy, Inc., at approximately 9:30 a.m., after Member Milligan arrived to participate throughout on this matter, LV 21-2102.

The Chairman asked if there was any further public comment. None was offered at the hearing and Board counsel advised that his office had not received any written comment while the meeting was proceeding on this date.

Adjournment

Chairman Weber asked for a motion to adjourn the meeting until 9:00 a.m., on the next day. It was accordingly moved by Scott Fullerton, seconded by William Spielberg, to adjourn the meeting. Motion was adopted.

Vote: 5-0.

The meeting was adjourned at approximately 6:30 p.m., on September 8, 2021.

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Jorge Macias (Management)
Scott Fullerton (Labor)

On September 9, 2021, the continuation of the September meeting of the OSHA Board of Review was called to order at approximately 9:00 o'clock a.m.

1. Roll Call

Roll Call.

Members present at the outset were Chairman Rodd Weber, Vice-Chairman William Spielberg, and Members Jorge Macias and Scott Fullerton. Frank Milligan joined the meeting at approximately 9:30 a.m.

2. Public Comment

Chairman Weber called this item to be heard. No public comment was offered at this time during the course of the meeting. Board Counsel advised that his office had received no written public comment as of the commencement of the meeting on this date.

Chairman Weber next called to be heard Item 4, the Administrative portion of the scheduled two day meeting of the Board. He then called Item 4(1) to be heard, approval of the previous Review Board minutes of August 11, 2021, for possible action.

It was moved by Jorge Macias, seconded by Scott Fullerton, to approve the minute of the August 11, 2021, meeting as read. The motion was adopted.

Vote: 4-0.

Chairman Weber next called Administrative Item 4(2), a review of the contested case settlement of LV 19-1955, James E. Wolf dba Plenty of Places aka Plenty O'Places dba Park Avenue Apartments, for possible action.

Board Counsel explained the settlement provisions in this matter which resulted in a reduction of \$49,400 to \$34,580 of the fines proposed to be assessed in this matter. It was moved Scott Fullerton, seconded by William Spielberg to approve the resolution of the matter as proposed by the State Complainant. The motion was adopted.

Vote: 4-0.

Chairman Weber then called Administrative Item 4(3) general administration and/or procedural issues.

- i. General matters of import to Board members.

Chairman Weber called this matter next. There was no discussion under this heading.

- ii. Old and New Business.

Chairman Weber called this matter next. There was no discussion under this heading as well.

- iii. Post Pandemic, whether hearings may continue to be conducted remotely and if so, under what circumstances. (For possible action).

Chairman Weber called this matter next. The Board discussed whether or not to proceed for the October 13 and 14, 2021 meeting of the Board *via* a virtual hearing as opposed to an in person hearing. Given the uncertainty that still exists regarding the pandemic, an uncertainty affirmed by Victoria Carreon, the Board elected to conduct the October 13 and 14, 2021 meeting of the Board by virtual basis. Notice to the parties on the Stacked Docket for the meeting of October 13 and 14, 2021, shall go out advising the parties that the meeting will be conducted on a virtual basis as opposed to an in person hearing. Board Counsel pointed that in two of the cases before the Board on October 13 and 14, 2021, motions had been made dismiss or change venue on the grounds that conducting hearings by a virtual basis are, *inter-alia*, a denial of due process, claiming that only in person hearings may be conducted by the Board. This matter will have to be resolved in time for the October 13 and 14, 2021 hearings of the Board.

Scott Fullerton brought up the issue which he had raised with Board Counsel the previous day in private and outside the presence of the remaining Board members. His concern was the decree of control the Board has over witnesses testifying remotely by video, where other persons are in the room who may have the opportunity to influence the testimony being offered by the witness testifying remotely. Member Fullerton suggested that perhaps the Board could require witnesses testifying remotely to be alone and outside the presence of others when testifying, in order to avoid the possibility that testimony is influenced by other persons in the room.

While the Board Members approved of the concern and did not object, *per se*, to the proposal, there are some serious logistical concerns about proceeding in this manner and so, it was suggested that Board Counsel add a section to the information he provides when setting the case, admonishing that the coaching of witnesses is prohibited, must be avoided and that the Board would act if it believes coaching was taking place. For the moment, this was the suggested approach to controlling conduct involving witnesses testifying remotely from the Board.

By this time, Frank Milligan arrived at the meeting and accordingly, Board Chairman Weber, called Item 3, Contested Hearings, beginning with Tarkanian Basketball Academy, Inc., LV 21-2102.

Tarkanian Basketball Academy, Inc., was represented by Danny Tarkanian. The State of Nevada, Complainant, was represented by Salli Ortiz, Esq. The exhibits were admitted into evidence and testimony was taken by the witnesses. The hearing commenced at approximately 9:30 a.m. The hearing adjourned for a mid-day break at noon. The Board reconvened at 1:00 p.m. and continued on until approximately 2:15 p.m., when the hearing was adjourned because of a commitment that Mr. Tarkanian had in Reno at 3:00 p.m. on this date. The matter will be added as the first set or item on the October 13 and 14, 2021, contested docket. As of the adjournment of the hearing on this on this matter, the State had not rested. The State intended to call at least one more witness. Mr. Tarkanian indicated he had one witness also to call. Assuming they are the remaining witnesses to be heard, at the conclusion of their testimony, the Board will deliberate and decide the case at that time.

With all of the Administrative matters having been resolved at the outset of the hearing, Chairman Weber then called for any Public Comment to be heard. None was offered. Board Counsel advised that no written Public Comment had been received by his office during the course of the hearing on this date.

Chairman Weber called for a motion to adjourn as the business of the Board had been concluded for this date as of this time.

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

Vote: 5-0.


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