

STATE OF NEVADA

Minutes for the Nevada Occupational Safety and Health Review Board Reno, Nevada

August 27, 2020

Via teleconferencing and audio conferencing (WebEx)

Steve Ingersoll (Labor)
Rodd Weber (Management)
James Halsey (Labor)
Frank Milligan (Public at Large)
Lance Semenko (Management)

On August 27, 2020, 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 as modified by Governor Sisolak's Emergency Directive 006, permitting meetings to be conducted by teleconferencing and audio conferencing (WebEx) and providing for a refined publication process for posting and the publication of agendas or notices of the meeting. This meeting took place by teleconferencing. The hearing was recorded by a court reporter, Christy Joyce. Participating *via* video conferencing were Chairman Steve Ingersoll, Board Secretary Rodd Weber, and members James Halsey and Lance Semenko. Member Frank Milligan participated by telephone. 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.

Present by video conferencing were Chairman Steve Ingersoll, Board Secretary Rodd Weber and Board members James Halsey and Lance Semenko. Member Frank Milligan participated by telephone. As five 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 present *via* video conferencing was Board counsel, Charles R. Zeh, Esq., The Law Offices of Charles R. Zeh, Esq. Further, present at various times throughout *via* video conferencing were Jess Lankford, Chief Administrative Officer of Nevada OSHA, and Salli Ortiz, Esq., deputy legal counsel to the State OSHA Administrative.

Donald C. Smith, Esq., legal counsel to the Division of Industrial Relations, participated by telephone. Victoria Carreon, Director of the Division of Industrial Relations, participated by video conferencing. Ray Perez, Esq., Jackson Lewis P.C., appeared by audio conferencing on the LV 18-1952, Westcor Construction matter and Garo Injasoulian also participated on the Westcor Construction matter by audio conferencing, though when given the opportunity to participate, he deferred.

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 through the Governor's Emergency Directives. 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 further modified by Emergency Directive 006 of the Governor.

2. Public Comment.

Board Chairman called this item to be heard. Board counsel advised that there was no written public comment received by his office in advance of the meeting. There was no Public Comment offered at this time during the course of the meeting.

3. Administrative Meeting:

Next, Board Chairman convened the administrative segment of the meeting.

a. Approval of Previous Review Board Minutes of July 8, 2020.

It was moved by Lance Semenko, seconded by Frank Milligan, to approve the minutes of July 8, 2020, as read. **Motion adopted.**

Vote: 5-0.

b. Review Contested Case Settlements, Motions, Draft Decisions, or Procedural Issues Pending on Status Report, for Approval and Issuance of Final Orders:

i. LV 17-1905, The Original Roofing Company.

It was moved by James Halsey, seconded by Rodd Weber, to approve the settlement of this matter as proposed. **Motion adopted.**

Vote: 5-0.

ii. LV 19-1961, Apex Linen Service, Inc.

Notice was given for this matter to Apex Linen Service, Inc's legal counsel, John Naylor, who has not yet filed a formal Notice of Withdrawal as legal counsel. Notice was also given to Maria Sawczuk, Esq., Goldstein & McClintock LLLP, the bankruptcy attorney for Apex Line Service, who, in the interim since the hearing on the merits of this case, has filed a Chapter 11 bankruptcy reorganization proceedings in Federal Court in the State of Delaware. Board counsel advised the Board that in his opinion the automatic stay in bankruptcy was inapplicable to these proceedings as the OSH Review Board is: (a) exercising valid police power; and (b) the action being proposed on this date, the approval of the draft decision, seeks no pecuniary relief.

It was moved by Rodd Weber, seconded by James Halsey, to approve the decision as drafted. Lance Semenko did not participate in the disposition of this case and abstained from voting. **Motion adopted.**

Vote: 4-0-1 (Semenko abstained for the reasons stated).

iii. LV 18-1939, Olson Precast Co.

It was moved by Lance Semenko, seconded by Rodd Weber, to approve the draft Order as presented to the Board for Board Chairman Ingersoll's signature. **Motion adopted.**

Vote: 5-0.

iv. LV 18-1952, Westcor Construction.

It was moved by Rodd Weber, seconded by Frank Milligan, to approve the draft decision as presented by Board counsel for Secretary Weber's signature. Board Chairman Ingersoll did not participate in the disposition of this case and abstained from voting. **Motion adopted.**

Vote: 4-0-1 (Ingersoll abstaining for the reason stated).

Following the vote on this matter, an e-mail was forwarded to Board counsel's office from Raymond Perez, Esq., legal counsel in this matter for Westcor Construction, advising that he was muted and could not be heard while this matter was being discussed. Board counsel informed Board Chairman, Steve Ingersoll about the problem and the airways were cleared to allow Mr. Perez to discuss Westcor, even though the Board had already voted. His presentation was more in the nature of a motion to reconsider or to reargue the case. This was not, however, the time to move for a Motion to Reconsider or to re-litigate the case. The only issue before the Board was whether the decision was consistent with what the Board believed was the action it had taken at the conclusion of the hearing in this case. Salli Ortiz, Esq., legal counsel for the State in this matter joined in to make this argument. Board counsel also agreed with Ms. Ortiz characterization of the nature of the hearing now before the Board. It was suggested that Mr. Perez either take this matter up on appeal or file a motion for reconsideration in light of the draft decision presently before the Board and which was just prior to his comments approved by the Board. The Board declined to take up a motion for reconsideration or to reargue the case at this time. The vote by the Board remained the action of the Board, approving the draft decision as the decision of the Board.

v. Appointment of Board Public Records Officer and direction to appointed office to develop a procedure for processing request consistent with Nevada Law.

Board counsel advised that Chapter 239 of the Nevada Revised Statutes requires Boards and Commissions, like other executive branch entities, to have a Public Records Officer and a

protocol for responding to public records. Chapter 239 of the Nevada Revised Statutes is Nevada's analog to the Federal Freedom of Information Act (FOIA). Requests under the FOIA do not apply to Nevada records. The State, however, as indicated has adopted its own Freedom of Records Information Act, set forth in Chapter 239 of the Nevada Revised Statutes. Chapter 239 of the Nevada Revised Statutes requires that the Board appoint a Records Officer to address requests for the inspection and/or copying of public records of the State of Nevada. Chapter 239 also requires to establish a protocol for responding to request for public records. Chapter 239 implies, therefore, that the Board maintain in some accessible fashion documents generated by the Board which amount to public records. Given that Board Counsel's offices is also the place where all documents records are to be filed once a matter comes to the attention of the Board, it makes sense for Board Counsel to be designated as the Public Records Officer with all its duties and responsibilities and privileges.

Donald C. Smith, Esq., offered public comment affirming the requirement that the Board have a Public Records Officer and Public Records Policy and Procedures and offered the services of his office to help the Board establish a protocol and procedure for handling public records requests. It was moved by Rodd Weber, seconded by James Halsey, to appoint Board counsel, Charles R. Zeh, Esq. as the Public Records Officer.

It was, therefore, moved by Rodd Weber, seconded by James Halsey, to appoint Board counsel as the Public Records Officer for the Board of Review. **Motion adopted.**

Vote: 5-0.

vi. Streamline the Decision Making Process.

Board counsel pointed out that upon direction by the Board, Board counsel drafts the decisions of the Board, memorializing the Board's disposition of contested hearings on the matters that come before it. The current practice also requires that the counsel for the State and opposing counsel in these matters before the Board draft Findings of Fact, Conclusions of Law and an Order, after receiving the decision drafted by Board counsel for the Board and after the Board has approved that decision. Board counsel's drafts, however, prepared for the Board's review and approval, themselves, consist of Findings of Facts, Conclusions of Law and the disposition of the matter. Therefore, there is a redundancy in that the decision approved by the Board as drafted by Board counsel and the disposition the product of negotiation between State counsel and opposing counsel both have Findings of Fact, Conclusions of Law and an Order. Board counsel recommends, therefore, that the process eliminate the second decision drafted as a product of negotiation between State counsel and opposing counsel and make as the final order, the decision drafted by Board counsel, which is approved by the Board as its disposition of the matters that come before it. The Board concurred in the recommendation.

It was, therefore, moved by Rodd Weber, seconded Lance Semenko, to require only one set of Findings of Fact, Conclusion of Law, and disposition as the final Order of the Board, as drafted by Board counsel, thereby, eliminating this second set, the decision drafted as a product of negotiation between the State counsel and opposing counsel in the matter before the Board.

The motion is for this to take place prospectively, commencing after the conclusion of the hearings on this date. Those decisions pending a draft disposition by State legal counsel and opposing counsel must, therefore, be completed. **Motion adopted.**

Vote: 5-0.

c. General administration and/or procedural issues.

i. General matters of import to Board members.

There was no discussion.

ii. Old and New Business.

There was none discussed as old and new business as this item is actually subsumed by Items iii and iv, below.

The Chairman then called for discussion item 3.c.iii and iv.

A discussion ensued. Donald C. Smith, legal counsel to DIR offered his comments. Jess Lankford, the Chief Administrative Officer of Nevada OSHA, offered his comments, Victoria Carreon, Director of the Division of Industrial Relations offered her comments. During the course of the discussion, it became apparent for the time being that State OSHA personnel would be unable to appear in person to testify in a contested case before the Board. The participation would be limited to appearances in virtual hearings, only. Salli Ortiz asked the Board to vacate and continue the contested cases for the September 2020 docket, because it was too late to be able to subpoena witnesses to appear at the hearing as of September 9 through 11, 2020.

She had been waiting for the Board to decide what it was going to do about the September docket. Ms. Ortiz, accordingly, asked the Board to vacate and continue the contested matters on the docket for the September calendar of the Board.

By contacting Board counsel's office, Sami Randolph, of the Hooks, Meng & Clement firm, was finally able to get through to address the Board on this issue as well. In her opinion, based upon her experience with video conferencing hearings and in person hearings before the District Court in Las Vegas it was possible with enough space to have the hearing in person where social distancing was practiced and observed. Her experience with video conferencing, however, was extremely negative and she highly recommended against it. She believed it would take 2 to 3 times longer to complete a hearing by video conferencing than a hearing conducted in person observing social distancing.

Rodd Weber was adamant that he believed hearings could be conducted with sufficient space to observe social distancing and that it would be unnecessary, unproductive and more time consuming were the Board forced to conduct hearings by video conferencing as opposed to an in-person hearing where social distancing was practiced. Chairman Steve Ingersoll advised he completely agreed with the comments of Board Secretary Weber. The discussion, however,

became academic since, for the present, it was apparent that State OSHA staff would not be permitted to participate as of this time in a hearing conducted in-person and would only be allowed to participate in a contested matter on a virtual hearing basis.

The discussion also focused on the process by which a video conferencing hearing could be conducted. One of the major problems is the handling of exhibits. According to Salli Ortiz, she provides opposing counsel in contested matters with a copy of her exhibits that she intends to offer for admission into evidence approximately 2 weeks in advance of the hearing.

Typically, she states, however, that she only receives the exhibits that opposing counsel intends to offer in defense of the citation or citations the day before or the day of the hearing. In any event, the exhibits are usually large in number averaging 150 pages which are delivered to the Board members from both parties at the outset of the hearing. The Board then resolves any quarrel the parties have over admissibility of the exhibits, after which the hearing proceeds.

This arrangement will not work for a hearing conducted by video conferencing. Board members will be scattered and 150 pages plus of documentary evidence could not be distributed to the Board members in time to be of any use for a hearing that was set to commence and was ready to be heard. This process could well deteriorate into a logistical nightmare.

The Board believes it would be advisable for Board counsel to develop, if possible, a process and procedure to be implemented to facilitate the admission into evidence and the distribution of the evidentiary matters to the Board members in time for them to have material in their possession for use during the hearing. Board counsel advised that he could attempt to draft such an emergency procedural order to be followed in the hearings conducted by video conferencing.

The procedure could then come before the Board for approval as an administrative item on the agenda for the September administrative hearing of the Board. It was accordingly moved, by Rodd Weber, seconded Lance Semenko to vacate and continue the contested cases on the September docket, to proceed with contested cases for the October docket by video conferencing in order ascertain whether and to what extent this could prove to be an acceptable alternative until in-person hearings can be conducted once again free of the pandemic virus and that Board counsel be directed to prepare for Board review and approval at the September meeting of the Board, an emergency procedure for the handling of exhibits and other pertinent procedural issues that might be needed in order to facilitate a contested hearing to be conducted by video conferencing. **Motion adopted.**

Vote: 5-0.

d. Schedule of Hearings on Pending cases, calendar and status report.

The Chairman called this item to be considered. Other than the vacation of the September 2020 docket, the remaining items on the agenda are to remain as scheduled and docketed. Board counsel advised the Board that cases have been docketed through March 2021. Also, there are at least 14 cases which have been filed with the Board that have not yet been scheduled for a hearing, as they are waiting, for example, the filing of an answer to the complaint.

4. Public Comment.

Chairman Ingersoll called this matter next to be heard. No public comment was offered at this time.

5. Adjournment.

Chairman Ingersoll called this item for consideration. It was moved by Rodd Weber, seconded by Lance Semenko, to adjourn the meeting. **Motion adopted.**

Vote: 5-0

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

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