

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

February 14 and 15, 2024

Rodd Weber (Management)  
William Spielberg (Labor)  
Jorge Macias (Management)  
Scott Fullerton (Labor)  
Tyson Hollis (Public)

On February 14, 2024, 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 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.

Chairman Rodd Weber called the meeting to order of the OSH Review Board at approximately 9:02, a.m., on February 14, 2024.

**1. Roll Call.**

Board members present in Las Vegas were Chairman Rodd Weber, Secretary William Spielberg, and Members Jorge Macias and Scott Fullerton. Absent from the meeting was public member Frank Milligan. Tyson Hollis, the Board public member alternate was present in place of member Milligan. As five members of the Board were present for the meeting, including two members representing labor, one member representing the public at large and two members representing management, a quorum was present for the Board to conduct its business on this date.

Also present in person was Salli Ortiz, Esq., Legal Counsel to the Division of Industrial Relations, State of Nevada in these proceedings. Appearing electronically was Charles R. Zeh, Esq., The Law Offices of Charles R. Zeh, Esq., Legal Counsel to the Board of Review.

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 timely posted at the following website addresses:

State of Nevada, Department of Business and Industry, Industrial Relations (DIR)  
website at <https://dir.nv.gov/Meetings/Meetings>

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

## **2. Public Comment.**

There was no public comment offered from those in attendance at the meeting. Board counsel advised that his office had received no form public comment for these proceedings.

## **3. Contested Case Hearings.**

Chairman Weber called this item to be heard and then called the case of LV 23-2184, Universal Consulting Corporation dba A-1 Concrete Cutting. This matter was before the Board upon a Motion for Summary Judgment seeking dismissal of the first two causes of action of a three cause of action complaint. Dawn Davis, Esq., Snell & Wilmer, LLP, appeared on behalf of the moving party, the respondent in this matter. Salli Ortiz, Esq., appeared on behalf of the complainant, the Chief Administrative Officer of the Occupational Safety and Health Administration of the Division of the Industrial Relations of the Department of Business and Industry, State of Nevada, complainant.

This case involved the demolition of highway bridges in the Las Vegas area, wherein, one side of the bridge collapsed. The case involved the interpretation of 29 CFR 1926.850(a) and 29 CFR 1926.856(a). Under 29 CFR 1926.850(a) the issue was whether an engineering survey had been completed by the contractor, respondent, which was sufficient to assess the condition of the bridge while demolition work was undertaken.

The issue surrounding the allegation involving 29 CFR 1926.856(a) was whether the respondent had done enough to ensure that the bridge would not collapsed while demolition was taking place.

Ms. Davis, for the movant, presented her oral argument. Ms. Ortiz argued in reply. Both counsel then were subjected to questions from the Board. Board Counsel advised the Board that as this was a Motion for Summary Judgment, the standard for granting Summary Judgment involves whether there is a genuine dispute over any material fact of the case and whether or not

the moving party was entitled to relief as a matter of law. If, in other words, there was a dispute as to what were the elements of the engineering survey or if there was an engineering survey, then it would not be possible to grant a Motion for Summary Judgment as there would be a dispute over material facts of the case. With respect to 29 CFR 1926.58(a) Board Counsel advised that the mere fact that there was, as here, a collapse of the bridge relating to a mini excavator is in and of itself insufficient to establish that the respondent had not done enough to ensure that there would not be a collapse of the bridge. The burden, Board Counsel advised was upon the State/complainant to make a showing that there was some nexus between what respondent did or did not do, and the collapse of the bridge to establish a claim under this section of the Code.

Board members deliberated. Member Macias said that he needed more time to digest the volume of information the Board had been given in conjunction with the motion and opposition to the application of summary judgment. It was accordingly, moved by Scott Fullerton, seconded by Jorge Macias, to continue this matter until the next day, February 15, 2024 when the Board would reconvene on this matter and make a decision on the Motion for Summary Judgment.

The vote on this was unanimous, 5-0 in favor of continuing the deliberations. Board Counsel also advised and/or reminded again that there were three causes of action in this case. The Motion for Summary Judgment only addressed the first two causes of action. Even if the first two causes of action were dismissed by virtue of the Motion for Summary Judgment, the matter will still proceed to a hearing on the third cause of action. He also explained that if the Motion for Summary Judgment is denied as to one or both causes of action the subject of the motion, the case would not be over. It would mean that either one or both of the two causes of action, the subject of the Motion for Summary Judgment, would be heard on the merits when the case re-calendared on the stacked docket of the Board.

Board Chairman then called LV 23-2198, D&L Roofing, LLC, to be heard. Justin Zarcone, Esq., of the Zarcone Law Group, appeared on behalf of D&L Roofing, LLC. Salli Ortiz, Esq., appeared on behalf of the Chief Administrative Officer of the Occupational Safety and Health Administration of the Division of the Industrial Relations, State of Nevada. This case involves at least three roofing employees of D&L Roofing working on a low/sloped roof, removing the old roofing and replacing it with new roofing. The canopy/roofing where they were working had a width that was greater than 50 feet. It was approximately 17 feet above the lower level in the photographs of the three employees working the low slope roof of 3 and 12. The photos show no guardrail system was in place and PPE was not worn. No guardrail system was in place even though that form of equipment was present and available to be used by these roofers while replacing and removing the old roof. No safety monitor was present, either, in the photos.

There was no safety monitor evident, though the roof was wide enough to eliminate a safety monitor as a form of employee protection while working on the roof. There was a parapet wall but that too was not high enough to provide adequate protection. The employer was participating in the State's SCATS safety program, indicating a potential commitment to safety and also suggesting that it would not have been foreseeable to the employer that its roofers would be so brazen as to work on the roof without any safety protections as provided and made available by the roofer to its employees, given the employer's participation in the State's safety

SCATS programs.

At the conclusion of the presentation by both parties, the Board deliberated the case. Once deliberations were concluded, it was moved by Jorge Macia, seconded by Scott Fullerton, to uphold the citation under 29 CFR 1926.501(b)(10). The vote on the motion was 4 in favor and 1 against. Chairman Weber voted against the motion on the grounds that the employer was participating in the SCATS program and as a result, it may well not have been foreseeable to the employer that its roofers would not avail themselves of the safety precaution equipment and measures while roofing the canopy.

The Board Chairman then called LV 22-2145, Specialty Contractors Northwest, LLC dba Pacific Bath Company (Specialty or Pacific Bath), to be heard. David Lee, Esq., of the lawfirm of Lee, Landrum & Ingle appeared on behalf of the respondent. Andrea Cordova, Executive Vice-president of the company also appeared on behalf of the respondent. Salli Ortiz, Esq., appeared of behalf of the complainant/administrator. At the outset of the hearing, the State offered five exhibits, consisting of pages C-1 through C-117 for admission into evidence. This evidence package was admitted into evidence without objection from Mr. Lee. Specialty offered for admission into evidence 37 exhibits, consisting of pages 1 through 919. There was no objection regarding their admissibility and both evidence packets were admitted into evidence without objection.

This was an asbestos case. The respondent is a bath tub renewal and remodeling company associated with Kohler, a nationally known toilet utility manufacturer and seller. Pacific Bath remodels old bath tubs and showers, replacing them with new, Kohler toilet utilities or bathroom utilities. This invariably requires cutting into walls to replace the old bath tub or shower or sink with the new Kohler system. Pacific Bath states that it does not remodel houses constructed prior to 1980. This is a line of demarcation. When houses are constructed prior to 1981, they are presumed (PACM) to contain asbestos containing material. After 1980, the presumption evaporates but there is no presumption that for houses constructed after 1980, they do not contain asbestos material.

Well into the hearing on this matter, the Board, nevertheless, had to adjourn and pick up on this case the next day. It was the end of the day. Prior to the adjournment, the Chairman asked if there was any public comment. There was none that was generated during the hearing. Board Counsel advised that his office had received no public comment. It was accordingly moved by William Speilberg, seconded by Scott Fullerton, to adjourn the meeting. Vote was unanimous at 5-0.

February 15, 2024

On February 15, 2024, Board chairman Rodd Weber reconvened the meeting of the Board to pick up with the continuation of the hearing on merits of LV 22-2146, Specialty Contractors Northwest LLC dba Pacific Bath Company (Pacific Bath).

The Chairman called roll. Those present in person for the second day of hearings were the Chairman Rodd Weber, members Jorge Macia, Scott Fullerton and Tyson Hollis who was present on behalf of Frank Milligan who was still absent for work related reasons. Also Secretary, William Speilberg was absent for the commencement of this meeting. It was expected that he would return at some point during the course of the hearing on this date to participate. Meanwhile, there were four Board members present, at least one of whom represented labor and one of whom represented management. Therefore, a quorum was present to conduct Board business.

The Chairman then called for the continuation of the Pacific Bath matter, case number LV 22-2146. The case rises and falls on the definition of Asbestos Containing Material (ACM), Presumed Asbestos Containing Material (PACM) and the meaning of due diligence required to be deployed for an employer such as Pacific Bath to feel secure that it was not exposing employees to working around asbestos containing material as they remodel bathrooms, which necessarily entails cutting into the walls and the flooring in the bathroom under renovation. Where PACM is found, there is no question that testing is required or remediation of the condition to eliminate the exposure to asbestos. In this case, the condition in the remodeled bathroom at issue was tested and no asbestos or PACM was detected. The State brought the claim against Pacific Bath pursuant to 29 CFR 1926.1101(k)(3)(i), which provides: "Before work in areas containing ACM and PACM is begun, employers shall identify the presence, location, and quantity of ACM and/or PACM therein."

29 CFR 1926.1101(k)(2) provides: "Duties of building and facility owners, (i) before work subject to the standard is begun, building and facility owners shall determine the presence, location and quantity of ACM and/or PACM."

The question raised by this case was whether subsection (k)(2)(i) applies or whether subsection (k)(3)(i) applies. The case was brought under subsection (3)(i) which is triggered by the presence of areas containing ACM and PACM. In this case, there was no ACM or PACM found and, therefore, an argument was raised that the wrong section of 1926.1101 was pled since no ACM or PACM was detected when tested and this section is triggered by the presence of ACM or PACM.

It was argued in the alternative that section 1926.1101(k)(2)(i) should have applied. This section is not triggered by the absence of ACM or PACM. Rather, it applies to determine whether ACM or PACM is present. After considerable deliberation, it was moved by Scott Fullerton, seconded by Rodd Weber, to dismiss the case on the grounds that the wrong section of the code (k)(3)(i) was pled by the complainant. The vote was taken, the motion did not pass. The vote was 2 in favor and 2 against with Tyson Hollis and Jorge Macias opposing the motion.

There were only 4 votes because for a portion of the hearing on this matter, Secretary William Spielberg was not in attendance. He missed a portion of the hearing on the merits on this matter and therefore could not vote on the case. As an even number of votes were cast, it fell to a tie vote of 2-2. The case is to be continued until March 2024 when it will be picked up again and further deliberation will take place. Secretary Spielberg will be provided a transcript of the small portion of the case he missed while he was away from the meeting. He will be able to participate, then, meaning there will be an odd number of Board members present which will eliminate the possibility of a tie vote once again.

After the conclusion of the vote on Pacific Bath, the Chairman reconvened the Board to finish the deliberations on A-1 Concrete. Meanwhile, Secretary Spielberg had rejoined the meeting.

Recall this matter was continued from the previous day to give the Board members additional time to digest the volume of information and arguments presented to the Board during the hearing on the merits on the previous day. Recall further that there was a Motion for Summary Judgment to dismiss the first cause of action based upon 29 CFR 1926.850(a) and a Motion for Summary Judgment to dismiss the second cause of action based upon 29 CFR 1926.856(a).

29 CFR 1926.850(a) requires that prior "... to permitting employees to start demolition operations, an engineering survey shall be made, by a competent person, of the structure to determine the condition of the [structure] as well as the ... possibility of unplanned collapse of any portion of the structure...." For this cause of action the Board members quickly coalesced and accordingly it was moved by Scott Fullerton, seconded by Tyson Hollis, to deny the Motion for Summary Judgment as to 29 CFR 1926.850(a). The vote on this cause of action was unanimous with 5 voting in favor and 0 voting against the motion to deny the Motion for Summary Judgment for this cause of action. Secretary Spielberg was present to vote having been present during the time that this matter was before the Board.

29 CFR 1926.856(a) provides that "Mechanical equipment shall not be used on floors or working surfaces unless such floors or surfaces are of sufficient strength to support the imposed load." Under this cause of action, a small piece of construction equipment crashed through the tub of the bridge being demolished. Board Counsel pointed out that the mere fact that equipment passed through and collapsed the working surface is not sufficient in and of itself to result in a violation of this section of the regulations. That is to say, there must be proof of something that the employer did or failed to do which is connected to and the cause of the collapse beyond the collapse itself to justify a violation of this section of the code.

Jorge Macias moved to grant the Motion for Summary Judgment, meaning there was a failure of proof that the employer, respondent had failed to ensure that there would be no collapse of the working surfaces due to the imposed load. Tyson Hollis seconded the motion. Secretary Spielberg joined the discussion of this matter as he was present the day before when the entire hearing on this case on the merits was conducted. He also returned to the meeting of the Board and was present, therefore, when this matter was taken up again for deliberation. After further discussion, Tyson Hollis withdrew his second to the motion of Jorge Macias to grant the Motion

for Summary Judgment. The motion, therefore, died for want of a second. It was then moved by Secretary, William Speilberg, to deny the Motion for Summary Judgment, Scott Fullerton seconded the motion. The vote was taken. The motion was adopted on a vote of 4-1 with Jorge Macias voting against the motion. That means that all three causes of action for this matter will be heard on the merits when the matter is rescheduled which will be on the agenda for the March 13 and 14, 2024 meeting of the Board, or as soon thereafter as it can be heard.

This concluded all of the hearings scheduled on the docket under Item 3 of the Agenda. Chairman called Item 4, administrative matters to be heard, specifically he called for Item 4 (a), the approval of the Review Board meeting minutes for December 13, 2023. It was moved by Jorge Macias, seconded by William Speilberg, to approve the minutes as read. Motion was adopted on a vote of 3-0-2, with member Frank Milligan not voting as he was absent and alternate member Tyson Hollis not voting as he was not present and participating and a Board Member on December 13, 2023.

After a brief recess, the Chairman called Item 4 (b) and 4 (c) to be heard. He also announced that Items 4 (b) (i) - 4 (b) (xiii) and 4 (c) (i) will not be heard on this date given the lateness of the hour. These matters will be continued to the March 13 and 14, 2024 meeting of the Board.

The Chairman then called Item 4 (d) to be heard, General Administration and/or Procedural issues, Items 4 (d) (i), 4 (d) (ii), 4 (d) (iii). There was no discussion on any of these items.

The Chairman moved on to 4 (d) (iv), the status of the process by which the Board will timely select and make its decision to select and retain its Legal Counsel for the next FY. Victoria Carreon appeared at the meeting at this point and Chairman Weber asked her if this process is going to be completed in time so there will be no repeat of the pause which occurred for the current contract year for Board Counsel, when the Board was forced to cease conducting hearings. Ms. Carreon assured the Board and Chairman that the Board will be able to timely make its selection of its Legal Counsel and have the Legal Counsel it chooses in place so that there will be no delay or break in the conduct of the Board business.

The Chairman then called for hearing 4 (d) (iii), the digitization of the transmission of the State's evidence packets to the Board members. There was no objection to adopting this procedure for the time being and, therefore, commencing at the next meeting of the Board, the State's evidence packets will be transmitted to the Board digitally.

The Board considered 4 (e), the schedule for hearing of pending cases. It was pointed out that the hearing on May 8 and 9, 2024 will be in Las Vegas, the hearing on March 13 and 14, 2024 will be in Las Vegas and the hearing on April 10 and 11, 2024 will be in Reno. The Board will have to determine where the location of the meetings commencing on June 12 and 13, 2024 will take place. Board Counsel also advised that prior to the end of this contract year, June 2024, the Board must elect a new Chairman and vote on the new Board Secretary. This is done annually but in this case, the Board Chairman is term limited and will no longer be with the Board after June 30, 2024. This Item, the selection of Board officers, will be placed on the agenda for the March 13 and 14 meeting of the Board.

Chairman then called Item 5 to be heard, Public Comment. There was no public comment originating from the hearing room and Board Counsel advised that his office had received no public comment.

Item 6, Adjournment. It was moved by Scott Fullerton, seconded by Tyson Hollis to adjourn the meeting. Vote, unanimous, 5-0.

Dated this 13<sup>th</sup> day of March, 2024.

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

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