

STATE OF NEVADA
Minutes for the
Nevada Occupational Safety and Health Review Board
Reno, NV

September 13, 2023

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

On September 13, 2023, 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, 4600 Kietzke Lane, Building F, Suite 150, Reno, NV 89502. The Board convened at the Division of Industrial Relations offices located at 4600 Kietzke Lane, Building F, Suite 150, Reno, NV 89502. 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 OSH Review Board at approximately 8:18, a.m.

1. Roll Call.

Board members, Chairman Rodd Weber and Board members Jorge Macias and Scott Fullerton, appeared in person for the meeting conducted at the State offices in Reno, Nevada. Secretary of the Board William Spielberg, and Board member Frank Milligan, appeared by video conferencing. As all the 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 on this date.

Salli Ortiz, Esq., Legal Counsel to State OSHA appeared in person in Reno, Nevada. Charles R. Zeh, Esq., The Law Offices of Charles R. Zeh, Esq., Legal counsel to the Board of Review appeared by video conferencing.

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

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

Each Notice was timely posted.

2. Public Comment.

There was no public comment offered when called by the Chairman. Board counsel advised that there was no public comment in written form received by Legal Counsel's office prior to the commencement of the meeting.

3. Contested Case Hearings.

Chairman called to be heard LV 17-1900, Xtreme Manufacturing, LLC. *Chief Administrative Officer of the Occupational Safety and Health Administration of the Division of Industrial Relations of the Department of Business and Industry, State of Nevada vs. Xtreme Manufacturing, LLC.* The complainant, the State, was represented by Salli Ortiz, Esq. The respondent, Xtreme Manufacturing, LLC, was represented by Lisa Wiltshire Alstead, Esq., of the law firm of McDonald Carano LLP.

The matter was before the Board upon the motion of Xtreme Manufacturing to dismiss the case on the grounds that the State had failed to diligently prosecute the complaint in this matter. Each party was given 15 minutes to argue their position on the motion. Ms. Alstead was then given 10 minutes to argue in reply. During oral argument, however, she conceded that she had no proof of actual prejudice attributed to the delay in the prosecution of this matter. At the

conclusion of the oral argument and deliberation by the Board, it was moved by Scott Fullerton, seconded by Frank Milligan, to deny the motion to dismiss. **The motion adopted.**

Vote: 5-0

The Board will revisit this matter to approve the draft proposed findings of facts, conclusions of law and final order prepared by the State at a later duly noticed date.

The Board then took a recess to try and cure the problem that the Board was having with the sound system. There was enormous static making it difficult for the Board's members, Board counsel, and the Court Reporter to hear what was being stated. During the recess, Board counsel received a phone call from Tori Carreron, who requested permission to make a public comment before the next case was to be heard. She did not want to disclose the nature of her public comment, before making her comment.

During the recess also, Board counsel conferred by phone with Scott Fullerton. He was concerned because of a communication that he had with a representative of Mt. Rose Heating. He advised that he did not give any advice to Mt. Rose Heating and he told Board counsel that he believed he could be fair and objective in deciding the case when it came before the Board on this date. Board counsel advised that Mr. Fullerton should disclose the fact of the contact and that he did not believe it would interfere with his ability to decide the case when heard based upon the facts and the law.

The repairs were partially made at least to the sound system and the Board reconvened at the call of the Board Chairman.

Chairman Rodd Weber then called to be heard Docket No. RNO 22-2180, Mt. Rose Heating and Air Conditioning, Inc., *Chief Administrative Officer of the Occupational Safety and Health Administration of the Division of Industrial Relations of the Department of Business and Industry, State of Nevada vs. Mt. Rose Heating and Air Conditioning, Inc.* The State was represented in this matter by Salli Ortiz, Esq. Mt. Rose Heating and Air Conditioning, Inc. was represented by Perry P. Poff, Esq., Donnell, Melgoza & Scates LLP.

The Chairman gave Ms. Carreon the opportunity to make the public comment she had requested of Board counsel. Ms. Carreon advised the Board that Mt. Rose Heating and Air Conditioning, Inc., and the State were in settlement discussions and, therefore, the parties wanted the matter continued to give them a chance to settle the matter. Board counsel advised that if a request to continue the matter was granted, it should be conditioned upon setting the matter for hearing at the earliest available date when matters can be heard in Reno, Nevada, in order to move the case along if it is not going to settle.

Mr. Fullerton then, made the disclosures aforementioned regarding his contact with Mt. Rose Heating and Air Conditioning, Inc. It was accordingly moved by the Chairman, Rodd Weber, seconded by Jorge Macias, to vacate and continue this matter to be set during the January 2024 session of the Board meeting in Reno, Nevada on January 10, 2024 and January 11, 2024 if

necessary. Perry Poff, and Ms. Ortiz both acknowledge that those date were available on their respective calendars and the matter could be heard at that time, if it had not settled. **The motion was adopted.**

Vote: 5-0.

The Chairman then called to be heard, RNO 23-2185, Peek Brothers Construction Incorporated. *Chief Administrative Officer of the Occupational Safety and Health Administration of the Division of Industrial Relations of the Department of Business and Industry, State of Nevada vs. Peek Brothers Construction Incorporated.* The complainant was represented Salli Ortiz, Esq., and the respondent, Peek Brothers Construction Incorporated, was represented by Nathan J. Aman, Esq., of the lawfirm of Viloría, Oliphant, Oster & Aman L.L.P. Ms. Ortiz waived an opening statement on behalf of the complainant. Nathan Aman gave an extended opening statement at the conclusion of which he moved for dismissal on summary judgment grounds under Rule 56, NRCP, asserting that 29 CFR 1926.1101(k)(2) was controlling, that the facility owners had a controlling responsibility for notifying of the presence, location and quantity of ACM or PACM and that based upon the pleadings the owner and also the general contractor on this project, DR Horton had failed in their responsibilities under 29 CFR 1926.1101(k)(2) and, therefore, summary judgment should be granted in favor of Peek Brothers, dismissing the case with prejudice as Peek Brothers was victimized by the owner and DR Horton, the general contractor on the multi-employer, asbestos implicated project.

The Board deliberated upon the motion and concluded that it was too early in the stage of the case to conclude that there was no genuine dispute over any of the material facts of the case, a condition precedent to granting motions for summary judgment under Rule 56, NRCP. It was, therefore, moved by Scott Fullerton, seconded by William Speilberg, to deny the motion for summary judgment at this time, without prejudice to resubmit such a motion at a later stage in the proceedings. **The motion was adopted.**

Vote: 5-0

The parties proceeded to press on with the prosecution and defense of this case.

At the conclusion of the presentation by the State of its case in chief in support of the complaint, counsel for Peek Brothers, Nathan Aman, then made a Rule 41(b), NRCP, motion to dismiss, on the grounds that the State had failed to prove a claim for relief in this case. The motion was somewhat similar to the argument asserted by counsel for Peek Brothers in connection with the earlier motion for summary judgment. The Board deliberated on this motion which, again, revolved around whose responsibility it was to discover, delineate, and warn against exposure to asbestos in an old farm house building that was being demolished as a part of the grading permit issued for Peek Brothers, under its contract with the DR Horton to grade the premises of the project under contract and to demolish the building situated on this site of the project. Again, the Board deliberated and at the conclusion of its deliberations, it was moved by

William Speilberg, seconded by Jorge Macias to deny the motion to dismiss under Rule 41(b), NRCP. **The motion was adopted.**

Vote: 4 in favor and 1 against (Frank Milligan voting no).

Given the lateness of the hour, the Chairman decided to conclude the hearing and continue the Peek Brothers Construction case to the next day when the hearing would pick up with the Peek Brothers case in chief in defense of the complaint, inasmuch as the State had rested prior to the Rule 41(b), NRCP, motion being brought.

The Chairman asked for any additional public comment. There was none. Board counsel advised that his office had received no public comment during the course of the hearing on this date. The Chairman called then for a motion to adjourn. It was moved by William Speilberg, seconded by Jorge Macias to adjourn the meeting for this date and reconvene on Thursday, September 14, 2023 at 8:00 am.

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

September 14, 2023

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

On September 14, 2023, Chairman Weber reconvened the hearing of the Board and called the meeting to order at 8:00 am at the State Offices in Reno, Nevada.

1. Roll Call. Chairman Weber called roll. Board members present were Scott Fullerton, Jorge Macias, Frank Milligan and William Spielberg, Secretary and Rodd Weber, Chairman. The meeting was conducted in Reno, Nevada, at the State offices of the Division of Industrial Relations. Chairman Rodd Weber, Jorge Macias, member, and Scott Fullerton, member, appeared in person at the State offices building. William Spielberg and Frank Milligan participated virtually from Las Vegas. Board Legal Counsel, Charles R. Zeh, Esq., The Law Offices of Charles R. Zeh, Esq., appeared virtually. Salli Ortiz, Esq., Legal Counsel for the State, appeared in person at the State office building in Reno, Nevada.

Chairman Weber called for Public Comment. No public comment was offered. Board Counsel advised that his office had received no written correspondence constituting public comment.

Chairman Weber then called for the continuation of the hearing in the Peek Brothers matter, RNO 23-2185, Peek Brothers Construction Incorporated. *Chief Administrative Officer of the Occupational Safety and Health Administration of the Division of Industrial Relations of the Department of Business and Industry, State of Nevada vs. Peek Brothers Construction Incorporated.* The hearing commenced with the counsel for Peek Brothers presenting Peek Brothers' case in defense of the complaint. Witnesses were called. Witnesses were examined and cross-examined, exhibits were reviewed and nearly at the end of the day, the evidentiary portion of the hearing on the Peek Brothers' matter was concluded.

Counsel for both parties gave oral argument during which and at the conclusion of which both parties were questioned by Board members and Board Counsel. The exhibits were examined. Again, counsel for Peek Brothers argued that the case should be dismissed against Peek Brothers because of the priority of the 29 CFR 1926.1101(k)(2) outlining the duties of building owners. He further again argued that DR Horton as owner and general contractor had the laboring oar for advising of and locating the presence of asbestos that might have been contained in the farmhouse that was demolished by Peek Brothers as a part of its demolition and grading contract with DR Horton. During the course of the deliberations, it was pointed out on more than one occasion that the burden of proof rests with the complainant/the State.

Both Frank Milligan and Jorge Macias felt the State failed to carry its burden. There was no evidence of the age of the farmhouse that was demolished by the Peek Brothers, i.e., was it built prior to 1980 when certain presumptions would have attached concerning the presence of asbestos in the structure. There was also a general lack of proof, it was thought, of any exposure to asbestos. There was no air sampling for Asbestos conducted. There was not adequate proof of exposure.

Accordingly, it was moved by Jorge Macias, seconded by Frank Milligan, to dismiss the case for failure to prove a *prima facie* case. Lacking was proof by a preponderance of evidence that all four elements of a *prima facie* case were established in this multi-employer setting. **The motion was adopted.**

Vote: 5-0, the complaint was accordingly dismissed with prejudice.

Before the next matter was called, Frank Milligan retired from the hearing for work related reasons. As four members remained and both labor and management were still represented on the Board, a quorum was present to hear the case.

Chairman Weber then called the next and last case on the contested docket for the meeting of this date to be heard, namely the Raine's Market, Inc., case RNO 21-2106, the Chief Administrative Officer of the Occupational Safety and Health Administration of the *Division of Industrial Relations of the Department of Business and Industry, State of Nevada vs. Raine's Market, Inc.* The State was represented in this matter by Salli Ortiz, Esq., Division Counsel. Raine's Market, Inc., was represented by Scott Raine, the owner of the respondent and a non-lawyer. The State's Exhibits C-1 through C-84 were admitted into evidence, save and except a protest was lodged as to the written statement of Raine and the written statement of two employees of Raine's Market that were taken by the State's investigator, Rob Nanse. Mr. Raine offered for Exhibits into evidence, R-1 through R-6, a total of six pages. Raine's Exhibits were admitted without objection.

The State waived an opening statement other than to inform the Board that this case involved Covid-19. Mr. Raine gave an extended and impassioned opening statement.

The State commenced its case in chief. Ms. Ortiz called Mr. Nanse to testify. Mr. Nanse testified and was examined by Ms. Ortiz, cross-examined by Mr. Raine and at the conclusion of Mr. Nanse's testimony, the State rested its case.

Mr. Raine then presented the case of Raine's Market, by testifying in defense of his business. He was cross-examined by Ms. Ortiz. He was also questioned by the Board. At the conclusion of the defense by Raine's Market, both parties rested. Board members then interrogated both Ms. Ortiz and Mr. Raine. Board members began to deliberate. Again, due to the lateness of the hour, it was after 5 o'clock p.m., Chairman Weber continued further deliberations on the Raine's Case. He also continued the remaining items on the Agenda consisting of items 4, a, b, c, d and e. They are tabled and will be held over to the next meeting of the Board commencing October 11 and if necessary October 12, 2023, in Las Vegas, Nevada. The Raine's case will be taken up again when the Board has a transcript in its possession to review as a part of its deliberations.

Chairman Weber then called for Item 5 on the Agenda, Public Comment. There was no public comment. Board Counsel advised that his office had received no public comment during the course of the meeting on this date.

The Chairman then called for Item 6 to be heard, the adjournment. It was moved by Rodd Weber, seconded by Scott Fullerton, to adjourn the meeting. **The motion was adopted.**

Vote: 4-0 (Milligan absent).

Dated this 11th day of October, 2023.

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

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