

MINUTES OF THE MEETING OF
THE NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

Held at DEPARTMENT OF OCCUPATIONAL
SAFETY & HEALTH
4600 Kietzke Lane, Building B, Suite 111
Reno Nevada on
Wednesday, July 13, 2016
Commencing at 9:00 o'clock a.m.

PRESENT

James Barnes (public)
Steve Ingersoll (labor)
Rodd Weber (management)
Fred Scarpello, Esq., Legal Counsel

ABSENT

Nicole Baker (labor)
Sandra Olson (management)
Frank Milligan (alternate)

The Nevada Occupational Safety and Health Review Board convened the scheduled meeting of the board at approximately 9:00 a.m., July 13, 2016. 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.

The Chairman identified the cases noticed and set for contested hearings as follows, docket no. RNO 16-1845, Occupational Safety and Health Administration, Division of Industrial Relations of the Department of Business and Industry, vs. Cooper Roofing & Solar.

The Chairman called the Board to order for hearing of the case on the contested hearing calendar, namely docket no. RNO 16-1845, Occupational Safety and Health Administration, Division of Industrial Relations of the Department of Business and Industry, vs. Cooper Roofing & Solar. The chairman noted the appearance of division counsel Ms. Salli Ortiz, Esq. on behalf of the complainant, Chief Administrative Officer of the Occupational Safety and Administration, Division of Industrial Relations of the Department of Business and Industry and Mr. Rick Roskelley, Esq. on behalf of respondent, Cooper Roofing & Solar.

The Chairman recognized complainant counsel Ortiz who informed the Board that a settlement of the case had been reached just minutes before the hearing was called to order. The Chairman inquired of the terms and bases for the settlement. Counsel Ortiz informed that just this morning the respondent provided to OSHES, and particularly Chief Administrative Officer Lankford and Northern Nevada District Manager Davis, documentation that established no lawful basis to support the complaint against the respondent. Counsel further represented that had the evidence been timely provided and reviewed by the CSHO, District Manager, or Chief Administrative Officer no citation nor complaint would have been issued. Board members questioned the settlement presented as a "withdrawal of complaint and citation" as a basis for dismissing the action as opposed to a negotiated settlement. Counsel Ortiz stated there was "nothing to settle" because the case was filed without availability of evidentiary proof of the defense of employee misconduct, therefore no legal basis for OSHA to successfully prove a case of violation against the cited respondent.

The Board inquired further as to the method of resolution and the unusual aspects of the subject case including the extraordinary delivery of dispositive evidence so late which required the hearing, notification of parties and presence of both CSHO and respondent witnesses and parties. Attorneys Ortiz and Roskelley explained the information was not made available by the employer to Mr. Roskelley for review in sufficient time before the case was prepared for hearing. Mr. Roskelley explained he was involved in addressing a backlog and only after assembling the case information and showing it to counsel shortly before the hearing, OSHES became convinced there was insufficient evidence to prove a violation.

The Board expressed concerns with the procedure, settlement terms and explanations for the late hour settlement. However based upon the representations of both legal counsel in the presence of the Chief Administrative Officer Lankford and District Manager Davis, the contested matter was subject of motion for dismissal. Discussion and debate occurred amongst complainant and Board legal counsel in continued reflection of the expressed Board concerns and dissatisfaction over the subject case resolution process; and also withdrawal of the entire complaint and citation procedure as opposed to a written settlement agreement with supporting rationale. Board counsel advised that based upon the representations of OSHES counsel that the evidence received provided a complete defense to the citations issued, a motion for dismissal may be considered despite the concerns over procedural/withdrawal issues. On motion Mr. Barnes, second by Mr. Weber, and unanimous vote of all Board members present (Barnes,

Weber, Ingersoll) the motion for dismissal was approved. Continued discussion and debate occurred regarding the process, however Board counsel was instructed to prepare an order of dismissal in furtherance of the representations made on the record.

At the conclusion of the contested hearing calendar, the chairman called for commencement of the Board administrative meeting and referenced the published agenda made a part of these minutes and incorporated by reference and as attached.

The Chairman recognized new Board member, Mr. Rodd Weber, recently appointed by Governor Sandovol to the management representative position effective July 1, 2016. Board members welcomed Mr. Weber and noted his background, experience and current work in the field of Occupational Safety and Health.

The minutes of the previous Board meeting were approved as distributed based upon a motion by Mr. Ingersoll, second by Mr. Weber, and unanimous vote of all Board members present.

The Chairman referenced item B on the subject agenda, and reviewed the contested cases on the hearing docket as set for hearing, all pending matters, as well as the status report. A brief discussion occurred regarding a potential for changing the usual Board hearing/meeting dates from the second Wednesday and Thursday of each month to the first week of each month. Counsel advised that the hearing rooms must be reserved in advance and difficult to alter, particularly at the Las Vegas venue, due to the high demand for the neutral hearing room. The Board agreed to table the matter until the next Board meeting or after assurance of all Board members attendance to discuss the potential for a regularly scheduled hearing/meeting date change. Board counsel was instructed to determine the ability to make changes for hearing room reservations, particularly in the Las Vegas venue, but also inquire into any conflicts with the Reno conference room during the first week of each month.

Item C of the agenda was referenced and counsel noted there still had been no order from the District Court following the remand by the Nevada Supreme Court of the Terra Contracting case, LV 13-1627. Counsel again reviewed the issue to include consideration of resetting the matter for hearing and determination of OSHES position in that regard. The matter will remain diaried on the status report; and counsel was instructed to inquire whether the District Court will soon issue the order so it might be subject of advance notice on the formal agenda for consideration by the Board.

The Board next considered item E on general administration procedural issues. Member concerns were again raised regarding the questionable method of case resolution in this morning's hearing for docket no. RNO 16-1845, Cooper Roofing & Solar. Mr. Weber questioned particularly how it was possible that none of the information or evidence which had to exist prior to the issuance of the citation was not known by any of the responsible parties until only minutes before the hearing. Mr. Ingersoll stated the reasons for dismissing such an extensively cited case without any disclosures of the evidence was troubling. Mr. Barnes noted a lack of a written settlement leaves the Board and public "in the dark." The members expressed further concerns over complainant counsel's reference to a previous case resolution based on withdrawal as "precedent" was not accurate nor a license for OSHES to bypass the full disclosure aspects of negotiated settlements by simply renaming as either "case resolutions" or "withdrawals of all pleadings." Board members and counsel reviewed the case settlement/resolution process with new member Weber and described previous discussions, debate and disagreements with OSHES during a three month period in 2015 as to the lack of full disclosure or rationale to support contested case settlements/resolutions. They also reviewed the eventual agreement with OSHES that all case resolutions would be accompanied by written rationale to support the settlements and submitted to the Board in accordance with the established Nevada Administrative Code (NAC) provisions. Counsel explained this applied to "all contested cases after Board jurisdiction" (interpreted as commencing on the filing of a complaint, although recognized in NAC as occurring on receipt of the employer notice of contest). Board counsel was instructed to provide Mr. Weber copies of the letter exchanges that previously occurred to resolve disputed settlement agreement procedures with OSHES.

After continued discussions, motion, second and unanimous vote, the Board instructed counsel to bring the contested case resolutions/settlements procedures back for discussion by a full compliment of the Board at either the next Board meeting or when all members could confirm attendance.

The Chairman referenced item D on the agenda identified as review of the independent legal counsel contract and consideration for renewal. The Chairman noted NRS 618.585 provided the Board with statutory authority to employ independent legal counsel. He reviewed the professional qualifications in OSHA law of current Board counsel Scarpello with Board members and noted extensive years of experience, background and continued high level of performance in all duties. The Chairman also referenced the written endorsements received from all Board members not present, recognizing the professional qualifications and services of Board

counsel and recommending renewal of the contract. Board members discussed the current contract fee rate. The three members present urged the hourly fee rate be increased closer to amounts normally charged by Scarpello and other area law firms and include a standard annual cost of living (COL) increase. Counsel thanked the Board members for their renewal offer and fee increase consideration but requested the contract renewal and his continued service as Board legal counsel remain at the existing hourly rate without increase. He explained the courtesies offered by his firm to the state of Nevada over many years whenever independent counsel was sought from the firm. He explained the policy is considered in part to be a service to the state of Nevada by offering substantially reduced fee rates. Counsel requested only confirmation of reimbursement authorization for round trip Reno/Las Vegas Southwest Business Select airline ticketing status. Counsel explained the preferential ticket status better accommodates timely attendance and more cost effective service to the Board. He explained preferential departure to and return from hearings through Business Select ticketing also facilitates reduction in hourly billing time to the Board due to hearing changes or adjustments.

The Board discussed the proposal and called for a motion on the contract renewal. On motion of Mr. Ingersoll and second by Mr. Weber, and further recognizing written endorsements from all members not present at the meeting, the Board voted unanimously (Ingersoll, Weber, Barnes) to renew the contract. The Board motion specifically provided as follows:

The independent contract for Board legal counsel, Fred Scarpello, be renewed at the same current rate of \$195 per hour, for a three-year term and subject to a 3% cost of living increase at commencement of the second and third years of the term. The contract to permit Southwest Business Select Reno/Las Vegas round trip airline ticketing reimbursement. All other reasonable expense reimbursements shall be provided as necessary for legal counsel to perform the professional duties as independent contractor to the Board.


Board counsel was instructed to provide a written response to OSHES Senior Legal Counsel, Don Smith confirming the agreed terms for the contract and request formal preparation of the documentation accordingly.

The Chairman referenced the agenda item for any special administrative matters which may require posting for the next public meeting. Member Ingersoll indicated he would likely not be able to attend the August meeting; Board counsel was instructed to confirm the availability of labor member Baker to assure the

satisfaction of a legal quorum. Board member Ingersoll referenced his suggestion to schedule hearings during the first rather than second week due to his business schedule which might allow fewer absences from time to time. This issue was already subject of discussion and will be included on the agenda at a time when assurance of all Board member attendance can be confirmed.

No further matters appeared on the agenda nor raised by Board members.

There being no further business, on motion, second and unanimous vote, the meeting of the Nevada Occupational Safety and Health Review Board was adjourned at approximately 11:40 a.m.



FRED SCARPECCIO, ESQ.
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Occupational Safety and
Health Review Board