

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

Held at Enterprise Library
25 East Shelbourne Avenue
Las Vegas, Nevada
Commencing at 10:00 o'clock a.m.

August 10, 2016

PRESENT

James Barnes (public)
Nicole Baker (labor)
Sandra Roche (management)
Rodd Weber (management)
Fred Scarpello, Esq., Legal Counsel

ABSENT

Steve Ingersoll (labor)
Frank Milligan (alternate)

The Nevada Occupational Safety and Health Review Board convened the scheduled meeting of the board at approximately 10:00 a.m., August 10, 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 noted settlement of the cases previously noticed and set for hearing as follows, docket no. LV 16-1848, Occupational Safety and Health Administration, Division of Industrial Relations of the Department of Business and Industry, vs. XL Landscape Development, LLC, and docket no. LV 16-1847, Occupational Safety and Health Administration, Division of Industrial Relations of the Department of Business and Industry, vs. Whole Lotta Loaf, LLC, dba Great Harvest Bread Co.

The Chairman called the Board to order for hearing of the first case on the contested calendar, namely docket no. LV 16-1852, Occupational Safety and Health Administration, Division of Industrial Relations of the Department of Business and Industry, vs. Desert Plastering, LLC. The Chairman noted the appearance of division counsel, Ms. Salli Ortiz, Esq. on behalf of complainant, Chief Administrative Officer of the Occupational Safety and Administration, Division of Industrial Relations of the Department of Business and Industry and Ms. Virginia Toalepai, Safety Consultant, on behalf of respondent, Desert Plastering, LLC.

Documentary evidence and testimony were presented in the course of the hearing. The case was adjourned for a luncheon break at 12:40 p.m. The Board reconvened the hearing approximately 1:45 p.m. Witness testimony continued and, after closing arguments of counsel, the matter was concluded and submitted at approximately 2:45 p.m. The Board adjourned for a brief recess.

The Chairman reconvened the Board at approximately 3:00 p.m. and commenced deliberation of the case submitted on the contested hearing calendar, namely docket no. LV 16-1852, Occupational Safety and Health Administration, Division of Industrial Relations of the Department of Business and Industry, vs. Desert Plastering, LLC. After study of the hearing notes, pleadings, exhibits, deliberation, and review of the applicable case law, a question for the vote was called. The Board reached a decision subject to drafting, edits and final review for approval as follows:

On motion, second and majority vote, found no violation at Citation 1, Item 1 and denied the classification and proposed penalty. Board members present voted three in support of the motion and one opposed.

On motion, second and majority vote, found no violation at Citation 2, Item 1, and denied the classification and proposed penalty. Board members voted three in support of the motion and one opposed.

The Board directed counsel to prepare, draft and circulate the proposed decision for review, comment and edit prior to final issuance.

The Board commenced review of matters subject of the published administrative agenda. The previous Board meeting minutes were approved as distributed on unanimous vote of Board members present.

The Board reviewed the current setting calendar of contested cases, and exchanged information on availability, time expectations for the hearings, and assurance of the special legal quorum. The Board again noted the limited number of cases pending for settings and particularly the reduction of complaints being filed. Currently there is one contested matter set for hearing in September, together with administrative matters pending consideration and/or action by the Board. Board counsel noted the Reno setting at docket 16-1851, Reno Forklift, was subject of a request for continuance based on the unavailability of the CSHO involved in the citation. Counsel reviewed the hearing schedule information listed and potential for case settings in Reno and Las Vegas. The Board agreed that if the cases at issue permit settings for Las Vegas in

October, then November or December could be elected for hearing docket 16-1851, Reno Forklift and any other northern Nevada cases available for hearings at that time.

The Board reviewed matters pending resolution from the published agenda for dockets LV 16-1833, Coyote Springs and RNO 16-1834, Ahern Rentals. Board members noted memoranda from Board counsel that the settlement documentation submitted met the minimum guidelines for Board review and approval. After discussion no objections with regard to the ultimate terms of the case settlements, the Board approved issuance of the Final Orders.

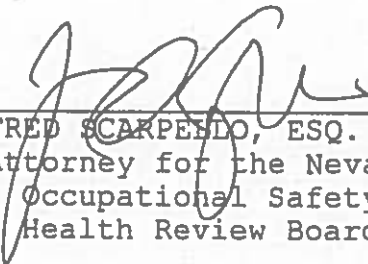
The Board reviewed the memoranda regarding the draft order in docket RNO 16-1845, Cooper Roofing & Solar. Counsel advised the transcript had still not been submitted as of the time of the meeting, but expected it would arrive shortly. The Board addressed and briefly discussed the concerns experienced by the Board members who heard the subject case regarding lack of any ability to review the bases, rationale, and support for the settlement/resolution. Complainant counsel moved for withdrawal of the entire complaint and citation based upon representations that OSHES determined it could not in good faith establish a case of violation after receipt of recently presented documentation which demonstrated a complete defense to the charges. Board members discussed their discomfort with inability to review supporting facts and/or documentation in furtherance of the NRS/NAC 618 mandate. Members reviewed the extensive discussions with OSHES at the end of 2015 and the beginning of 2016 noting the importance of Board review of case settlement terms to satisfy the public, that issuance of a Board Final Order carries the assurances of independent oversight for compliance.

Board members discussed recent notification of case resolution for docket 16-1848, XL Landscape, set for the August contested hearing docket. Members discussed with counsel the limited options available for the Board but expressed discomfort with OSHES having only discovered at a very late time that the four elements to establish a prima facie case could not be met although long after CSHO inspections, management review, issuance of citations and filing of complaints. Board members noted full NAC 618 compliance can be easily accomplished and both the Board and public satisfied by simply providing written recognized evidentiary bases to support settlements. Board members noted that the recent OSHES practice of simply withdrawing the entire complaint and citation without disclosing the bases for same, relying only on representations of counsel, leaves open concerns for public and other parties criticism as to the lack of transparency and rationale in furtherance of the Board rules.

Board members could not reach a complete consensus for changes in future preset meeting dates, but approved the first week of each month if it was possible to rearrange the hearing rooms and resolve member conflicts. The matter was left up to counsel first confirming hearing room availabilities. Members agreed to continue discussing the matter.

Counsel informed the Board the legal services contract is in process and scheduled for review and potential approval. Counsel further confirmed that despite the legal services contract and terms approved by the Board, DIR suggested it would be more expeditious and far less complicated if a simple one-year contract extension could be effectuated. Board counsel stated that it did not make much difference to him as not seeking any increase in the fee rate, nor benefits other than airfare consideration. The Board members inquired whether this was acceptable, and counsel confirmed that it was. Counsel advised the Board should simply again note when the next contract consideration comes up, the Board has statutory authority under NRS 618.585 to retain its own independent counsel subject to the standard independent contractor rules and regulations set by the state.

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 5:00 p.m.



FRED SCARPELO, ESQ.
Attorney for the Nevada
Occupational Safety and
Health Review Board