

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.

Wednesday, June 14, 2017

Thursday, June 15, 2017

PRESENT

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

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ABSENT

Frank Milligan (alternate public)

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The Nevada Occupational Safety and Health Review Board convened the scheduled meeting of the Review Board at 10:00 o'clock a.m., Wednesday, June 14, 2017. The notice of meeting was duly provided to all parties and posted pursuant to 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 announced the contested hearing calendar and identified the cases set for hearing on the published public agenda notice. The Chairman noted settlements of docket no. LV 17-1880, Occupational Safety and Health Administration, Division of Industrial Relations of the Department of Business and Industry, vs. TRE Barnen, LLC and docket no. LV 17-1885, Affinitylifestyles.com., Inc., dba Real Water. Chairman Barnes further noted the identified cases would be included on the weekly status report and diaried for receipt of settlement documentation in accordance with the NAC 618 and Board rules. The cases will be included on the publically noticed agenda for approval review listed "for possible action" at the next public meeting after settlement documentation is received by all members.

The Chairman called the Board to order for hearing of the

remaining contested case calendar. Mr. Barnes identified docket LV 17-1872, Accelerated Construction, Inc. and recognized the appearance of division legal counsel, Ms. Salli Ortiz, Esq. on behalf of complainant, Chief Administrative Officer of the Occupational Safety and Health Administration, Division of Industrial Relations of the Department of Business and Industry; and Mr. Brian Watkins, Esq. on behalf of respondent, Accelerated Construction, Inc. Counsel presented a joint motion to continue the hearing until the July meeting schedule based upon unpredictable and unavoidable absence of key witnesses. Respondent counsel advised of a death in the family of a primary witness and need to attend the funeral. Similarly, complainant advised of the unavailability until later in the day of her key witness. The Board considered the representations and noted NAC 618 provisions regarding continuances and allowances with regard to urgent or unexpected conditions. The members found the request for continuance bonafide and reasonable. On motion, second and unanimous vote, the Board continued the matter and instructed Board legal counsel to amend the notice of hearing and reschedule the case on the July 12, 2017 hearing docket in Las Vegas.

The Chairman announced the second matter on the contested hearing calendar, namely docket LV 17-1862, Occupational Safety and Health Administration, Division of Industrial Relations of the Department of Business and Industry, vs. Gilmore Construction. He noted the matter to be a continuation of the hearing of the matter originally before the Board on December 14, 2016. Chairman Barnes recognized the appearance of division legal counsel, Ms. Salli Ortiz, Esq. on behalf of complainant, Chief Administrative Officer of the Occupational Safety and Health Administration, Division of Industrial Relations of the Department of Business and Industry and Mr. Christopher McCullough, Esq. on behalf of respondent, Gilmore Construction.

Documentary evidence, witness testimony and closing arguments were presented during the course of the hearing. The presentation was concluded and the case submitted at approximately 11:30 a.m. The Chairman called for discussion and deliberation of the contested matter. Members reviewed and discussed their hearing notes, pleadings, exhibits and references in the transcript of witness testimony from the original hearing, as well as hearing notes and additional closing arguments of counsel from today's hearing. Board member Weber noted the testimony and evidence demonstrated no misuse of safety equipment, the federal OSHA interpretation letter reflecting recognition of conditions which can warrant a "tie-off" for safety at foot level, utilization of the safety equipment afforded by the employer to address the fall hazard and that the employee was reasonably protected under the site conditions from the hazard exposure of a potential fall.

On motion, second and vote of 4-0 (member Baker abstaining due to an absence from the original hearing), the Board dismissed Citation 1, Item 1, referencing 29 CFR 1926.501(b)(13) or in the alternative 29 CFR 1926.502(d)(6)(iii) and denied the violation.

The Chairman called for discussion and deliberation with regard to Citation 2, Item 1 referencing 29 CFR 1910.1200(g)(8), classified as an "other" violation with zero (\$0.00) penalty proposed. After discussion, review of the documentary evidence and consideration of the current hearing testimony and previous hearing transcript references in conjunction with the documentary evidence submitted, the chairman called for a vote.

On motion and second to dismiss the citation and deny the violation, the Board voted unanimously (member Baker abstaining due to the absence from the original hearing) the citation was dismissed and the violation denied.

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

After a brief discussion, the Chairman announced the remaining matters pending on the published agenda and calendar for **possible final action** would be continued for consideration on the second meeting day set, namely Thursday, June 15, 2017. The Chairman announced that two Board members required additional time to review their files, meeting notes, legal research and case law, and study transcript testimony prior to being prepared to reach a decision as to matters pending in dockets RNO 16-1851, Reno Forklift and LV 17-1882, MMC Contractors West, Motion to Dismiss.

The Chairman identified additional items on the published agenda for consideration by the Board. Members agreed to address portions of the administrative agenda as follows: 4A. Approval of the previous board minutes - on motion, second and unanimous vote of Board members in attendance, the previous minutes were approved as distributed.

4B. The Board reviewed the schedule of hearings on pending cases, calendar and status reports. Counsel noted contested matters are now set through September of 2017 and additional matters awaiting settings subject of the next distribution of the weekly status report and calendar. Counsel noted the likelihood of the next northern Nevada hearing schedule to be November with October and December relegated to the Las Vegas venue where more cases are pending. Board member Ingersoll indicated the potential inability to attend the July meeting, however member Baker advised

she would be in attendance, noting the expiration of her term on June 30, but per the statutory provision will continue to serve despite the expiration date of the term until the vacancy is filled by appointment of the Governor.

The Board reviewed item 4C, the contested case settlements, and noted the memorandum and advisory of counsel that settlement review in docket RNO 17-1883, Eastfork Roofing, LLC had been subject of document supplementation by counsel. The rationale supporting the basis for the settlement conformed with the Board guidelines and the spirit and intent of occupational safety and health law. On motion, second and unanimous vote of Board members in attendance, the negotiated settlement scheduled **for possible action** was approved. Counsel was directed to circulate the Final Order for signature by the chairman and effectuate service on the parties.

The Board briefly discussed general administration issues and reviewed the status report and agreed to defer further consideration as to any particular matters on the status report for the administrative meeting to be conducted on Thursday, June 15.

The Chairman identified item 4F, the Board internal officer elections pursuant to NRS 618.575. On discussion and review of the duties and obligations of Chairman and noting the two statutory offices to be for only Chairman and Secretary, a motion was made to re-elect Jim Barnes as Chairman for an additional year. The motion was seconded by Board member Roche and on unanimous vote Jim Barnes was re-elected Chairman of the Review Board for the calendar year July 2017 through June 2018.

Continued discussion occurred with regard to the Secretary position. Current Secretary, Steve Ingersoll, expressed his desire to continue in the position for another year. On motion of Board member Roche, seconded by Board member Baker, and unanimous vote, Steve Ingersoll was re-elected to the position of Board secretary. Mr. Ingersoll also expressed his interest in serving as the Chairman at some time when Mr. Barnes no longer wished to continue. A discussion occurred with regard to the added obligations of the chairman for the various procedural and operational duties. Mr. Ingersoll then expressed an interest to serve in the non-statutory role as acting chairman in the absence of Chairman Barnes to gain experience for potential future Chairman service. On motion of Board member Weber, seconded by member Roche, and unanimous vote, Steve Ingersoll was designated as the acting chairman for the fiscal year July 2017 through June 2018 to serve in the absence of the Chairman. All noted the role is a non-statutory position and actually a matter of convenience to facilitate operations of the Board in the event of an unexpected absence of the Chairman.

The Board concluded the foregoing as the major matters on the published agenda, except for those previously identified for consideration at the duly scheduled meeting on Thursday, June 15th. The Chairman called for any public comment, noting a single individual in the audience. The man identified himself as a subpoenaed witness for a contested matter. The case had been settled, but he had not been so informed by OSHES. He questioned whether he needed to remain. After a brief discussion OSHES enforcement counsel offered apologies for an administrative error in OSHES not advising that the matter had been settled. The individual graciously accepted the apologies and departed.

The Chairman announced no further matters before the Board and recommended the meeting be concluded for the day and reopened as scheduled on Thursday for consideration of the remaining matters on the published agenda commencing with the matters identified **for possible action**. The Chairman announced the Board will reconvene as duly scheduled on Thursday, June 15, 2017 at 10:00 a.m. for conduct of the administrative meeting and any remaining Board business subject of the published administrative agenda. On motion, second and unanimous vote, the meeting was concluded at approximately 12:30 p.m.

Thursday, June 15, 2017

The Chairman convened the scheduled meeting of the Nevada Occupational Safety and Health Review Board at approximately 10:00 a.m. on Thursday, June 15, 2017. The Chairman confirmed his attendance and Board members Nicole Baker, Steve Ingersoll, Sandra Roche and Rodd Weber as well as legal counsel Fred Scarpello. He announced the continuation of the meeting of the Nevada Occupational Safety and Review Board from Wednesday, June 14, 2017. Chairman Barnes referenced item 4C on the administrative agenda "**for possible action**" and identified the first matter as a Motion to Dismiss the complaint in docket LV 17-1882, MMC Contractors. The respondent Motion to Dismiss the complaint is based upon failure of OSHES to comply with the applicable time requirements for filing of the complaint. The Chairman and Board reviewed the motion and opposition, and discussed the general pleading file. The Board also reviewed Nevada Administrative Code (NAC) 618.746(1) and related provisions of the code as well as NRS 618.605(1) and related provisions. The members confirmed their review of legal analysis and research from Board counsel regarding the options available in the Board's determination of the applicable law and rules regarding the time for the filing of the complaint. Board members discussed the issues and the arguments raised. The Chairman called for a motion. During the course of discussion on the motion, Board member Baker referenced the plain meaning of the NAC rule governing the time for filing a complaint to 20 days.

Board member Roche read the provisions of 618.746(1) noting it was mandatory and jurisdictional in nature. Board member Weber noted the position raised by complainant defensibly required an "implied" interpretation of NRS which did not even speak to the terms of filing a complaint but rather the duty of OSHES to transmit the employer notice of contest. All Board members commented they were uncomfortable with dismissing a matter based upon a motion, particularly for a one day delay, but this interpretation, unlike decisions which are not precedent, would surely be raised again and there was simply no question the wrong provision was followed by OSHES. On motion by Board member Weber, second by Board member Ingersoll, the Board voted unanimously to grant the Motion to Dismiss filed by respondent. The Chairman instructed counsel to prepare the appropriate order as outlined in the alternatives and options made available in the legal research referencing the basis for the denial and effectuate service on all parties.

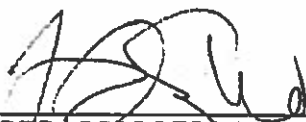
The Chairman referenced item 4B on the published agenda, noting the requirement for deliberation and decision in the case previously heard and submitted on May 10, 2017 identified as docket RNO 16-1851, Reno Forklift. The matter was published as subject for "**possible final action.**" The members reviewed the testimony, evidence, transcript references and applicable law. After discussion of the cited and related standards, elements required to find a violation, burden of proof, hearing notes, exhibits and transcript references of testimony, the Board determined the incorrect standard was cited. The facts in evidence demonstrated the case was actually a **testing** versus a **service and maintenance** issue, therefore the cited standard **not applicable**. The Board further found no sufficient or preponderant evidence to meet the OSHES burden of proof of employer knowledge for violative employee conduct while testing energized equipment. Board members reviewed the cited and related standards, as well as OSHA guidance regarding the applicable standards for "testing" machinery while energized/operating. After discussion the Chairman called for a vote.

Board member Roche restated her motion to deny the citation and violation due to the cited standard being inapplicable to the facts in evidence, lack of preponderant evidence for the required element of **employer knowledge** that employees used hands instead of tools during energized testing work, and no employer requirement to document procedures for testing energized equipment based upon compliance with "exceptions" in the standards. The Motion was seconded by Board member Baker. Board members Barnes, Baker, Roche and Weber voted 4-0 to find no violation; member Ingersoll abstained from the vote based upon his absence from the original hearing, although stated for the record that he had read the transcript and reviewed the exhibits, testimony, transcript

references, and concurred with the vote. The chairman directed counsel to prepare and circulate the proposed draft decision for review, comments and edits prior to final issuance.

Board members discussed general agenda matters, reviewed settings, and continued the previous days discussions. Availability and options for hearing room facilities with expanded public access was again discussed. Chairman Barnes noted his experience on the Reno planning commission where meetings are telecast on public access television so fully open and unrestricted to the public. Similarly, public television access is provided by the Las Vegas City Council and other government bodies. Legal counsel noted both UNLV and UNR maintain telecast facilities and similarly the Boyd Law School. The latter previously issued and circulated a law review article on the need for more "openness" by NVOSHES through publication of Board decisions, orders and settlement agreements. Board members reconfirmed their positions taken at previous meetings for public access for all OSHA meetings, hearings and deliberations. Through a public access telecast, employers, employees, safety representatives, union organizations, enforcement people, defense counsel and any others in the safety industry, as well as the general public, would be meaningfully informed of how Nevada OSHA operates, the enforcement and appellate processes and adjudication of contested cases. Chairman Barnes indicated he and Board counsel would inquire further on facility availabilities equipped for public telecast and inform all members. If acceptable options are found, the information could then be reviewed with the DIR Director, AG legal staff specializing in Nevada open meeting law practices, and other state government authorities as appropriate. This matter will continue as a discussion item.

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 12:30 p.m.



FRED SCARPELLO, ESQ.
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Occupational Safety and
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