

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.

September 13, 2017

PRESENT

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

ABSENT

Frank Milligan (alternate-public)

The Nevada Occupational Safety and Health Review Board convened the scheduled meeting of the board at 10:00 a.m., September 13, 2017. The notice of meeting was duly provided under Chapter 618 of the Nevada Revised Statutes (NRS), Chapter 618 of the Nevada Administrative Code (NAC) and 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 called the Board to order, announced the contested hearing calendar and identified the contested cases set for hearing on the published agenda. Chairman Barnes noted settlements in three of the scheduled cases, namely docket LV 17-1893, Occupational Safety and Health Administration, Division of Industrial Relations of the Department of Business and Industry, vs. Affordable Concepts, docket LV 17-1895, Occupational Safety and Health Administration, Division of Industrial Relations of the Department of Business and Industry, vs. Auburn Electric, Inc. and docket LV 17-1898, Occupational Safety and Health Administration, Division of Industrial Relations of the Department of Business and Industry, vs. Closeout Surplus & Savings, LLC. Chairman Barnes stated the matters would be included on the weekly status report and diaried for receipt of settlement documentation in accordance with the Board rules, practice and approval review "for possible action" at the next public meeting.

The Chairman announced the formal appellate hearing of the remaining case on the contested calendar, namely docket LV 17-1905,

Occupational Safety and Health Administration, Division of Industrial Relations of the Department of Business and Industry, vs. Original Roofing Company. He 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 Ms. Bernadette Rigo, Esq. on behalf of respondent, Original Roofing Company.

Documentary evidence and testimony were presented in the course of the hearing. The case was adjourned for a luncheon break at 1:15 p.m. The Board reconvened the hearing approximately 2:15 p.m. After closing arguments by counsel, the matter was submitted and the hearing concluded at 3:00 p.m.

The Board commenced deliberation of the submitted case, docket LV 17-1905, Occupational Safety and Health Administration, Division of Industrial Relations of the Department of Business and Industry, vs. Original Roofing Company.

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, member Roche dissenting, the remaining members present found a violation by a preponderance of evidence as to Citation 1, Item 1, 29 CFR 1926.501(b)(13). The Board confirmed the classification of Repeat/Serious and approved the penalty in amount of \$8,800.00.

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

The Chairman and Board reviewed the remaining matters on the published meeting agenda after confirming the contested hearing calendar had been completed:

A) On motion, second and unanimous vote by Board members present, the minutes of August 9, 2017 were approved as distributed.

B) The weekly status report of pending matters was reviewed and discussed. Members noted the cases scheduled and current contested calendar now set through February of 2018. Members and counsel discussed any additional matters to be heard on the Las Vegas and Reno dockets. Counsel was instructed to set additional cases for hearing in March 2018.

C) The chairman referenced all matters on the agenda "for possible action" involving case settlement documentation, pending motions and issues submitted for Board review and approval. The Chairman confirmed all Board members had received, prior to the meeting, memoranda and documentation submitted for approval. The Chairman further noted advisories of counsel that no Board members had raised any objections prior to the meeting. The Chairman requested Board members vote on each matter or register objections for discussion. There being no objections, on motion of Board member Ingersoll, second by Board member Roche, the following cases were approved by unanimous vote for settlement and issuance of Final Orders:

- 1) RNO 17-1869, Otis Elevator Company
- 2) RNO 17-1897, Paso Robles Tank - Brown - Minneapolis Tank
- 3) RNO 17-1903, Bombard Electric, LLC
- 4) LV 17-1885, Affinitylifestyles.com, Inc., dba Real Water

The Board referenced docket LV 17-1909, Earth Resource. Counsel advised the Opposition to the Motion to Dismiss had not been filed, therefore no final action could be taken on the subject case at the present time. Counsel advised an extension for filing had been agreed upon, and as soon as the Opposition is filed, a legal analysis would be subject of a memorandum advisory as to the controlling law. The Board could consider the matter at the next public meeting and listed on the forthcoming published agenda.

D) The Board legal counsel position and contract issues were reviewed and discussed. The contract of current legal counsel Fred Scarpello expires on November 30, 2017. Mr. Scarpello thanked the Board, DIR and the State of Nevada for the many years of support and confirmed he did not intend to seek a new contract. He also confirmed discussions with Mr. Barnes who had previously expressed interest in the legal counsel position. Mr. Scarpello recommended consideration of Mr. James Barnes as new Review Board legal counsel. Members confirmed their high regard of Mr. Barnes based upon his longstanding membership on the Board and as Chairman. Mr. Barnes expressed his interest in serving as legal counsel and presented his formal written resume for review by all Board members. Members noted his substantial legal experience in the special field of OSHA law and particularly a unique qualification factor for having served as Director of the Department of Business and Industry (DIR) during his early career. Members also referenced Mr. Barnes longstanding legal experience in the field of administrative law and positions in Nevada state government, including the Director of the Nevada State Department of Energy and Chairman of Compensation for State Employees Committee. Mr. Barnes outlined his professional experience and background noting many continuous years practicing law in public service and privately. Board members agreed on the knowledge, background and recognized

qualifications of Mr. Barnes in the area of Occupational Safety and Health law and as demonstrated during his service on the Board.

Members discussed the hourly fee rate requested by Mr. Barnes. Member Ingersoll reported his organization had recently completed a survey of Reno lawyers hourly rates pursuant to an RFP. He reported rates ranged from \$290 to \$450 per hour depending upon experience. Members commented the \$350 per hour request appeared both reasonable and a well supported middle range. Board counsel noted there are few lawyers in Reno and Las Vegas who practice in the specialized OSHA field.

After discussion, Board member Weber offered a formal motion to retain Mr. Barnes as legal counsel for the Nevada Occupational Safety and Health Review Board. The motion provides:

". . . I move the Nevada Occupational Safety and Health Review Board (Board) retain Mr. James Barnes to serve as legal counsel pursuant to the specific statute, NRS 618.585, for a contract term of at least two years, at the hourly rate of \$350.00 per hour commencing at expiration of the current legal counsel contract on November 30th, 2017. The motion is based upon Mr. Barnes extensive experience and effective specialty in the field of Occupational Safety and Health Law, practice and procedure. Mr. Barnes' administrative background as a prior Cabinet level Director of the Nevada State Department of Industrial Relations (DIR), makes him uniquely qualified for the legal counsel position; all as more particularly described in his professional resume incorporated in this motion (attachment).

Pursuant to NAC 333.150 the foregoing qualifications meet the criteria for exception as well as designation of sole source contractor.

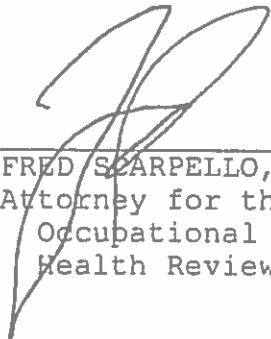
I further move that should there be any delay implementing the James Barnes contract by November 30, 2017, for any reason, the current counsel contract with Fred Scarpello shall be extended for the delay time required, if any, up to 90 days, subject to additional extensions if/as needed. This contract extension provision is intended to maintain continuity of Review Board operations for the prompt hearing, adjudication, and processing of Board business to responsibly foster the statutory mandate under NRS Chapter 618 and avoid interruption of the appellate process. . . ."

The motion was seconded by Board member Ingersoll. (Mr. Barnes recused) all Board members present voted for the retention of Mr. Barnes.

Current legal counsel Scarpello was instructed to contact Senior DIR Legal Counsel, Mr. Don Smith, and proceed in the same manner and process as done in previous years for Board legal counsel contracting. Counsel was also instructed to request expedition of the contract completion for submittal to the Board of Examiners to meet schedule timelines and avoid any delay or disruption in Board operations.

The Chairman referenced items E and F on the agenda and asked for discussion relative to general administration and procedural issues not subject of requirement "for possible action." None were offered noting the subjects were already addressed at agenda items B and C. The Board discussed matters for the next public meeting agenda, noting that anything of special interest to any Board member be communicated to counsel well in advance of the time requirement for posting and electronically publishing the meeting agenda under expanded interpretations of the Nevada Open Meeting Law.

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 4:45 p.m.



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