

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, March 14, 2018

PRESENT

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

ABSENT

Sandra Roche (management)

Thursday, March 15, 2018

PRESENT

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Rodd Weber (management)
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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, March 14, 2018. 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. Chairman-Elect Ingersoll, confirmed a lawful quorum of members present.

The Chairman announced the contested hearing calendar and identified the cases scheduled for hearing on the published public agenda notice. The Chairman inquired as to whether all counsel or party representatives for the three contested matters noticed and scheduled for hearing were present and inquired whether complainant counsel had communications with each as to the allocation of times for presentation of their respective cases. Complainant counsel responded that she and respondent counsel had discussed the first two matters to be heard, namely docket LV 18-1912, Occupational Safety and Health Administration, Division of Industrial Relations of the Department of Business and Industry, vs. BMC West, LLC, and docket LV 17-1900, Occupational Safety and Health Administration, Division of Industrial Relations of the Department of Business and

Industry, vs. Xtreme Manufacturing. Both cases were intended to be presented and completed at today's hearing. Counsel further referenced she had no communications or responses from the representative, non-attorney, employer/owner in docket LV 17-1906, Restoration and Recovery, LLC. She noted there was an answer on file and an offer made for settlement but no response whatsoever received from the respondent. The chairman announced the Board would proceed with the first two cases identified and determine whether counsel for docket LV 17-1906 would appear, otherwise that matter could be carried over to the Thursday meeting if/as necessary or required due to time constraints.

The Chairman called the Board to order for hearing of the first contested matter, namely docket LV 18-1912, Occupational Safety and Health Administration, Division of Industrial Relations of the Department of Business and Industry, vs. BMC West, LLC. 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 Mr. Rick Roskelley, Esq. on behalf of respondent, BMC West, LLC.

Documentary evidence, witness testimony and closing arguments were presented during the course of the hearing. The hearing was concluded and the case submitted at approximately 2:00 p.m. The Chairman announced that deliberations would be conducted after completion of the second contested matter scheduled for hearing.

The Chairman called the Board to order for hearing of the second contested matter, namely docket LV 17-1900, Occupational Safety and Health Administration, Division of Industrial Relations of the Department of Business and Industry, vs. Xtreme Manufacturing. 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 Mr. Tim Rowe, Esq. on behalf of respondent, Xtreme Manufacturing.

Documentary evidence, witness testimony and closing arguments were presented during the course of the hearing. The hearing was concluded and the case submitted at approximately 4:30 p.m.

After a brief recess, the Board reconvened at approximately 4:45 p.m. The Chairman announced the matters subject of deliberation, decision and vote on the Board agenda would be considered in order as follows:

Docket LV 17-1894, Occupational Safety and Health Administration, Division of Industrial Relations of the Department of Business and Industry, vs. Performance Builders subject of hearing at the last Board meeting on February 15, 2018 was identified as the first matter subject of consideration. The Chairman called for discussion and deliberation of the subject matter. Members reviewed and discussed their hearing notes, pleadings, photographic exhibits, documentary evidence and referenced the cited standard and applicable law. Additionally the Board members noted their receipt and review of the extensive transcript of the hearing and confirmed all had studied the witness testimony and noted comments accordingly. On motion and second to dismiss the citation and deny the violation, the Board members present voted unanimously to deny the citation and dismiss the violation. Board members Weber, Milligan, Halsey and Ingersoll voting, Board member Roche absent. The Board directed counsel to prepare, draft and circulate the proposed decision for study, comment, edits and review prior to final issuance.

The Chairman announced the next matter for consideration, deliberation and decision vote, docket LV 18-1912, Occupational Safety and Health Administration, Division of Industrial Relations of the Department of Business and Industry, vs. BMC West, LLC. The Chairman noted only one violation to be subject of contest and requiring deliberation and decision vote. Citation 1, Item 1, was not subject of contest and accordingly deemed admitted, on motion, second and unanimous vote of Board members in attendance.

The Chairman called for discussion and deliberation with regard to Citation 1, Item 2, referencing a violation of 29 CFR 1926.452(c)(4) classified as Serious, and a proposed penalty of \$4,400.00. After discussion, review of documentary evidence and consideration of the testimony in conjunction with the hearing notes, the Chairman called for a vote. On motion, second and unanimous vote, the Board voted to deny the violation and proposed penalty. The Board directed counsel to prepare, draft and circulate the proposed decision for study, comment, edits and review prior to final issuance.

The Chairman announced the final matter for consideration, deliberation and decision vote, docket LV 17-1900, Occupational Safety and Health Administration, Division of Industrial Relations of the Department of Business and Industry, vs. Xtreme Manufacturing. Citation 1, Item 2, was not subject of contest and accordingly deemed admitted, on motion, second and unanimous vote of Board members in attendance.

The Chairman called for discussion and deliberation with

regard to Citation 1, Item 1, referencing NRS 618.375(1) commonly known as the "General Duty Clause" classified as "Repeat/Serious", with a proposed penalty of \$8,000.00. After discussion, review of the documentary evidence and consideration of the testimony in conjunction with the hearing notes, the Chairman called for a vote. On motion and second to confirm the citation, classification and proposed penalty, the violation was approved by the Board with all members present voting unanimously. Board counsel was directed to prepare, draft and circulate the proposed decision for study, comment, edits and review prior to final issuance.

After a brief recess, the Chairman announced consideration of the administrative agenda as duly published and posted.

On motion, second and unanimous vote the previous Review Board minutes were approved as distributed.

Board members then reviewed item B, the schedule of pending cases, and reviewed the proposed case settlement subject of consideration. On motion, second and unanimous vote, the proposed settlement in docket LV 17-1898, Occupational Safety and Health Administration, Division of Industrial Relations of the Department of Business and Industry, vs. Closeout Surplus & Savings was approved.

The Board considered general procedural matters and the requirement for internal officer elections based upon the chairman-elect serving after the resignation of the previous Chairman and Mr. Frank Milligan having been appointed to the status of permanent public at large member as opposed to an alternate. On motion, second and unanimous vote, the Board confirmed Mr. Ingersoll serve as the Chairman of the Review Board. Subsequently on motion, second and unanimous vote, Mr. Rodd Weber was elected to serve as secretary of the Review Board.

Counsel reported on general status of the legal services contract for the employment of Mr. Barnes as previously approved by the Review Board. The matter was again discussed, noting the process has been extraordinarily delayed, but now subject of review by the Director of Business and Industry. Counsel commented that the contract issue appears to be on tract for conclusion. Board members reviewed the historical legal services contract delays for the benefit of Mr. Milligan, now a permanent sitting member. Mr. Weber moved for the reconfirmation of Mr. Barnes as the legal counsel duly employed through Board action at the September 13, 2017 meeting. On motion second and unanimous vote of all members present, the previous motion made by Mr. Weber was incorporated by reference and approved unanimously; subject only to a modification

that should Mr. Barnes elect to discount his fee rate, that would be subject of a meeting with he and the BI Director after budget reviews. The Board directed that no further delays be permitted noting this matter has been ongoing since September 2017. Members further noted the urgency to resolve the issue due to current counsel serving under only a limited extended term contract, and the Board's immediate need for permanent OSHA experienced legal counsel to properly address the pending contested hearings and assure continuity of Board operations.

The Board reviewed the scheduled hearings and meetings for April 11 and 12, 2018. Chairman Ingersoll noted the previously announced absence of Board member Roche for the April meetings due to a preplanned business commitment. Additionally Board members Ingersoll and Halsey advised their respective employers had scheduled annual conventions which overlap so both unable to attend the April hearings/meetings. Counsel advised that with the absence now of both labor members the special quorum could not be satisfied for a legal meeting of the Review Board. The Board instructed counsel to follow up with Board members Ingersoll and Halsey to review their scheduling and if nothing could be resolved forthwith, that in fairness to all litigating parties and other Board members, authorized counsel to cancel the April contested hearing calendar. Counsel inquired as to whether any Board members could be available by telephone should there be any need to connect the Board members during the month of April, particularly because of the delayed legal contract issues or any other matters that may require attention, other than of course the contested hearings which require personal presence of all Board members. The Board requested counsel monitor the issues and keep them advised of the need for a limited telephonic administrative meeting.

There being no further business, on motion, second and unanimous vote, Board meetings and hearings were concluded at approximately 5:45 p.m. including an announcement by the Chairman that the Board would reconvene Thursday, March 15th and first consider the last remaining matter on the contested hearing docket namely docket LV 17-1906, Occupational Safety and Health Administration, Division of Industrial Relations of the Department of Business and Industry, vs. Restoration and Recovery, LLC. The Chairman noted that if neither the respondent nor counsel appear then the matter would be subject of a default motion and presentation of a prima facie case by complainant counsel for the Board to review and determine the evidence of violations.

No members of the public were present requesting comment.

Thursday, March 15, 2018

The Chairman convened the scheduled meeting of Nevada Occupational Safety and Health Review Board at approximately 10:00 a.m. on Thursday, March 15, 2018. The Chairman announced the remaining matter on the contested matter, docket LV 17-1906, Occupational Safety and Health Administration, Division of Industrial Relations of the Department of Business and Industry, vs. Restoration and Recovery, LLC. The chairman 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. There was no appearance on the part of the respondent. Complainant counsel announced that she had not received any response to previous communications with the owner and noted there had never been any legal counsel involved in the case. An answer was timely filed and the case set for hearing. Board counsel referenced the original file noting signed certified receipt notices of hearing documented, but no advisory or contact by the respondent. On motion, second and unanimous vote, the Board entered a motion for default, subject to presentation of evidence and Board review of the documentary exhibits presented by complainant to determine the basic burden of proof and evidence of violations.

After presentation of witness testimony by complainant and closing argument, the case was submitted for decision. Board members noted a lack of reasonable application of the OSHA standards and NRS through issuance of citations. The factual evidence reflected a lack of employee exposure within the meaning, scope, and/or intent of the Occupational Safety and Health Act. The undisputed preponderant evidence demonstrated the respondent owner, albeit acting through her LLC, an assistant and family members were merely renovating her office building when a health department officer found and reported evidence of asbestos in the company dumpster. The Board noted the evidence verified the ultimate testing reflected the asbestos material was at a non-violative level. All members opined the case should have been resolved at the administrative level rather than pursue 10 violations, Serious classifications and excessive proposed penalties in the amount of \$9,900.00.

On motion, second and unanimous vote, the previous motion for default judgment due to a failure to appear was withdrawn. After discussion of the lack of evidence to meet the burden of proof, and consideration of the extensive documentary evidence establishing no violations of the standards or Nevada statute cited, on motion, second and unanimous vote of all members in attendance, the Board

voted to dismiss the citations, classifications and proposed penalties as to the following:

29 CFR 1926.1101(3)(1), Serious, with a proposed penalty of \$1,200.00.

29 CFR 1926.1101(e)(6), Serious, with a proposed penalty of \$1,200.00.

29 CFR 1926.1101(f)(1)(i), Serious, with a proposed penalty of \$1,200.00.

29 CFR 1926.1101(g)(1)(i), Serious, with a proposed penalty of \$1,200.00.

29 CFR 1926.1101(g)(1)(ii), Serious, with a proposed penalty of \$1,200.00.

29 CFR 1926.1101(g)(1)(iii), Serious, with a proposed penalty of \$1,200.00.

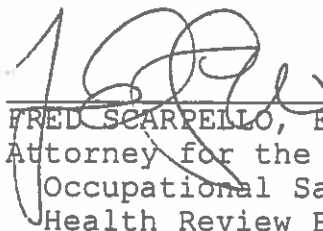
29 CFR 1926.1101(1)(2), Serious, with a proposed penalty of \$1,200.00.

29 CFR 1926.1101(i)(2)(i), Serious, with a proposed penalty of \$1,200.00.

29 CFR 1926.1101(k)(9)(i), Serious, with a proposed penalty of \$1,200.00.

NRS 618.790, Regulatory, with a proposed penalty of \$300.00.

Chairman called for public comment without response. On completion of business subject of the duly noticed agenda and on motion, second and unanimous vote, the meeting of the Nevada Occupational Safety and Health Review Board was concluded at approximately 11:45 a.m.



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