

STATE OF NEVADA

**Minutes for the
Nevada Occupational Safety and Health Review Board
Reno, Nevada**

December 12 and 13, 2018

Present

**Steve Ingersoll (labor)
Rodd Weber (management)
James Halsey (labor)
Sandra Roche (management)
Frank Milligan (public at large)**

December 12, 2018

On December 12, 2018, a meeting of the Nevada Occupational Safety and Health Review Board was convened. The meeting took place at the Department of Occupational Safety and Health, 4600 Kietzke Lane, Building B, Suite 111, Reno, Nevada.

1. Roll Call.

Chairman Ingersoll called the meeting to order at approximately 9:10 a.m. Those Board members personally attending the meeting were Chairman Steve Ingersoll, Secretary Rodd Weber, and members Sandra Roche, James Halsey and Frank Milligan. 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.

Also in attendance at the meeting in person were Board Legal Counsel, Charles R. Zeh, Esq., The Law Offices of Charles R. Zeh, Esq., Sally Ortiz, Esq., Division Counsel, Division of Industrial Relations (DIR), Charles B. Woodman, Esq., Counsel for the Respondent, DNA Framing, Inc. and other members of the public, as well as possible witnesses to the contest case or cases noticed for this meeting.

Notice of the meeting was posted or published, electronically or otherwise, consistent with the requirements of the Nevada Open Meeting Law.

2. Public Comment.

There was no public comment.

3. Contested Cases Hearings.

- a. **RNO 18-1944, BRIGGS ELECTRIC**
- b. **RNO 18-1937, SAVAGE SERVICES**
- c. **RNO 18-1946, DNA FRAMING, INC.**
- d. **RNO 18-1953, PACIFIC WEST CONTRACTORS OF NEVADA, LLC**
- e. **RNO 19-1958, ARAMARK UNIFORM**
- f. **RNO 19-1957, TESLA MOTORS NV, INC.**
- g. **RNO 19-1959, PETERSEN-DEAN, INC.**
- h. **RNO 14-1684, SIERRA PACKAGING & CONVERTING, LLC**

It was noted that items 3 (a), RNO 18-1944, Briggs Electric, (d), RNO 18-1953, Pacific West Contractors of Nevada, LLC, (e), RNO 19-1958, Aramark Uniform, (f), RNO 19-1957, Tesla Motors NV, INC., and (g), RNO 19-1959, Petersen-Dean, Inc. were settled prior to the hearings.

c. RNO 18-1946, DNA Framing, Inc.

Chairman Ingersoll called to be heard the first case for the Board to consider this morning, to-wit, Chief Administrator Officer of the Occupational Safety and Health Administration of the Division of Industrial Relations of the Department of Business and Industry, State of Nevada, Complainant, vs. DNA Framing, Inc., Respondent. Docket No. RNO 18-1946.

Both counsel waived opening argument and the parties proceeded to litigate the case.

Mr. Woodman submitted his case to the Board, and after both sides gave their closing argument, the Board briefly adjourned, while taking the matter under advisement. The Board then reconvened. Mr. Woodman and his client had departed by then. Ms. Ortiz remained throughout. The Board deliberated in public and concluded that the respondent, DNA Framing, Inc., (DNA), essentially did not contest that 29 CFR §1926.502(d)(16)(iii) had been violated. Instead, the respondent offered as an affirmative defense, the regulation cited was violated due to a rogue employee over whom DNA could not exert control and, therefore, that DNA should not be cited and held accountable. The Board concluded after deliberating that the respondent, DNA had successfully mounted this affirmative defense of a rogue employee, which required dismissal of the serious violation alleged by the complainant.

Accordingly, it was moved by Sandra Roche, seconded by James Halsey, to dismiss the citation against DNA. **The motion was adopted.**

Vote: 5-0.

Board counsel is to draft a decision for the Board review in 90 days, after which counsel for the respondent, as prevailing party, will draft the Findings of Fact, Conclusions of Law and Final Order that the respondent successfully established a rogue employee defense to the complaint.

The remaining two cases on the docket, RNO 18-1937, Savage Services and RNO 14-1684, Sierra Packaging and Converting, LLC, were continued until Thursday, December 13, 2018.

4. Administrative Meeting.

a. Approval of the previous Review Board minutes of November 15, 2018.

Chairman Ingersoll next called this matter to be heard, consideration of the minutes for the Review Board meeting of November 15, 2018. It was moved by Rodd Weber, seconded by Sandra Roche, to approve the minutes as written. **Motion adopted.**

Vote: 3-0-2 (Ingersoll and Milligan abstaining as they were absent from the meeting.)

b. Review contested case settlement, motions, draft decision, or procedural issues pending on status report, for approval and issuance of final order:

i. RNO 17-1929, Reno Forklift, Inc.

Chairman Ingersoll advised that approval of this decision will be deferred until the January 2018 meeting of the Board, when it will be placed on the Agenda and Reno Forklift notified that the decision will be considered at that time.

ii. LV 18-1926, Martin Thompson, DDS Ltd.

iii. LV 18-1929, Focus Plumbing, LLC

Chairman Ingersoll called for consideration of the approval of settlements in item b(ii) and b(iii) above. It was moved by Rodd Weber, seconded by Frank Milligan, to approve the settlement of LV 18-1926, Martin Thompson, DDS Ltd., and LV 18-1929, Focus Plumbing, LLC. **Motion adopted.**

Vote: 5-0

c. General administration and/or procedural issues.

Chairman Ingersoll discussed the process by which settled matters were approved by the Board. The Board expressed concern that since approval is a determination owned by the Board, the Board should have more detailed information at its disposal about why the matter should be settled and why the settlement should be approved by the Board. This will be agendaized for affirmative action by the Board at the next regularly scheduled meeting.

Board counsel then advised that the Board should revisit its regulations governing Board hearing procedures. The regulations are somewhat antiquated in places, such as, for example, the fact that service of pleadings and filings must be by first class mail, return receipt requested, if not by personal service or filing. These are the rules even though the Ninth Circuit Court of Appeals, for example, accepts service by email. This, too, will be further agendized to direct the Board counsel to conduct a review of the procedures and make recommendations for revisions to the Board in the next six months, to coincide with the conclusion of the Legislative Session, when the Legislative Counsel Bureau will then be freed up to undertake its role in the regulation drafting and amending process.

d. Schedule of hearings on pending cases.

The current schedule of the Board meetings needs to be amended for the January 2019 meeting of the Board which coincides with the Computer Expo convention in Las Vegas. Rooms are booked and if a room is available, a survey revealed rates upwards of \$1,400, a rate that is prohibitive for State employees on a per diem for travel. The same problem presents itself for Board legal counsel and Board members who must travel to the meeting. It was accordingly decided to move the date of the meeting to January 24 and 25, provided that the room at the State offices is available on those dates, the parties and their counsel for the cases and their witnesses are available to attend, and that the State officials can make themselves available, also, for hearings on that date. Members Halsey, Roche and Milligan have those dates clear on their calendars and, thus, a quorum of the Board would be present to hear and decide the matters before the Board. Secretary Rodd Weber can also attend the second day of the hearings.

State legal counsel and Board legal counsel are to work through this as soon as possible to see if this can be arranged and the parties properly noticed for revised January 2019 hearing dates.

5. Public Comment.

There was no public comment.

6. Adjournment.

Chairman Ingersoll called this matter next to be heard. It was moved by James Halsey, seconded by Frank Milligan to adjourn the meeting at approximately 5:20 p.m. **The motion was adopted.**

Vote: 5-0.

Chairman Ingersoll then adjourned the meeting.

December 13, 2018

Chairman Ingersoll called to order the second day of meetings of the Nevada Occupational Safety and Health Review Board (Board) at approximately 9:13 a.m.

1. Roll Call.

Chairman Ingersoll called role of the Board for the meeting. Those in attendance in person from the Board were Chairman Steve Ingersoll, Secretary Rodd Weber, James Halsey, Sandra Roche and Frank Milligan.

Also present in person were Board Legal Counsel, Charles R. Zeh, Esq., The Law Offices of Charles R. Zeh, Esq., Sally Ortiz, Esq., Division Counsel, Division of Industrial Relations (DIR), Frank LaForge, Esq. and Dora Lane, Esq., of Holland and Hart, Tim Rowe, Esq., of McDonald Carano, and other members of the public and/or staff of the DIR.

Notice of the meeting was posted or published, electronically or otherwise, consistent with the requirements of the Nevada Open Meeting Law.

2. Public Comment.

There was no public comment.

3. Contested Cases.

Chairman Ingersoll called to be heard, Savage Services, Inc., RNO-18-1937, the first of the two remaining contested cases to be heard. Board legal counsel explained that this matter was before the Board upon the motion of Savage Services, Inc.'s, (Savage Services of Savage), to dismiss the case for the want of jurisdiction due to Federal preemption based upon the Federal Railroad Safety Act (FRSA), Public Law No. 91-458, 84 Stat. 971 (1970). Savage argued that the Act so occupied the field that State OSHA and, thus, this Board, were without any authority to impose personal fall protection requirements on Savage when their employees were unloading railway cars sited on a spur even though they were working 15-17 feet above ground and were also susceptible to a fall of 9-10 feet into the bottom of the cargo hold of the rail way car when working to unload the car. The State was represented by Salli Ortiz, Esq., and Savage was represented by both Ms. Lane and Mr. LaForge.

Board counsel also explained that while the State has the burden of proving jurisdiction, it was Savage's motion to dismiss. Savage would, therefore, go first, with the State following. Then, if necessary, Savage could be heard again. The Board had allotted 30 minutes aside, according to Board counsel, to be heard on this issue.

Both sides then proceeded to assert their respective arguments, pro and con the question of jurisdiction. The Board peppered counsel with questions and at the conclusion of oral argument, took the matter under advisement, pending hearing on the next case. Ms. Ortiz remained in the hearing room to argue the next case. Ms. Lane and Mr. LaForge departed the hearing room.

Board Chairman, after a brief recess, then called the next and last case to be heard, Sierra Packaging and Converting, LLC, RNO 14-1684. Board Chairman again asked Board counsel to explain why this case was again before the Board. Board counsel advised that the Board had previously heard this matter and decided to affirm the citation against Sierra Packaging. The matter was appealed to the District Court, who affirmed the Board's decision, and then, to the Court of Appeals. The Nevada Court of Appeals reversed and remanded the case to the District Court to remand to the Board for reconsideration. Board counsel advised that the Court of Appeals reversed the Board because in the opinion of the Court of Appeals, the Board had applied the wrong standard for determining whether there was a violation of the requirement that if an employer supplies personal fall protection equipment (PPE), the employer must provide adequate training in the use of the PPE.

The Court of Appeals reversed on the grounds that it is insufficient to prove the employer failed to provide adequate training in the use of the PPE. The Court of Appeals advised that before the Board even gets to the issue of adequate training in the PPE, the Board must determine in the first instance whether it is reasonably predictable that the employees to whom PPE was provided were or would be exposed to a hazard, here, height. The Board, however, had skipped this threshold step and based its decision solely upon a failure to train. If it is not reasonably predictable that employees were or would be exposed to a hazard, the training issue should not ever be reached and no violation should be assessed the employer for failing to train in PPE. If there is no proof it is reasonably predictable that employees would be exposed to the hazard of height, the PPE training question is rendered moot. The Court of Appeals remanded the case back to the Board to reconsider the record in light of the correct legal standard in order to determine whether the record would support a finding that it was reasonably predictable that the employees were or would be exposed to a hazard.

Board counsel finally pointed out that the Board members had before them to conduct the review, the record that was before the Board when the case was first heard. The Board, thus, had all the exhibits admitted into evidence, the pleadings, and the transcript of the hearing. The Board also had before it the decision of the Board and the Board's Findings of Fact, Conclusions of Law and Order.

As the burden of proof here lies with the State, Salli Ortiz, Esq., presented her argument that the original decision should be affirmed, after applying the correct legal standard which she agreed was correctly recited to the parties by Board legal counsel. Tim Rowe, Esq., of McDonald Carano then argued his case as to why the decision should not be reaffirmed on appeal. Both counsel were questioned by the Board. Each was allowed 30 minutes a side to present their respective cases.

The matter was not remanded for a hearing *de novo* by the Court of Appeals. The Board was free to reconsider the case based upon the existing record. Nothing in the Court of Appeals decision foreclosed an election by the Board to take additional testimony and evidence. The Board proceeded to hear the case based on the entire record, alone.

After the parties concluded their presentation, the Board took the matter under advisement.

Following a brief recess, Board Chairman reconvened the meeting for public hearing and called for the Board to take up the Savage case first. The Board members deliberated until it was moved by Sandra Roche, seconded by Frank Milligan, to grant the Savage motion to dismiss. The motion was defeated. Vote: 2 in favor and 3 against (Weber, Ingersoll and Halsey). After further deliberation, it was moved by Chairman Ingersoll, seconded by James Halsey, to deny the motion to dismiss. After more deliberation, a vote was taken. The motion was defeated. Vote: 2 in favor and 3 against (Roche, Milligan and Weber). It was then moved by Sandra Roche, seconded by Rodd Weber, to grant the motion to dismiss. **Motion approved.**

Vote: 3 in favor and 2 against (Ingersoll and Halsey).

Obviously, this was a very close decision. A written order will follow after review of its contents by the Board.

The Board then took up in public deliberations, Sierra Packaging. The correct legal standard was recited once again for the Board, before reviewing the record of the matter when initially heard. The Board concluded that there was indeed, preponderantly sufficient evidence in the existing record to establish that it was reasonably predictable that the employees issued PPE were or would be exposed to the hazard of working at heights. PPE is, then, to be issued and the duty to train is triggered. Applying this standard, the Board concludes by a preponderance of the evidence that the record also supported a finding that the impacted employees were not effectively trained in the use of PPE. Finally, the Board concluded that the employer, Sierra Packaging, had not met its burden of proof on the rogue employee affirmative defense.

Accordingly, it was moved by Chairman Ingersoll, seconded by Frank Milligan that upon application of the correct legal standard enunciated by the Court of Appeals, the existing record shows by the preponderance of the evidence that it was reasonably predictable that the effected employees were or would be exposed to the hazardous condition of working at altitude, that they were not effectively trained and that the rogue employee affirmative defense was not established. Accordingly, the Board reaffirmed issuance of the citation. **Motion adopted.**

Vote: 5-0

Mr. Rowe then exited the meeting.

5. Public Comment.

There was no public comment.

6. Adjournment.

Chairman Ingersoll called this matter next to be heard. It was moved by James Halsey, seconded by Frank Milligan to adjourn the meeting at approximately 5:20 p.m. **The motion was adopted.**

Vote: 5-0

As the Board members, Ms. Ortiz, and Board legal counsel exited the room, they were heard to wish all a happy holiday season and a healthy and prosperous New Year.



Charles R. Zeh, Esq., Board Legal Counsel

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