

**STATE OF NEVADA**

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

**February 27, 2019**

**Present**

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

On February 27, 2019, a meeting of the Nevada Occupational Safety and Health Review Board was convened. The meeting was duly noticed in compliance with the Nevada Open Meeting Law to take place at the Department of Occupational Safety and Health, 3360 West Sahara Avenue, Suit 175, Las Vegas, NV 89102. Participating in person were Rodd Weber, Sandra Roche, Frank Milligan and James Halsey. In accordance with the Nevada Open Meeting Law, each Board member participating in the meeting either had before him or her all written materials to be considered during the deliberations or was obliged to refrain from voting if not in possession of the materials.

**1. Roll Call.**

In the absence of Board Chairman Steve Ingersoll, Acting Chairman and Board Secretary, Rodd Weber, called the meeting of the State Occupational Health and Safety Review Board to order at approximately 9:03 a.m. Board members personally in attendance were Acting Chairman Weber and members Sandra Roche, Frank Milligan, and James Halsey.

Also, personally in attendance were Donald C. Smith, Esq., Division of Industrial Relations (DIR) legal counsel and Charles R. Zeh, Esq., the Law Offices of Charles R. Zeh, Esq., Board legal counsel. Bryan Hoggan was personally in attendance. He is the Vice President, Safety, Health and Environment, Savage. Other officials of DIR were in attendance at the meeting. Participating by telephone for this hearing were Dora Lane, Esq., and Frank LaForge, Esq., of the law firm of Holland and Hart.

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.

As four Board members were present to participate in the meeting, one on behalf of labor and one on behalf of management, a quorum was present.

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 Case Hearings.**

**a. RNO 18-1937, Savage Services Corp.**

Acting Chairman Weber called this item to be heard. He asked Board counsel to explain. Board counsel advised that this matter was before the Board on this date to consider the motion to reconsider brought by the complainant, Chief Administrative Office of the Occupational Safety and Health Administration of the Division of Industrial Relations of the Department of Business and Industry, State of Nevada (State). The motion was brought pursuant to NRS 233B.130(4). The State sought reconsideration of the Board's order dated January 29, 2019, in the *State v. Savage Service Corp.*, RNO 18-1937, dismissing the case with prejudice due to Federal preemption, ousting the Board of jurisdiction to hear a case involving personal protective equipment for fall protection for employees working at heights atop railroad cars.

Appearing on behalf of the State for this hearing was Donald C. Smith, Esq., Division Legal Counsel for DIR. Mr. Smith was appearing in place of Salli Ortiz, Esq., the lawyer who prosecuted the case for the State. Ms. Ortiz was unavailable because she was attending a conference, according to Mr. Smith. This matter was scheduled for this date, however, by agreement amongst Ms. Ortiz, the counsel for Savage, the respondent, and counsel for the Board. Appearing by telephone due to travel issues was Dora Lane, Esq., Holland and Hart. Also, appearing by telephone was Frank LaForge, Esq., of Holland and Hart. Both Ms. Lane and Mr. LaForge represented Savage. Mr. Hoggan was also present, in person, for Savage.

Board counsel pointed out to the Board that the threshold issue on the motion to reconsider was whether the additional information that the State wished to have entered into the record for the Board to consider on the merits of the claim, was, in fact, newly discovered evidence and then, if so, whether, in the exercise of reasonable diligence, it was evidence which could not have been discovered and submitted to the Board for consideration at the hearing on the merits of the motion of Savage to dismiss, which was held on December 13, 2018. If the evidence being offered pursuant to the motion to reconsider was not, in fact, newly discovered evidence, or if the State, in fact, failed to exercise reasonable diligence in the pursuit of this information in order to make the evidence and testimony available during the hearing of December 13, 2018, the motion to reconsider should be denied.

Board counsel then pointed out that in the interim after the State filed its motion to reconsider and on the Friday before the hearing on the motion to reconsider, the State also filed a petition for judicial review. This filing implicated *Honeycutt v. Honeycutt*, 94 Nev. 79 (1978), wherein the Nevada Supreme Court held that where, as here, a party files an appeal of a case while a motion

to reconsider is pending, the tribunal considering the motion to reconsider is ousted of jurisdiction to actually rule on the merits of the motion. Nonetheless, the tribunal, the Board, in this case, may consider the motion to reconsider and certify to the tribunal, above, how it would rule on the motion, if the motion were before the Board to consider on the merits.

In the opinion of Board counsel, the Board could proceed to hear the motion to reconsider. It could not actually grant or deny the motion. But, the Board could certify to the tribunal, above, the Board's position on the motion.

Thus, the Board, at this time, could proceed to hear testimony, evidence, and oral argument from the parties on the threshold question of whether the State had exercised reasonable diligence in the pursuit of the information it is now proffering under the motion to reconsider. If the Board finds that despite reasonable diligence, the information would not have been available when the motion to dismiss was heard on its merits, the State would have met its threshold burden and consideration of the merits, themselves, of the motion could be considered. If the State was unable to show reasonable diligence in the pursuit of the information being proffered pursuant to the motion to reconsider, the Board would then certify to the tribunal above, that the motion to reconsider would be denied by the Board, if given the chance to consider the merits of the motion to reconsider.

With this background, the Board looked to Mr. Smith to discharge the State's burden of showing that this threshold issue of due diligence had been met. He advised, he was not ready to make that proof because he was not the lawyer on the case, was simply pinch hitting for Ms. Ortiz and did not know that the Board was contemplating an evidentiary hearing on due diligence. Nonetheless, Mr. Smith allowed that at the moment, the information he did have at his disposal on the issue of due diligence could be found at page three, the first paragraph of the State's motion to reconsider.

Mr. Smith then asked the Board to continue the case to give him the opportunity to put together an evidentiary record on the question of due diligence. Respondent, of course, objected to the request. The Board deliberated. The motion to continue today's proceedings was then denied, especially in light of the fact that this hearing date was set with the agreement and concurrence of Salli Ortiz, Esq., the State's lead counsel on this matter and the person who was absent from the meeting. The vote on Mr. Smith's request was four voting to deny the request, with one Board member being absent from the meeting.

Mr. Smith then asked for a 20 minute continuance to see if he could marshal testimony and evidence on the due diligence issue. Acting Chairman Weber granted the motion.

After the 20 minute recess, Acting Chairman Weber reconvened the meeting. Mr. Smith was present. Also, Ms. Lane and Mr. LaForge were back on the conference call to fully participate in the meeting.

Acting Chairman Weber called upon Mr. Smith to proceed with the State's burden. Mr. Smith said, he had no additional testimony and evidence to present other than that already in the record. Acting Chairman Weber then asked respondent's counsel for respondent's position on the motion. Respondent related, through Ms. Lane, a litany of reasons already outlined in the respondent's opposition to the motion to reconsider, why the State had failed to show it had exercised reasonable diligence in the pursuit of the evidence the State wishes to add to the record with the motion to reconsider.

When she concluded, and after Mr. Smith advised, he had nothing further to add, the Board deliberated. Acting Chairman Weber called for the question. It was moved by Sandra Roche, seconded by Frank Milligan, to certify that the motion for reconsideration be denied as there was no showing by the State that it had exercised reasonable diligence in the pursuit of the information which the State was seeking to add to the record and, therefore, the State had not cleared the threshold inquiry for granting a motion to reconsider. Before voting on the motion, Frank Milligan advised that Ms. Lane was providing legal work for his employer, the Las Vegas Water District. He explained this legal service was wholly unrelated to the issues before the Board. He did not believe that this would constitute a conflict of interest and accordingly, he would be voting on the disposition of this matter.

The vote was taken. **The motion passed.** Board counsel will draft a written order.

**Vote: 4-0. (One member absent).**

**4. Administrative Meeting:**

**a. Approval of the previous Review Board minute os February 13 and 14, 2019.**

Acting Chairman Weber next called this matter to be heard, consideration of the minutes for the Review Board meeting of February 13 and 14, 2019. Acting Chairman Weber advised that he was not present at the February 13 and 14, 2019 board meeting and, therefore, was abstaining from voting on this matter. It was moved by Frank Milligan, seconded by Sandra Roche, to approve the minutes as written. **Motion adopted.**

**Vote: 3-0-1. (Weber abstaining for the reason stated).**

**b. General administration and/or procedural issues.**

**i. General Matters of Import to Board Members:**

There were no matters discussed.

**ii. Old and New Business.**

There was no old or new business discussed.

**c. Schedule of Hearings and Pending Cases, Calendar and Status Report.**

Board counsel reminded that at the March 13, 14, 2019 meeting of the Board, the Board will take up the State's request to postpone the July 10 and 11, 2019 meeting of the Board because the State's officials will be training and unavailable on those dates.

The next scheduled meeting is set for March 13 and 14, 2019, at 3360 West Sahara Avenue, Suite 175, Las Vegas, NV 89102.

**5. Public Comment.**

There was no public comment.

**6. Adjournment.**

Acting Chairman Weber called this matter next. It was moved by Rodd Weber, seconded by Frank Milligan, to adjourn the meeting. **Motion adopted.**

**Vote: 4-0.**

/s/Charles R. Zeh, Esq.  
Charles R. Zeh, Esq., Board Legal Counsel