

STATE OF NEVADA

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

May 8 and 9, 2019

Present (May 8, 2019)

**Steve Ingersoll (labor)
Sandra Roche (management)
Frank Milligan (public at large)**

On May 8, 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, Suite 175, Las Vegas, NV 89102. Participating in person were Chairman Steve Ingersoll and members Sandra Roche and Frank Milligan. Board Secretary, Rodd Weber and James Halsey were absent. 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.

Chairman Steve Ingersoll called the meeting of the State Occupational Health and Safety Review Board to order. Participating in person were Chairman Steve Ingersoll and members Sandra Roche and Frank Milligan. Board Secretary, Rodd Weber and James Halsey were absent. As three members of the Board were in attendance and one labor representative and one management representative were present, a quorum was present to conduct the Board's business.

Also personally in attendance was Board legal counsel, Charles R. Zeh, Esq., The Law Offices of Charles R. Zeh, Esq, and Salli Ortiz, Esq., Division of Industrial Relations (DIR), Jess Lankford, Chief Administrative Officer, NV OSHA, was present as were members of the public. Brady Linen was present through its legal counsel, Whitney J. Selert, Esq., Fisher & Phillips, LLP.

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.

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. LV 19-1961, Apex Linen Service Inc. (Deliberations)
- b. LV 18-1941-1943 and LV 19-1977, Brady Linen Services, LLC (Oral Argument)
- c. LV 19-1969, BARNEY FAMILY LTD
- d. LV 19-1971, 9W HALO WESTERN OPCO LP
- e. LV 19-1970, MAMMOTH UNDERGROUND, LLC
- f. LV 19-1973, CORDAN LLC
- g. LV 19-1955, James E. Wolf
- h. LV 19-1976, Hirschi Masonry, LLC

Board Chairman Ingersoll called this matter to be heard. He, then, asked Board legal counsel to set the hearing and explain the status.

Board counsel advised that all of the contested matters on the stacked docket had either settled, the Board was advised, or were matters that were vacated, to be rescheduled. This left for resolution this morning, the four Brady Linen cases, LV 18-1941, 18-1942, 18-1943 and 19-1977 for consideration. Each entailed a motion to compel discovery and for sanctions. Board counsel advised that for the Brady Linen cases LV 18-1941-1943, the issue was primarily the quality of the State's answers to the interrogatories. For Brady Linen, LV 18-1941, specifically, it was the State's response to interrogatories 3 and 4 of Brady's first and only set of interrogatories propounded to the State. For Brady Linen LV 19-1977, the issue was not the quality of the responses but a refusal of the State to answer the discovery whatsoever, on the grounds that absent permission from the Board of Review authorizing the propounding of interrogatories and requests for the production of documents and records, the State did not have to respond to such discovery being propounded.

Board counsel advised, therefore, that the hearing on these pending motions to compel discovery and sanctions should be bifurcated. The three Brady motions pertaining to the quality of the State's answers should be taken up first and together, *i.e.*, LV 18-1941-1943, and then, the case where there was no discovery provided, taken up separately in case LV 19-1977.

The hearing then proceeded as suggested with the motions pending in LV 18-1941, 18-1942 and 18-1943 heard first. Salli Ortiz, Esq., appeared on behalf of the State. Whitney Selert, Esq., of Fisher & Phillips, LLP, appeared on behalf of Brady Linen. Each side was given multiple opportunities to explain to the Board of Review their respective positions for these three cases. During the course of the hearing, it was learned that Brady Linen only presented evidence of specific objections in the State in LV 18-1941 to interrogatories 3 and 4. Brady Linen presented no evidence of the State's responses to the interrogatories in LV 18-1942 and LV 18-1944.

After the parties concluded their presentations and after being thoroughly questioned by the Board, the Board concluded that without the State's answers to the interrogatories in LV 18-1942 and LV 18-1943, it had no basis for granting Brady Linen's motions to compel in those two cases.

The Board also concluded that there was no duty imposed upon Donald C. Smith, Esq., Chief DIR legal counsel, to sign the State's answers to the interrogatories in LV 18-1941, as they were properly signed on behalf of the State by the person actually supplying the answers. Rule 33, NRCP, requires no more.

The Board concluded that there was no need for sanctions in the form of striking portions of the State's complaint, if the State were to properly answer the interrogatories.

The Board then determined that the State's answers to interrogatories 3 and 4 in LV 18-1941, were inadequate in that the State listed a grouping of documents and then, in effect, told Brady Linen to dig through the information provided for the answers to the interrogatories, since the State was far more accessible to the information contained in the grouping of documents than was Brady Linen, the State should be compelled to provide a detailed response to these two interrogatories.

It was accordingly moved by Sandra Roche, seconded by Frank Mulligan to grant in part and to deny in part, the motions to compel discovery in cases LV 18-1941, 1942 and 1943 as follows:

1. Deny the motion to require the State to make Donald C. Smith, Esq., sign the State's answers to the interrogatories.
2. Deny the motion to compel the State to answer the interrogatories in LV 18-1942 and LV 18-1943, as there was no evidence of the quality of the State's responses presented to the Board.
3. Deny the motion to award at this time, Brady's motion for sanctions in the form of attorney's fees.
4. Deny the motion at this time for sanctions such as striking all or portions of the State's complaint or citations.
5. Grant Brady Linen's motion to compel answers to interrogatories 3 and 4 in LV 18-1941, as the answers provided, the Board finds, are inadequate. Simply listing documents and records with an invitation to Brady Linen to ferret out the specific responses to the interrogatories is unresponsive and the State must articulate reasonable and thorough answers to these interrogatories.

The **motion was adopted** on a vote of 3-0 in favor of the motion, which is to be reduced to an Order from the Board of Review to the parties.

A recess was then taken.

Following the recess, the Board reconvened, briefly on LV 18-1941, whereupon it was moved by Sandra Roche, seconded by Frank Milligan to provide further that the State is ordered to answer interrogatories 3 and 4 within 30 days of May 8, 2019 and then, the Board will set this matter out for a hearing on the merits, 60 days or more from May 8, 2019. **Motion adopted.**

Vote: 3-0.

Next, the Board turned to the motion for sanctions and to compel discovery in LV 19-1977. As indicated, no responses, whatsoever, were provided by the State to the interrogatories and request to produce propounded in this case. The State took the position that the Board's Order of November 21, 2018 in Brady Linen LV 18-1941-1943, that discovery under the Nevada Rules of Civil Procedure by interrogatory and requests to produce could be pursued as a matter of right, was applicable only to those three cases and that the State was still correct in its position that discovery, as before, could only be had by leave of the Board.

The Board found incredulous the claim that the Board's Order of November 21, 2018 was limited only to the three Brady cases. There is nothing in the Order suggesting such an interpretation. It was intended to be precedential and the Board was not inclined to reverse its course and hold otherwise in this case.

It was accordingly moved by Sandra Roche, seconded by Frank Milligan, to grant the motion to compel to the extent that the State is ordered to respond to the Brady Linen discovery propounded in this matter within 30 days of May 8, 2019. It was moved, further, that if Brady Linen believes it is entitled to sanctions against the State including its attorney's fees and costs, it may file its motion for such sanctions in this case, within 15 days of May 8, 2019. The State may respond within 10 days of service upon it of said motion. That completes the motion cycle under NAC Chapter 618, absent leave of the Board. **Motion adopted.**

Vote: 3-0.

This concluded the official business of the Board for this date. There was no public comment.

It was moved by Sandra Roche, seconded by Frank Milligan, to adjourn. **Motion adopted.**

Vote: 3-0.

May 9, 2019

Present

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

1. Roll Call.

The continuation of the Board meeting from May 8, 2019, to May 9, 2019 was called to order by Board Chairman, Steve Ingersoll. Participating by telephone for the meeting was Board Secretary, Rodd Weber. Participating in person were Board Chairman, Steve Ingersoll, and members, Frank Milligan, Sandra Roche and James Halsey. Also present was Charles R. Zeh, Esq., the Law Offices of Charles R. Zeh, Esq., Board legal counsel. Salli Ortiz, Esq., DIR legal counsel also attended as were various members of the public. John Naylor, Esq., of Naylor & Braster, e-mailed Board legal counsel that he could not attend, but was not asking for a continuance of the deliberations on Apex Linen, LV-19-1961 until he could be present.

2. Public Comment.

There was no public comment.

3. Contested Case Hearings.

Chairman Ingersoll called this item to be heard. The sole remaining case for consideration, this date was Apex Linen, LV-19-1961. The Chairman explained that the case had been continued from March 14, 2019, as the Board, then, voted to affirm the State's complaint for Citation 1, Item 1, but was deadlocked on Citation 1, Item 2, on a vote of 2-2, as only four members were present to address the case, then.

The full Board, now, is available to resume the deliberations. Chairman Ingersoll made it clear, he had read the transcript of the hearing of March 14, 2019, and the transcript of the deliberations on the case. He also had been provided a copy of all the Exhibits in the case, the complaint and the answer. Thus, except for seeing live testimony, he was privy to the same information Board members had when they heard the case on March 14, 2019. He is eligible, *see*, NRS 233B.124, to deliberate and vote on Citation 1, Item 2, should the Board be ready, today, to decide upon the rest of the case. As the full complement of the Board consists of five members, it would also be unlikely the Board will remain deadlocked, one way or the other.

The Board accordingly took up the matter and deliberated on Citation 1, Item 2, which was a claim 29 CFR section 1910.28(b)(3)(i), had been violated as employees of Apex Linen had been required to work around 40 roof top skylights for a period of at least 3 months, without any form of fall protection, personal or otherwise. As the skylights were roof top, they were elevated far

more than four feet above the next level beneath the roof, the level at which fall protection as enumerated in the regulation must be provided.

The Board commenced deliberations on Citation 1, Item 2. The Board members were reminded and recalled that there were 40 skylights on the roof that employees worked around for around 3 months, without fall protection. Apex Linen pointed out that there was an advisory opinion letter accepted by the State that concluded, if a Skylight could withstand a force of at least 200 pounds, no fall protection was needed. Apex then had a study commissioned where the same brand/make or model skylight was tested and it was proved to withstand a force of 200 pounds. Thus, it was Apex position, there was no violation because the skylights at issue, would withstand the qualifying force quantum.

The State, however, countered that the skylights on the roof had been in place 16-20 years in the harsh roof top climate extremes in Las Vegas. There was no proof the skylights tested had been exposed to a climate the same or similar to that found in Las Vegas and there was no proof, the skylights tested were as old as those on the roof at Apex. Furthermore, there was a photo in evidence of an Apex skylight that had a disclaimer, warning that people should stay off the skylights.

The Board had to reconcile or balance these conflicting claims. It was pointed out that Apex defense was in the nature of an affirmative defense. Apex had the burden, then, of proving the relevance of the testing to the skylights on the roof at Apex in order to sustain the defense of no violation. Apex, however, offered no proof that the skylights being tested were in the same condition as those on the roof at Apex. The testing was, therefore, not relevant as there was no proof, the skylights tested were the same as the Apex skylights.

It was also contended that the State had the burden of proving its case, purportedly, that the State had to prove that the skylights at Apex were insecure, and subject to breaking if subject to a force of 200 pounds or more. The regulation, however, only requires proof of the existence of a skylight around which employees are working, that is more than 4 feet above the next level. If that is shown, there is a violation, unless the employer can show that the skylight can withstand at least 200 pounds of force. The guidance letter does not require, in other words, proof by the State that the skylight cannot withstand 200 pounds of force before a violation is shown. The escape hatch, *i.e.*, the 200 pound force limit, is the employer's burden to prove.

That proof was lacking in this case. Thus, once deliberations had exhausted themselves, it was moved by James Halsey, seconded by Rodd Weber, to uphold Citation 1, Item 2. Upon further review, member Frank Mulligan, decided to change his mind and vote to affirm. **Motion adopted.**

Vote: 4-1(Roche dissenting).

The characterization of the violation as serious, was accordingly affirmed as was the fine of \$7,000. Board counsel shall prepare a decision, consistent with the Board's action, today. Within 20 days of her receipt of the decision, Salli Ortiz, Esq., is to prepare Findings of Fact, Conclusions of Law and the Disposition of the case for submission to opposing counsel and then,

for review and disposition by the Board.

The hearing on the continued deliberations was concluded. The original vote to sustain Citation 1, Item 1, was left standing, therefore, as a serious offense carrying a fine of \$7,000.

4. Administrative Meeting:

a. Approval of the previous Review Board minute of April 10, 2019.

Chairman Ingersoll called for consideration the minutes of 4/10/19. It was moved by Frank Milligan, seconded by Sandra Roche, to approve the minutes as read. **Motion adopted.**

Vote: 4-0-1 (Ingersoll abstaining as he was absent from the meeting).

b. Review Contested case settlements, motions, draft decisions, or procedural issues pending on status report, for approval and issuance of final orders:

There were no cases.

c. 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.

d. Schedule of Hearings and Pending Cases, Calendar and Status Report.

There were no changes in the schedule of meetings. The next scheduled meeting is set for June 12, 2019 and June 13, 2019, at 4600 Kietzke Lane, Building F, Suite 153, Reno, Nevada 89509, July 10, 2019 and July 11, 2019, at 3360 West Sahara Avenue, Suite 175, Las Vegas, NV 89102; August 14, 2019 and August 15, 2019, at 3360 West Sahara Avenue, Suite 175, Las Vegas, NV 89102; September 11, 2019 and September 12, 2019, at 4600 Kietzke Lane, Building F, Suite 153, Reno, Nevada 89509.

5. Public Comment.

There was no public comment.

6. Adjournment.

Chairman Ingersoll called this matter next. It was moved by James Halsey, seconded by Sandra Roche, to adjourn the meeting. **Motion adopted.**

Vote: 5-0.

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

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