

**STATE OF CALIFORNIA
CALIFORNIA OCCUPATIONAL SAFETY AND HEALTH APPEALS
BOARD**

MINUTES OF THE PUBLIC MEETING & CLOSED SESSION

Held on December 19, 2019

Sacramento, California

West Covina, California

PRESENT:

Ed Lowry, Chair
Judith Freyman, Member
Marvin Kropke, Member
Patricia Hapgood, Acting Executive Officer
Jeff Mojcher, Chief Counsel
Kevin Reedy, Presiding Administrative Law Judge
Ursula Clemons, Presiding Administrative Law Judge
Autumn Gonzalez, Industrial Relations Counsel
Andia Farzaneh, Attorney
Lee Berlin, Staff Services Manager
Janis Jonas, Management Services Technician

MINUTES OF DECEMBER 5, 2019 MEETING:

(Approve or amend minutes of previous Board meeting.)

ACTION: Board approved minutes of the December 5, 2019 meeting.
Moved: Judith Freyman.
Seconded: Marvin Kropke.
The vote was 3-0.

NEW BUSINESS:

(The Appeals Board hears and discusses new reports presented by staff.)

ACTION: The Board discussed calendaring of hearings before Administrative Law Judges, including the procedure for setting and noticing the hearings.

OLD BUSINESS:

(The Appeals Board hears and/or discusses matters on a follow-up basis.)

ACTION: Stakeholder Roundtable scheduled for February 26, 2020.

LEGISLATION:

(Review and discuss current legislation which may affect the Appeals Board.)

ACTION: No report.

CHAIRPERSON'S REPORT:

(Hear report from the Chairperson on activities and issues affecting the Appeals Board.)

ACTION: No report.

BOARD MEMBERS REPORTS:

(Hear reports from Board Members on activities and issues affecting the Appeals Board.)

ACTION: Member Freyman reported on attending the Employer Advisory Group's holiday luncheon and discussed the year at the Standards Board.

EXECUTIVE OFFICER'S REPORT:

(Report regarding administrative matters.)

ACTION: Executive Officer Hapgood updated the Board on the progress of meeting the computer accessibility requirements. A new format for the summary table was presented.

STAFF REPORTS:

(Reports from the Presiding ALJ and the Chief Counsel regarding matters from the Hearing Operations and Legal Units.)

1. REGULATIONS:

ACTION: No report.

2. LITIGATION UPDATE:

ACTION: Chief Counsel Mojcher reported on current court cases.

Any matter not completed at this meeting may be continued to subsequent meetings. If the closed session agenda is not completed on the scheduled day, the closed session will continue from day to day until completion and adjournment.

PUBLIC COMMENT:

(Public comment will be entertained during discussion of each agenda item of the Open Meeting.)

ACTION: There were no public comments.

The Board recessed to its closed session.

DECISIONS OF ADMINISTRATIVE LAW JUDGES:

(Written decision issued by an Administrative Law Judge. The decision summarizes the evidence received from the Division of Occupational Safety & Health and the Employer, makes findings of fact for all issues involved in the appeal and gives reasons and grounds for the decision. The Board Members review the decision and decide if they will reconsider the ALJ decision on their own motion.)

- 1199064 SA RECYCLING
ACTION: Board discussed.
- 1251174 TARGET
ACTION: Board discussed.

PETITIONS FOR RECONSIDERATION:

(The Division of Occupational Safety & Health and the Employer each has the right to petition the Appeals Board to reconsider a decision or order of an Administrative Law Judge. The Appeals Board must decide to grant or deny each petition.)

- 1213886 JACE VARGHESE
ACTION: Board discussed.

PETITIONS FOR RECONSIDERATION (Second Review):

- 1308948 GOLDEN STATE BORING & PIPE JACKING, INC.
ACTION: Order granting reconsideration issued.
Moved: Marvin Kropke.
Seconded: Judith Freyman
Vote: 3-0.
- 1218807 PARK WEST RESCON, INC.
ACTION: Denial issued.
Moved: Judith Freyman.
Seconded: Marvin Kropke.
Vote: 3-0.
- 1402052 UNION PACIFIC RAILROAD
ACTION: Denial issued.
Moved: Judith Freyman.
Seconded: Marvin Kropke.
Vote: 3-0.
- 1242676 UNITED PARCEL SERVICE, INC.
ACTION: Order granting reconsideration issued.
Moved: Marvin Kropke.
Seconded: Judith Freyman
Vote: 3-0

ORDERS DISMISSING APPEAL:

1341830 FLAGSHIP FACILITIES
ACTION: Board discussed.

1376408 SAN DIEGO GRANITE, INC.
ACTION: Board discussed.

ORDER DENYING LEAVE TO FILE LATE APPEAL:

1404976 233 DIESEL CLUB, LLC
ACTION: Board discussed.

1355736 MICHAILOV, INC.
ACTION: Board discussed.

MATTERS PENDING RECONSIDERATION:

(If the Appeals Board orders reconsideration of an Order or Decision, it reviews the record and then affirms, rescinds, alters or amends the Order or Decision being reconsidered.)

The following list is intended to inform stakeholders and members of the public of what the Board believes is the issue of most interest to the general public presented in each of the following matters. The issues are listed so as to assist those interested in research or public information, and not litigation, and are not necessarily or exclusively the only issue or issues presented in each matter. The issues identified are not positions of the Board. Further, the Board may add and decide issues not included in the list or decide the matter on other grounds, under authority of Labor Code sections 6620 through 6623.

1308968 AEG MANAGEMENT OAKLAND, LLC
Whether employer received the citations, and thus, whether there was good cause for a late appeal.

1200176 AEROTEK, INC. dba AEROTEK
Whether the employer established and implemented its IIPP as required.

1272378 ANDREW HARRISON BARNES
Whether Mr. Barnes was/is an employer.

1141604 BOY RACER INC. DBA BURNING ANGEL
(EMPLOYER'S PETITION)
Whether adult film performers are employees or independent contractors.

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- 1141604 BOY RACER INC. DBA BURNING ANGEL
(DOSH'S PETITION)
Whether adult film performers are employees or independent contractors.
- 1246527 CEMEX
Whether the settlement in this matter was procured by fraud.
- 316446855 CYBERNET ENTERTAINMENT, LLC, 14-R6D1-0364-0367
Whether adult film performers are employees or independent contractors.
- 1206788 DPR CONSTRUCTION, INC. ET AL
Whether DOSH had jurisdiction. Whether the ALJ decision constituted an underground regulation.
- 1199473 FEDEX GROUND
Whether the employer's supervisor of the workplace was reasonable.
- 1310525 GOLDEN STATE FC, LLC
Whether Employer provided appropriate foot protection under § 3385.
- 1235643 GRANITE CONSTRUCTION CO., INC/GRANITE INDUSTRIAL
Whether the Division proved exposure to Valley Fever.
- 1251604 INTERLINE BRANDS, INC.
Whether Employer had provided adequate foot protection by means of administrative and engineering controls
- 1173183 L & S FRAMING, INC.
Whether the stairway involved was a "stairwell." Whether the motion to amend citation was timely and for good cause.
- 1290766 MILLENIUM REINFORCING
Whether the Employer proved that wearing foot protection would not have prevented the injury. Whether futility is a defense to a personal protective equipment requirement.
- 1236440 PAPICH CONSTRUCTION COMPANY, INC.
Whether the Division proved exposure to Valley Fever.

- 1237932 SACRAMENTO COUNTY WATER AGENCY
Whether the citation was correctly classified as serious.
Whether the ALJ correctly denied Employer's Newbery defense.
- 1123110 SINCLAIR CONCRETE, INC.
Whether the widow of decedent employee had adequate notice of Employer's appeal of the OSHA citation.
- 1088791 TUTOR PERINI CORPORATION
Whether Employer violated safety orders pertaining to keeping equipment and spoils a safe distance from an excavation.

LEGISLATION:

PENDING LITIGATION:

(If the Division of Occupational Safety & Health or the Employer disagrees with a decision after reconsideration or a denial of a petition for reconsideration, either one or both parties may apply to the California Superior Court for a writ of mandate. The Appeals Board receives legal advice from its Legal Unit and provides policy direction regarding pending litigation.)

SUPERIOR COURT:

1. MARIA DE LOS ANGELES COLUNGA DBA MERCED FARM LABOR, 15CV-00945 (08-R2D1-3093 through 3098)
2. OLDCASTLE PRECAST, INC., 34-2015-80002167 (13-R3D3-0583)
3. SHIMMICK CONSTRUCTION CO., INC./OBAYASHI CORP., 34-2015-80002206 (12-R3D1-0781)
4. CHARLES PANKOW BUILDERS, LTD., 34-2015-8000221 (13-R4D1-1759)
5. MCM CONSTRUCTION, INC., 34-2016-80002312 (13-R1D2-3851-3854)
6. SOLARCITY CORP., 14-R3D2-3707, 34-2016-80002345
7. OLDCASTLE PRECAST, INC. (34-2017-80002522) 1025083
8. KEY ENERGY SERVICE, LLC 12004280
9. SHIMMICK FCC IMPREGILO JOINT VENTURE DBA SFI, JV, 34-2017-80002562, (1144056)

10. ATKINSON CONSTRUCTION, LP (317386084)
11. BARNARD IMPREGILO HEALY, JV, (317134021), CPF 17-515575
12. R N R CONSTRUCTION, INC., (1092600) 34-2017-80002632
13. ASHLEY FURNITURE INDUSTRIES, 34-2017-800002750, (1016514)
14. BLUE DIAMOND GROWERS, (1040471)
15. UNITED PARCEL SERVICE, (1158285)
16. NORM WILSON & SONS INC., 19STCP00663 (1116151)
17. ROBINSON MFG., INC., 30-2019-01067631 (1169633)
18. WEST COAST ARBORISTS, 37-2019-00026620 (1180192)
19. NATIONAL RETAIL TRANSPORTATION, INC., 19STCP02623 (1200875)
20. PERFORMANCE TEAM FREIGHT SYSTEMS, 19STCP 02154 (1183505)
21. UNITED PARCEL SERVICE, INC. DBA UPS, 34-2019-80003174 (1116529)
22. SHIMMICK CONSTRUCTION COMPANY, INC., 34-2019-80003191
(1059365)
23. OWENS CORNING ROOFING & ASPHALT, LLC, 19STCP04117 (1063574)
24. ENVIRONMENTAL CONSTRUCTION GROUP, 19STCP02405 (119260)
25. ACCO ENGINEERED SYSTEMS, INC.,RG19042824 (1195414)
26. STADCO, INC., 192TCP04944(1142674)

APPELLATE COURT:

1. BLUE DIAMOND GROWERS, 34-2012-80001308 (10-R2D1-1280/1281)
2. NOLTE SHEET METAL, INC., 16CE CG03592 (14-R6D8-2888 through 2783)
3. VENTURA COASTAL, F077267 (317808970)
4. HOME DEPOT, U.S.A. INC. DBA HOME DEPOT #6683, CIVDS1716416,
(1014901)
5. HOME DEPOT, U.S.A., INC. E070417 and RIC1710947 (1011071)
6. UPS GROUND FREIGHT, INC. DBA UPS FREIGHT, BS171910 (1111325)

7. LION FARMS, LLC, MCV075788 (1070258)
8. WALSH/SHEA CORRIDOR CONSTRUCTORS, BS172720 (1093606)
9. PROCESS COOLING INTERNATIONAL 34-2019-80003220 (1232555)

ORDERS OF ADMINISTRATIVE LAW JUDGES:

(Written order issued by an Administrative Law Judge after a pre-hearing conference in which the Division of Occupational Safety & Health and the Employer agree to settle an appeal without a hearing. The Board Members review the order and decide if they will reconsider or remand the issued order.)

1323739	ADVANCED WORKFORCE SOLUTIONS, INC.
1330759	AI CALIFORNIA LLC (DBA ALDI, INC.)
1385322	AKHGAR ATLMADZAI, AN INDIVIDUAL
1250861	ALL STAR AIR SYSTEMS, INC.
316214295	AN-WIL INC
1381980	ANS DISTRIBUTION, INC., ANS DISTRIBUTION CORP.
1194637	ARBORWORKS, INC.
1386313	ASSOCIATED READY MIXED CONCRETE, INC.
1398673	BORRMANN METAL CENTER
1408597	BOTTLING GROUP LLC DBA PEPSI BEVERAGES CO.
1319483	BROADLEY JAMES CORPORATION
1367878	CAMINO REAL FOODS INC.
1401007	CHALLENGER HARVEST, INC.
1422938	CHICO FOODS, LLC
1396887	COASTLINE CONSTRUCTION & AWNING CO., INC.
1377651	COLOREDGE INC.
1146878	COMMERCIAL BUILDERS INC.
1416454	CYPRESS LAWN CEMETERY ASSOCIATION
1296814	D G GRANADE, INC.
1408583	DWAYNE ANTHONY WEDGE
1379722	EMPLOYNET, INC.
1294506	EXECUTIVE COATINGS & CONTRACTING, LLC
1377988	FLORAWEST, INC.
1272063	FREEDOM PAINTING INC
1396300	FULL SPECTRUM MACHINING, INC
1392607	G M J ARBORISTS, INC.
1422427	GARY'S SIGNS & SCREEN PRINTING
1392332	GRANDE VISTA STEEL AND METAL SUPPLY, INC.
1414405	GREEN DAY POWER
1366831	HAIER US APPLIANCE SOLUTIONS, INC.
1206239	HANNIBAL INDUSTRIES INC.
1406473	HASA INC.
1219925	HI-GRADE MATERIALS CO
1377961	IMMEDIATE RESOURCE GROUP, INC.

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1164819 JOHN MINOCK ENTERPRISES
1202200 JS ELECTRIC CO
1414395 KASHAF MUNIR, AN INDIVIDUAL
1292780 KEHE DISTRIBUTORS, LLC.
1184905 KERN RIDGE GROWERS, LLC
1391722 KLEEGER INDUSTRIES, INC.
1398830 LUSK QUALITY MACHINE PRODUCTS
1404708 M & A FASHION, INC.
1413957 MRS. GOOCH'S NATURAL FOOD MARKETS, INC.
1402304 NELLSON NUTRACEUTICAL, LLC.
1412172 NEW IDEAS APPAREL, INC.
1187389 NEWPORT-MESA UNIFIED SCHOOL DISTRICT DBA
1403073 NGOC HOANG GIA, LLC
1078948 OIL WELL SERVICE COMPANY
1343061 PHILLIPS 66 COMPANY
1217465 POLY PAK AMERICA, INC.
1397322 PRATS INC.
1292130 PROSPECT MEDICAL HOLDINGS INC
1316259 PVH RETAIL STORES LLC
1373186 REASONABLE TREE SERVICES, INC.
1377658 RECYCLING SOLUTIONS, INC.
1193820 RJP FRAMING, INC. DBA R J P FRAMING INC.
1385980 ROHR INC.
1436003 ROMAN CATHOLIC BISHOP OF ORANGE
1357932 SANTA ANA CREEK DEVELOPMENT COMPANY
1342626 SCHLUMBERGER TECHNOLOGY CORPORATION
1370305 SCHULTZ INDUSTRIAL SERVICES, INC.
1365498 SHORETT PRINTING, INC
1393130 SIMGEL CO., INC.
1421327 SKANSKA USA CIVIL WEST CALIFORNIA DISTRICT INC.
1409134 SRG MANAGEMENT, LLC
1427334 SUN RICH FOODS INTERNATIONAL, CORP.
1108660 SUNDANCE SPAS, INC.
1362409 TETRA TECH, INC.
1410589 THE LAGUNITAS BREWING COMPANY
1082040 THOMAS SCANLAN
1386438 TOTAL GROUP, INC.
1432977 TOYOCOM, INC.
1379876 UNITED FURNITURE INDUSTRIES CA, INC.
1274992 UTILITY TREE SERVICE, INC.
1339457 VISTRA ENERGY CORP.
1305344 VULCAN MATERIALS COMPANY
1403417 WALTON HANISH
1409525 WESTMONT INDUSTRIES
1385428 WULF VINEYARDS

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ACTION: All Administrative Law Judge Settlement Orders
approved.
Moved: Judith Freyman.
Seconded: Marvin Kropke.
Voted: 3-0.

PERSONNEL:

(Issues regarding staff)

ACTION: No report.

The Closed Session was adjourned at 12:14 p.m. and the Board returned to the Public Meeting. The Appeals Board incorporated by reference its ACTIONS in the Closed Session, as indicated above. The meeting was adjourned at 12:15 p.m.