

STATE OF CALIFORNIA
CALIFORNIA OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
MINUTES OF THE PUBLIC MEETING & CLOSED SESSION

Held on April 16, 2020
Teleconference

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
Aaron Jackson, Industrial Relations Counsel
Autumn Gonzalez, Industrial Relations Counsel
Andia Farzaneh, Attorney
Lee Berlin, Staff Services Manager
Janis Jonas, Management Services Technician
Elizabeth Clarke, Attorney

MINUTES OF APRIL 2, 2020 MEETING:

(Approve or amend minutes of previous Board meeting.)

ACTION: The Board voted to approve minutes of the April 2, 2020 Board 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 confirmed that the April 30, 2020 meeting will be held by teleconference.

OLD BUSINESS:

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

ACTION: Board updated review of the February 26, 2020 stakeholder's round table discussion. Transcript of the event has been distributed for review.

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: Chair Lowry reported on phone meetings with new DIR director Katie Hagen.

BOARD MEMBERS REPORTS:

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

ACTION: No report.

EXECUTIVE OFFICER'S REPORT:

(Report regarding administrative matters.)

ACTION: Acting Executive Director Patricia Hapgood reported on quarterly meeting with Agency scheduled for Tuesday, April 21, 2020.

The Department has ordered masks and gloves for staff members dealing with the public during the Covid-19 pandemic.

STAFF REPORTS:

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

- REGULATIONS:
ACTION: No report.

- 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: Elizabeth Clarke introduced herself and thanked the Board for the opportunity to attend the meeting.

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.)

1241779 DAVIS DEVELOPMENT COMPANY, INC.
ACTION: Board discussed.

1299712 KING FRESH PRODUCE LLC
ACTION: Board discussed.

1101230 M T M BUILDERS, INC.
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.)

1133550 HANSFORD INDUSTRIES, INC. DBA VIKING STEEL
ACTION: Board discussed.

1231720 RIVERSIDE CITY FIRE DEPARTMENT
ACTION: Board discussed.

1280908 SIBONEY CONTRACTING CO
ACTION: Board discussed.

1320327 SOUTHERN CALIFORNIA EDISON
ACTION: Board discussed.

1061365 SPHERE ALLIANCE INC DBA ADVANCED AIRCRAFT SEAL
ACTION: Board discussed.

PETITIONS FOR RECONSIDERATION (Second Review):

1205077 HANOVER R S CONSTRUCTION LLC
ACTION: Granted.
Moved: Judith Freyman.
Seconded: Marvin Kropke.
Vote: 3-0.

ORDERS DISMISSING APPEAL:

1359678 CONSOLIDATED STAFFING SOLUTIONS, INC.
ACTION: Board discussed.

ORDER DENYING LEAVE TO FILE LATE APPEAL:

1446191 UNMUEANG KONGNAPA
ACTION: Remanded.
Moved: Judith Freyman.
Seconded: Marvin Kropke.
Vote: 3-0.

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.

1200176 AEROTEK, INC. dba AEROTEK
Whether 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.

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

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- 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 the Division had jurisdiction. Whether the ALJ decision constituted an underground regulation.
- 1300039 EMERICARE, INC. dba BROOKDALE NORTHRIDGE
Whether the employer's alternate means of guarding satisfied the requirements of the applicable safety order.
- 1199473 FEDEX GROUND
Whether Employer's supervision of the workplace was reasonable.
- 1308948 GOLDEN STATE BORING & PIPE JACKING, INC.
Whether the cited Employer committed the alleged violations and whether the ALJ erred in evidentiary rulings.
- 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.
- 1213886 JACE VARGHESE
Whether Employer has satisfied requirements of petition for reconsideration.
- 1173183 L & S FRAMING, INC.
Whether the stairway involved was a "stairwell." Whether the motion to amend citation was timely and for good cause.
- 1304615 MASTER TREE SERVICE, INC.
Whether the appeal was late and if so, was there good cause for the late appeal? Whether the employer's motion to include additional citations be treated as a motion to amend the appeal?

- 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.
- 1199064 SA RECYCLING
Whether employer established that, the alleged violation was abated at the time of inspection.
- 1237932 SACRAMENTO COUNTY WATER AGENCY
Whether the citation was correctly classified as serious. Whether the ALJ correctly denied Employer's Newbery defense.
- 1402052 UNION PACIFIC RAILROAD
Whether there was good cause for the late appeal.
- 1242676 UNITED PARCEL SERVICE, INC.
Whether the cited Employer had an effective IIPP and trained its employees as required.
- 1226666 WASHINGTON ORNAMENTAL IRON WORKS, INC., dba WASHINGTON IRON WORKS
Whether the Administrative Law Judge was correct in holding Employer had violated the safety orders as alleged in Citation 1, Item 1, and Citation 2.

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. SHIMMICK CONSTRUCTION CO., INC./OBAYASHI CORP.,
34-2015-80002204 (12-R3D1-0781) (315525790)

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3. SHIMMICK CONSTRUCTION CO., INC./OBAYASHI CORP.,
34-2015-80002206 (11-2562 thru 2570) (313169724)
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. KEY ENERGY SERVICE, LLC 12004280
8. SHIMMICK FCC IMPREGILO JOINT VENTURE DBA SFI, JV,
34-2017-80002562, (1144056)
9. BARNARD IMPREGILO HEALY, JV, (317134021), CPF 17-515575
10. R N R CONSTRUCTION, INC., (1092600) 34-2017-80002632
11. ASHLEY FURNITURE INDUSTRIES, 34-2017-800002750, (1016514)
12. BLUE DIAMOND GROWERS, (1040471)
13. UNITED PARCEL SERVICE, (1158285)
14. ROBINSON MFG., INC., 30-2019-01067631 (1169633)
15. WEST COAST ARBORISTS, 37-2019-00026620 (1180192)
16. NATIONAL RETAIL TRANSPORTATION, INC., 19STCP02623 (1200875)
17. UNITED PARCEL SERVICE, INC. DBA UPS, 34-2019-80003174 (1116529)
18. SHIMMICK CONSTRUCTION COMPANY, INC., 34-2019-80003191
(1059365)
19. PROCESS COOLING INTERNATIONAL, 34-2019-80003220 (1232555)
20. ENVIRONMENTAL CONSTRUCTION GROUP, 19STCP02405 (119260)
21. ACCO ENGINEERED SYSTEMS, INC., RG19042824 (1195414)
22. STADCO, INC., 192TCP04944 (1142674)
23. PRESTIGE PAINTING, 37-2019-00066143 (1367265)

APPELLATE COURT:

1. BLUE DIAMOND GROWERS, 34-2012-80001308 (10-R2D1-1280/1281)
2. VENTURA COASTAL, F077267 (317808970)
3. LION FARMS, LLC, MCV075788 (1070258)
4. WALSH/SHEA CORRIDOR CONSTRUCTORS, BS172720 (1093606)
5. ATKINSON CONSTRUCTION, LP, 34-2017-80002611, C091705
(317386084)

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.)

1404033	22ND DISTRICT AGRICULTURAL ASSOCIATION
1402019	3 BRAND CATTLE COMPANY
1393458	ADECCO USA, INC.
1356476	AIR CONTROL SYSTEMS, INC.
1347210	AK CORAL CAY TRUST LLC
1424777	ALDERWOODS GROUP (CALIFORNIA), INC.
1356988	ALPHA STRUCTURAL INC
1385747	AMB RANCH MANAGEMENT, INC.
1317818	AMERICOLD LOGISTICS LLC
1433290	ANDERSON SEAFOODS, INC.
1441094	ANTHONY HUYNH, AN INDIVIDUAL
1391600	ARTCAD BUILDERS INC.
1412242	AURORA - SAN DIEGO, LLC
1395919	BAR BAKERS LLC
1399425	BLUE STAR STEEL, INC.
1433378	BOGETTI CONSTRUCTION, INC.
1413647	BRADS CONCRETE CUTTING, INC.
1339105	BSA FRAMING, INC.
1399202	CALIFORNIA PAPER PRODUCTS, LLC
1353448	CERTIFIED BUSINESS SERVICE/UNLIMITED, INC.
1429615	CHAMBERS LOGGING COMPANY, INC.
1423883	CREATIVE GREEN LANDSCAPING, INC.
1312288	CUSTOM AGRICULTURE FORMULATORS, INC.
1372879	DAEHO FASHION INC.
1426672	DEMLER FARMS LLC
1286218	DIG A PONY, LLC
1330734	EAST BAY STRUCTURAL & TERMITE COMPANY

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1425973 EMAZING LIGHTS, LLC
1265243 FD THOMAS, INC.
1303453 FIRST TEAM OIL TRANSPORT, INC.
1330122 GLOBEX ENERGY CORPORATION
1295270 GOLETA WEST SANITARY DISTRICT
1333201 GRC HOMECARE PROVIDER
1416584 GREENSCAPES PROPERTY SERVICES, INC.
1446819 HEALTHCARE SERVICES GROUP, INC.
1357592 HERRICK CORPORATION
1368233 HERRICK CORPORATION
1419766 HETCH HETCHY WATER & POWER
1373925 HUFF CONSTRUCTION COMPANY, INC.
1423468 ILAD, INC.
1416244 IMPERIAL CFS, INC.
1430926 IZZY INSTALLATION, LLC
1428135 JAMPRO ANTENNAS, INC.
1413695 JB CHEMICAL COMPANY, INC.
1294503 JONATHAN ALFONSO
1443962 KHANH HOAI CAO, AN INDIVIDUAL
1394238 MAR VISTA BERRY II, LLC
1400239 METAL IMPROVEMENT LLC
1445069 MIKE FRIDLEY, AN INDIVIDUAL
1292591 OAA INVESTMENTS, INC.
1340030 OLD CASTLE BUILDING ENVELOPE, INC.
1439007 PABLO GONZALEZ & CLAUDIA CALDERON, INDIVIDUALS
1408492 PACIFIC CYCLE INC.
1408096 PARS DESIGN & CONSTRUCTION
1401929 PEACEFUL PAWS LLC
1387538 PEDRO ARCOS
1424504 ROCCOH GENERAL CONSTRUCTION
1433088 RYAN A. FISCHER, AN INDIVIDUAL
1439340 SANCHEZ LANDSCAPING, INC.
1369222 SCHWED CONSTRUCTION, INC.
1438737 SHENG LI ENTERPRISE, INC.
1426634 SIERRA COUNTY PUBLIC WORKS & TRANSPORTATION
1436809 SKYCO SHADING SYSTEMS, INC.
1421601 SOCAL ROOFING SOLUTIONS
1394876 SONIC INDUSTRIES, INC.
1394003 SPS TECHNOLOGIES LLC
1304278 SSA TERMINALS (LONG BEACH), LLC.
1453657 SUPER STORE INDUSTRIES
1406517 TAWA SUPERMARKET, INC.
1439882 TERIYAKI KING, INC.
1329736 TESLA, INC.
1399454 TREESMITH ENTERPRISES, INC.
1161013 TUTOR PERINI CORPORATION

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1284771 UNITED AIRLINES, INC.
1358842 USA CORP.
1445273 VARNI BROTHERS CORPORATION
1456591 VBS ENTERPRISES, INC.
1383553 WELLS FARGO BANK, NA
1396539 WESTSIDE AG. II, INC.
1445162 WOMACK CONSTRUCTION

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

PERSONNEL:

(Issues regarding staff)

ACTION: No report.

The Closed Session was adjourned at 11:33 a.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 11:34 a.m.