

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

MINUTES OF THE PUBLIC MEETING & CLOSED SESSION

Held on September 17, 2020

Sacramento, California

West Covina, California

PRESENT:

Ed Lowry, Chair, Public Member
Judith Freyman, Management Member
Marvin Kropke, Labor 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
Kerry Lewis, Administrative Law Judge
Sam Lucas, Administrative Law Judge
Mario Grimm, Administrative Law Judge

MINUTES OF September 3, 2020 MEETING:

(Approve or amend minutes of previous Board meeting.)

ACTION: Board approved minutes of the September 3, 2020 Board meeting.
Moved: Marvin Kropke
Seconded: Judith Freyman
The vote was 3-0

NEW BUSINESS:

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

ACTION: Member Freyman initiated a discussion regarding appeals filed related to the COVID-19 pandemic. It was requested that a memo, referencing these cases be prepared for the October 1, 2020 Board meeting. The topic will be added to staff reports on the next agenda.

OLD BUSINESS:

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

- Board to discuss progress on implementing Video Hearings.
ACTION: Judge Kerry Lewis presented an update regarding the use of video hearings and the status of training for judges and stakeholders. All notices and postings referencing the current pandemic must go through the media office.

LEGISLATION:

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

ACTION: The Board had a brief discussion regarding Proposition 22 related to AB5.

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 workshop presented by Ogletree, Deakins on September 16, 2020.

EXECUTIVE OFFICER'S REPORT:

(Report regarding administrative matters.)

ACTION: Covid-19 training is to be completed by September 30, 2020. Security training is also due by the end of September.

Open enrollment for health benefits starts Monday September 21, 2020.

STAFF REPORTS:

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

- REGULATIONS:
ACTION: No report.

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- Discuss the creation of, and availability of, OSHAB documents created in other languages.

ACTION: Chair Lowry requested additional information regarding languages our team encounters on the phone or in hearings, what steps DOSH might be taking to add documents in other languages, and report the costs of our current translation contracts.

- 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.)

NONE

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.)

1332715 APTCO, LLC

ACTION: Petition granted.
Moved: Marvin Kropke
Seconded: Judith Freyman
Vote: 3-0

1290383 JAFEC USA, INC.

ACTION: Petition granted.
Moved: Marvin Kropke
Seconded: Judith Freyman
Vote: 3-0

PETITIONS FOR RECONSIDERATION (Second Review):

NONE

ORDERS DISMISSING APPEAL:

NONE

ORDER DENYING LEAVE TO FILE LATE APPEAL:

NONE

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.

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| 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. |
| 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. |

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- 1206788 DPR CONSTRUCTION, INC. ET AL
Whether the Division had jurisdiction. Whether the ALJ decision constituted an underground regulation.
- 1199473 FEDEX GROUND
Whether Employer's supervision 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.
- 1205077 HANOVER R S CONSTRUCTION LLC
Whether the ALJ committed reversible error in evidentiary rulings regarding the alleged injury and illness prevention plan violation and the forklift operations violations.
- 1135350 HILL CRANE SERVICE INC.
Whether Employer violated the safety orders as alleged.
- 1251604 INTERLINE BRANDS, INC.
Whether Employer had provided adequate foot protection by means of administrative and engineering controls.
ACTION: DAR approved to issue.
Moved: Judith Freyman
Seconded: Marvin Kropke
Vote: 3-0
- 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.
- 1422951 LINEAGE LOGISTICS
Whether Employer's motion to amend its appeal should be granted.

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- 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.
- 1320327 SOUTHERN CALIFORNIA EDISON
Whether the ALJ commit reversible errors of law and/or fact in ruling on each of the alleged violations.
- 1061365 SPHERE ALLIANCE, INC. dba ADVANCED AIRCRAFT SEAL
Whether the Division had jurisdiction to cite the employer.
- 1303461 SSA TERMINALS (OAKLAND), LLC DBA SSA MARINE TERMINALS
Whether Employer violated section 3212(a)(2)(A) as alleged.
- 1251879 TARGET STORES, INC.
Whether the employee suffered a serious injury as defined by statute and regulation.
- 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.
- 1384029 USA WASTE OF CALIFORNIA, INC.
Whether the Division proved the alleged violation.
- 1226666 WASHINGTON ORNAMENTAL IRON WORKS, INC., dba WASHINGTON IRON WORKS
Whether the ALJ was correct in holding the employer violated the injury and illness prevention plan

requirements, the injury log (recordkeeping) requirement, and the machinery operational limitations, as alleged in the citations.

ACTION: The Board discussed this matter.

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.)

SUPPERIOR COURT:

1. MARIA DE LOS ANGELES COLUNGA DBA MERCED FARM LABOR, 15CV-00945 (08-R2D1-3093 through 3098)
2. CHARLES PANKOW BUILDERS, LTD., 34-2015-8000221 (13-R4D1-1759)
3. MCM CONSTRUCTION, INC., 34-2016-80002312 (13-R1D2-3851-3854)
4. SOLARCITY CORP., 34-2016-80002345 (14-R3D2-3707)
5. KEY ENERGY SERVICE, LLC (12004280)
6. BARNARD IMPREGILO HEALY, JV, (317134021), CPF 17-515575
7. R N R CONSTRUCTION, INC., (1092600) 34-2017-80002632)
8. ASHLEY FURNITURE INDUSTRIES, 34-2017-800002750, (1016514)
9. BLUE DIAMOND GROWERS, (1040471)
10. ROBINSON MFG., INC., 30-2019-01067631 (1169633)
11. WEST COAST ARBORISTS, 37-2019-00026620 (1180192)
12. UNITED PARCEL SERVICE, INC. DBA UPS, 34-2019-80003174 (1116529)
13. SHIMMICK CONSTRUCTION COMPANY, INC., 34-2019-80003191 (1059365)
14. PROCESS COOLING INTERNATIONAL, 34-2019-80003220 (1232555)
15. ACCO ENGINEERED SYSTEMS, INC., RG19042824 (1195414)
16. PRESTIGE PAINTING, 37-2019-00066143 (1367265)

17. DAVIS DEVELOPMENT COMPANY, 34-2020-80003373 (1226084)
18. VINCENT TUOMEY, RG20061099 (1152851)
19. GOLDEN STATE BORING & PIPE JACKING, INC. (1308948)

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. ATKINSON CONSTRUCTION, LP, 34-2017-80002611, C091705
(317386084)

OTHER ITEMS:

- Discuss categorizing the Board's DARs and Denials on the DIR website.

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.)

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| 1439960 | AERIOCONNECT, INC. |
| 1427522 | AIRGAS SPECIALTY PRODUCTS |
| 1466806 | AMERICAN JERKY COMPANY LLC |
| 1444885 | ARTAK DALDUMYAN |
| 1412185 | ASPIRANET |
| 1446835 | ASTONISH, INC./ASTONISH MARBLE & GRANITE |
| 1447087 | AT CONSTRUCTION SERVICES INC. |
| 1444290 | BEE IMAGINE LLC |
| 1422766 | BRIAN A. NORWOOD |
| 1432706 | BROWN CONSTRUCTION, INC. |
| 1400338 | CALIFORNIA MANTEL & FIREPLACE, INC. |
| 1451912 | CARGILL MEAT SOLUTIONS |
| 1444597 | CENTRAL VALLEY EGGS, LLC |

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1461339 COLIN MORRIS, AN INDIVIDUAL
1383269 DASALLA TRADING COMPANY INCORPORATED
1476050 DELORI-NUTIFOOD PRODUCTS, INC.
1352213 DONALD T. HEADRICK
1449595 DOWNEY WHOLESale, INC.
1240872 EATON CORPORATION
1431360 FELIX LIGHTING, INC.
1440951 FOREVER 21 RETAIL, INC.
1343335 FRESNO COUNTY CORRECTIONS DEPT.
1330743 G4S SECURE SOLUTIONS (USA) INC.
1377640 HANNIBAL INDUSTRIES
1246501 HY-MAX BUILDING, CORP.
1397315 JOHNRE CARE LLC
1425239 JOSE GUADALUPE CARRANZA
1359203 JPA CONSTRUCTION CLEAN-UP SERVICE
1391083 LA TRADICIONAL MICHOACANA
1340624 LENNAR HOMES OF CALIFORNIA, INC.
1420911 LENNAR HOMES OF CALIFORNIA, INC.
1449607 M & M SHEET METAL & RAIN GUTTER CORP.
1411695 M&M LABOR, INC.
1472468 MBL & SONS, INC.
1435527 MGBD, INC.
1447877 NEILMED PHARMACEUTICALS
1336773 NEUTRON HOLDINGS, INC.
1425548 NOODLE KING HOUSE
1412358 PACIFIC PARKS LANDSCAPING, INC.
1444091 PICO RIVERA HEALTHCARE, INC.
1238171 PRO LANDSCAPING, INC.
1470088 R PLANET EARTH
1469083 RALPHS-PUGH CO., INC.
1461315 REFCO FARMS, LLC

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1380234 RESTORATION HARDWARE, INC.
1368465 ROOFING WHOLESALE CO., INC.
1470069 ROSEVILLE ROCKLIN ELECTRIC INC.
1472740 S & R EGG RANCH COMPANY
1442605 SAN DIEGO ZOO GLOBAL
1454971 SERTA SIMMONS BEDDING, LLC
1445878 SHADYBROOK ESTATE WINERY
1424743 SHIMMICK / FCC / IMPREGILO, JOINT VENTURE
1466149 STONEHENGE MARBLE, INC.
1442540 SUNSHINE METAL CLAD INC.
1434581 SUPERIOR WALL SYSTEMS, INC.
1465023 TDI REFRIGERATION AND AIR CONDITIONING, INC.
1456533 THOMAS BUI, AN INDIVIDUAL
1394119 TRUST RESTAURANT GROUP, INC.
1427722 TURFRESH, INC.
1278505 WEST ISLAND COTTON GROWERS, INC.

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

PERSONNEL:

(Issues regarding staff)

ACTION: No report.

The Closed Session was adjourned at 12:00 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 12:01 p.m.