

State Of California
California Occupational Safety and Health Appeals Board
Minutes of the Public Meeting & Closed Session
Held on November 18, 2021
on Zoom platform

Present:

Ed Lowry, Chair, Public Member
Judith Freyman, Management Member
Marvin Kropke, Labor Member
Jeff Mojcher, Chief Counsel
Kevin Reedy, Presiding Administrative Law Judge
Sam Lucas, Presiding Administrative Law Judge
Aaron Jackson, Industrial Relations Counsel
Elizabeth Clarke, Attorney
Janis Jonas, Executive Secretary
Christopher Jessup, Administrative Law Judge
Kerry Lewis, Administrative Law Judge
Chris Grossgart, Assistant Chief Counsel, DOSH
Bruce Wick, Risk Management Director, HCC
Keith Mackenzie, Attorney, DOSH
Clara Hill-Williams, Attorney, DOSH
Lisa Brokaw, Attorney, DOSH
Mark Licker, Staff Counsel, DOSH
Dan Lucido, Chief Counsel, DOSH

Minutes of November 4, 2021 Meeting:

(Approve or amend minutes of previous board meeting.)

Action: The Board approved the minutes of the November 4, 2021 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: No report.

Old Business:

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

1. Consideration of regulatory amendments to the Board's rules of practice and procedure to govern, address and permit Board hearings via telephone or videoconference, including consideration of proposed amendments to Board regulation 376.

Action: Aaron Jackson updated the Board on progress of writing the notice and the regulatory amendments to the Board regulation 376.

Legislation:

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

Action: Elizabeth Clarke reported on current legislation.

Chairperson's Report:

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

Action: Comment on Cal/OSHA reporter article.

Board Members Reports:

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

Action: Judith commented on petition filed at the standards Board regarding Regulation 3203.

Executive Officer's Report:

(Report regarding administrative matters.)

Action: No report.

Staff Reports:

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

1. Discuss whether there are any proposals for new regulations or proposals for modifications to existing regulations. In addition, discuss whether any concerns exist with existing regulations.

Action: No report.

2. Discuss status of Video Hearings.

Action: Current video hearings were discussed and video shared on uploading exhibits to cases through OASIS.

3. Discuss recent appeals filed related to the current COVID-19 pandemic.

Action: Judge Sam Lucas discussed the current filing of appeals relating to the COVID pandemic.

4. Litigation update:

Action: Chief Counsel Jeff 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: The Board received 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.)

1486492 NBC Manteca Merchants, Inc.
Action: The Board reviewed this decision.

Petitions for Reconsideration:

(The Division of Occupational Safety & Health and the Employer each have 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.)

1423464 Lineage Logistics LLC
Action: The Board discussed this matter.

1342017 O.C. Jones & Sons, Inc.
Action: The Board voted to deny this petition.
Moved: Marvin Kropke
Second: Judith Freyman
Vote: 3-0

Petitions for Reconsideration (Second Review):

None

Orders Dismissing Appeal:

1477221 CA Forestry and Fire Protection
Action: The Board reviewed this Order.

1464367 RCM Building Systems
Action: The Board reviewed this Order.

1502855 Walsh/Shea Corridor Constructors
Action: The Board reviewed this Order.

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
<i>Whether Mr. Barnes was/is an employer.</i> |
| 1279492 | Arriaga USA, LLC
<i>Whether the cited employer's rights were adequately protected at the video hearing.</i> |
| 1141604 | Boy Racer Inc. DBA Burning Angel
(Employer's Petition)
<i>Whether adult film performers are employees or independent contractors.</i> |
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(Dosh's Petition)
<i>Whether adult film performers are employees or independent contractors.</i> |
| 1246527 | Cemex
<i>Whether the settlement in this matter was procured by fraud.</i> |
| 1290766 | Millenium Reinforcing
<i>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.</i> |
| 1334740 | Olam West Coast, Inc. dba Olam Spices and Vegetable Ingredients
<i>Whether the Employer committed the alleged violations.</i> |
| 1327187 | Ontario Refrigeration Service, Inc. |

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- 1155042 Signal Energy LLC
Whether Employer appropriately oversaw the actions of the subcontractors.
- 1303461 SSA Terminals (Oakland), LLC DBA SSA Marine Terminals
Whether Employer violated section 3212(a)(2)(A) as alleged.
- 1509967 United Pumping Service, Inc.
Action: The Board discussed this matter.
- 1384029 USA Waste of California, Inc. dba Blue Barrel Disposal Services
Whether the Employer committed the alleged violations.
Action: The Board discussed this matter.
- 1152851 Vincent Tuomey
Whether the Board ordered to issue a new decision was consistent with the superior court's ruling on a writ of mandate.
- 1461476 Walmart, Inc.
Whether Walmart was an employer citable for the alleged violation.

Matters 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. Key Energy Service, LLC (12004280)
2. Barnard Impregilo Healy, JV, CPF 17-515575, (317134021)
3. R N R Construction, Inc., 34-2017-80002632 (1092600)
4. Ashley Furniture Industries, 34-2017-800002750 (1016514)
5. United Parcel Service, Inc. DBA UPS, 34-2019-80003174 (1116529)
6. Shimmick Construction Company, Inc., 34-2019-80003191 (1059365)
7. Process Cooling International, 34-2019-80003220 (1232555)
8. Prestige Painting, 37-2019-00066143 (1367265)
9. Davis Development Company, 34-2020-80003373 (1226084)

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10. MWL Solutions, 34-2020-80003549 (1436014)
11. Hampton Tedder Electric, 34-2020-80003562 (1233597)
12. BMW West, LLC, 34-2021-80003574 (1399613)
13. Southern California Edison, 34-2021-80003580 (1320327)
14. L&S Framing, Inc., SCV-0046603 (1173183)
15. Granite Construction, 34-2021-80003634 (1235643)
16. Pacific Utility Installation, Inc., 30-2021-01201020 (1321161)
17. Golden State FC, LLC dba Amazon Fulfillment, STK-CV-UWM-2021-0004380 (1310525)
18. USA Waste of California, Inc. dba Blue Barrel Disposal Services, 21STCP01729 (1384029)
19. Grimmway Enterprises, Inc., BCV-21-101503 (1477159)
20. Grimmway Enterprises, Inc., BCV-21-101554 (1238985)
21. RND Contractors, Inc., CIV SB 2119442 (1436785)
22. Sunview Vineyards of California, Inc. RG21111733 (1153101)
23. Hill Crane Service Inc., 34-2021-80003744 (1135350)

Appellate Court:

1. Atkinson Construction, LP, 34-2017-80002611, C091705 (317386084)
2. United Parcel Service, B308218, 18STCP03195 (1158285)

Other Items:

1. New and/or interlocutory petitions for reconsideration not filed in time to be agendized.
Action: No report.
2. Categorizing the Board's DARs and Denials on the DIR website.
Action: No report.
3. Staff attorneys to provide legal analysis, advice and counsel regarding COVID-19 cases.
Action: Cases with citations related to COVID-19 were discussed.

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.)

1491344	A.J. Khair Construction, Inc.
1431343	Ace Hardware Corporation
1492283	Aerotek Inc.
1526610	Alumistar, Inc.
1474903	American Ironworks Manufacturing, Inc.
1500337	Amrep Mfg Co.
1490246	Armanino Foods of Distinction, Inc.
1486042	Armstrong Associates, Inc.
1403944	Bapko Metal, Inc.
1404973	Berkeley Cement, Inc.
1528101	Better Earth Electric, Inc.
1519857	Biogreen Unlimited, Inc.
1484816	BKP Construction, L.P.
1422981	Border Valley Trading
1486324	California Department of Food and Agriculture
1505157	Cisneros Ag
1481313	City Of Santa Maria, Department Of Public Works
1494587	Concrete Alliance, Inc.
1526254	Da Silva Dairy Farms, LP
1373859	Danfield, Inc. Leather
1479544	De Cano Concrete, Inc.
1472615	De Larshe Cabinetry, LLC
1390486	Digital Printing Systems, Inc.
1476070	Extended Care Hospital of Riverside
1483997	Furniture Of America California, Inc.
1501691	Gateway Center Of Monterey County, Inc.
1503955	Grand Central Recycling

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1492130	Grapes FLC
1495019	Great Northern Corp - Lamination West Division
1421238	Haxton Masonry, Inc.
1395501	Horizon Personnel Services, Inc.
1483470	HR Staffing Solutions Inc.
1513971	Intertrade Industries, LTD
1356717	JP Excavating And Paving
1449426	Karen Holmes
1493776	LA County Health Services LAC+USC Medical Center
1329215	LLP Concrete, Inc.
1407708	Los Angeles Unified School District, Maintenance
1543615	Mammoth Mountain Ski Area, LLC
1452730	Mia V. Fashion, Inc.
1487566	Newage Products Logistics California, Inc.
1484591	Next Level Construction Services Inc.
1332712	Pacific Bell Telephone Company
1476722	Palazzo Post Acute
1492560	Princess Paper, Inc.
1457762	Proset Construction, Inc.
1468725	Quikturn Professional Screenprinting, Inc.
1431701	Recology, Inc.
1476875	S. C. Anderson, Inc.
1505625	Saddleback Memorial Medical Center
1415239	Schreder & Brandt Mfg., Inc.
1305359	SGL Technic, Inc.
1481310	Shapiro Properties Services, Inc.
1510257	Shim's Food, Inc.
1476723	Smithfield Foods Inc.
1482197	South County Security Services, Inc.
1399891	Standard Drywall, Inc.
1382792	State of California Department of Corrections

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1503900 Sunview Vineyards of California, Inc.

1492579 Tom & Perry Charter

1186111 Tyler Development Corporation

1491011 Waste Management Co.

Action: The Board reviewed and discussed the Settlement
Orders issued by the Administrative Law Judges.

Personnel:

(Issues regarding staff)

Action: No report.

The Closed Session adjourned at 11:55 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 adjourned at 11:56 a.m.