

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

Held on May 28, 2020

Teleconference

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
Christopher Jessup, Administrative Law Judge
Kerry Lewis, Administrative Law Judge
Sam Lucas, Administrative Law Judge
Rheeah Avelar, Administrative Law Judge
David Donnell, Donnell, Melgoza and Scates
Perry Poff, Donnell, Melgoza and Scates
Manuel Melgoza, Donnell, Melgoza and Scates
Kevin Bland, Ogletree, Deakins, Nash, Smoak & Stewart
Heather Gribben, Ogletree, Deakins, Nash, Smoak & Stewart
Jennifer Yanni, Ogletree, Deakins, Nash, Smoak & Stewart
Deborah Weidle, Ogletree, Deakins, Nash, Smoak & Stewart
Cynthia Rice, California Rural Legal Assistance (CRLA)
Estella Cisneros, California Rural Legal Assistance (CRLA)
Willam Nguyen, DOSH
Chris Grossgart, DOSH
Lisa Brokaw, DOSH
Rocio Garcia-Reyes, DOSH
Tuyet Van Tran, DOSH
Lisa Prince, The Prince Law Firm

MINUTES OF May 14, 2020 MEETING:

(Approve or amend minutes of previous Board meeting.)

ACTION: Board approved minutes of the May 14, 2020 Board meeting.
Moved: Judith Freyman.
Seconded: Ed Lowry
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.)

- Discussion regarding modifying hearing procedures to address Coronavirus.

ACTION: There was an extensive discussion regarding holding virtual hearings in response to Governor Newsom's Executive Order during the Coronavirus Pandemic lock-down. Several members of the public expressed concerns regarding maintaining the process and integrity of the Appeals Board's hearings.

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: No report.

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.)

- REGULATIONS:
ACTION: Received approval on regulation package from the department of finance.

- **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: Numerous members of the public took part in the discussion of modifying the process of holding Appeals Board hearings.

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.)

- 1275087 QUALITY AG, INC.
ACTION: Board took under reconsideration under Board's own motion.
Moved: Marvin Kropke
Seconded: Judith Freyman
Vote: 3-0.

- 1352198 TRAPAC, LLC
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.)

- 1446216 WHJSK INVESTMENT, INC.
ACTION: Remanded to Hearing Operations.
Moved: Marvin Kropke
Seconded: Judith Freyman
Vote: 3-0

PETITIONS FOR RECONSIDERATION (Second Review):

1101230 MTM BUILDERS, INC.
ACTION: Board discussed.

ORDERS DISMISSING APPEAL:

NONE

ORDER DENYING LEAVE TO FILE LATE APPEAL:

1433986 MC MODE, INC.
ACTION: Remanded to Hearing Operations.
Moved: Judith Freyman
Seconded: Marvin Kropke
Vote: 3-0

1418458 STEVEN LEATHERBARROW MASONRY
ACTION: Remanded to Hearing Operations.
Moved: Marvin Kropke.
Seconded: Judith Freyman.
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.

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 employer was in violation of injury and illness prevention plan requirements and lockout/tagout requirements as alleged.
ACTION: Board discussed.
- 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.
- 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.

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- 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.
ACTION: Board discussed.
- 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.
- 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.

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)
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., 34-2016-80002345 (14-R3D2-3707)
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)
24. DAVIS DEVELOPMENT COMPANY, 34-2020-80003373 (1226084)

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)
6. BRAGG CRANE, A158500, HG18930741 (1157108)

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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|---------|-----------------------------|
| 1411969 | ALAMEDA HEALTH SYSTEM |
| 1399125 | AMERICAN RETROFITTERS CORP. |
| 1424909 | ANDRES FLORES SANDATE |
| 1419908 | ANDRES PEREZ, AN INDIVIDUAL |
| 1433086 | ANDY'S ROOFING CO., INC. |
| 1248203 | AUTONOMY PRODUCTIONS, LLC. |
| 1415889 | AVIA INDUSTRIES, INC. |

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1418708	BIODURO LLC
1438570	BRIGHTON CONVALESCENT, LLC
1366453	BUNZL UTAH, LLC
1407114	C & S HARVEST, LLC
1417183	CASTLE IMPORTING, INC.
1420492	CFR RINKENS LLC
1441300	CONTINENTAL HEAT TREATING, INC.
1301100	CREATIVE STONE MFG. INC
1437265	CUT A TREE, INC.
1386344	CVE CONTRACTING GROUP, INC.
1459378	DARK SOLUTIONS, LLC
1405415	DB CLOVIS 5, INC.
1394459	DEL AMO CONSTRUCTION, INC.
1435035	DREAMSCAPE LIGHTING MFG., INC.
1451751	EAST WEST BUILDING SERVICES, LLC
1315856	ERIN'S TREE SERVICE
1402635	EXCEL SIDING INC.
1418379	GHILOTTI BROS, INC.
1410097	GONZALEZ FOOD ENTERPRISES, INC.
1410097	GONZALEZ FOOD ENTERPRISES, INC.
1393432	HEALTHRIGHT 360
1428551	HELICOPTER TECHNOLOGY CORPORATION, LLC
1403967	INDUSTRIAL COMMERCIAL SYSTEMS
1396598	ITT AEROSPACE CONTROLS LLC
1373362	JACKSON PROPERTIES, INC.
1408938	JAMES A SHIRLEY CONSTRUCTION, INC.
1418337	JOE'S AUTO REPAIR NORTHRIDGE, INC.
1399885	JOHN KENNEY CONSTRUCTION, INC
1420299	JOHN MARRONE
1332165	JSR CONSTRUCTION SERVICES, INC.
1406326	LANDSBERG ORORA
1435219	M & B SERVICES, INC.
1429426	MAJESTIC PET PRODUCTS, INC.
1465056	MANPOWERGROUP US INC.
1420253	MARCELO RAMIREZ
1434711	MARIN COMMUNITY COLLEGE DISTRICT
1440225	METAL TITE PRODUCTS
1444066	MIGUEL ANGEL DE LA ROSA NUNEZ
1290754	NIBBELINK MASONRY CONSTRUCTION CORP
1407733	NICE RV PARK, LLC

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1428804	NYMAN BROS
1387407	ORANGE UNIFIED SCHOOL DISTRICT
1293060	OUTFRONT MEDIA, LLC.
1441772	OVERHEAD DOOR COMPANY OF FRESNO
1441772	OVERHEAD DOOR COMPANY OF FRESNO, INC.
1399071	PACIFIC COAST SUPPLY LLC
1424586	PACIFIC COAST SUPPLY LLC
1408605	PACIFIC COAST SUPPLY, LLC
1435931	PAINTSTAR
1413743	PARTNERSHIP STAFFING SOLUTIONS
1382833	PEPSICO, INC.
1397245	PERRY STOJSICH, AN INDIVIDUAL
1434690	PHARMAVITE LLC
1452484	PIN HSIAO & ASSOCIATES LLC
1448210	PLATINUM CLEANING OF INDIANAPOLIS, LLC
1431066	PRO ROOF, INC.
1412181	RAMZ WOOD PRODUCTS, INC
1417123	RIGOBERTO JUAREZ
1348269	RUIZ PAINTING AND WALLCOVERING
1417865	SAINT-GOBAIN SOLAR GARD, LLC
1315901	SAN DIEGO MOVING SERVICES
1463806	SANDRIDGE PARTNERS, LP
1395508	SANTOS ELECTRONICS, INC.
1284559	SILICON VALLEY SELF DIRECT, INC.
1358956	STRETCH FORMING CORP.
1430212	SUKUT CONSTRUCTION, INC.
1426699	SUN PACIFIC FARMING COOPERATIVE, INC.
1465691	SUN PACIFIC SHIPPERS, LP
1455088	SUPERIOR BLINDS MANUFACTURING, INC.
1287454	SYSCO SAN FRANCISCO, INC.
1454716	THE KIDS BUSINESS, INC.
1311890	THE OKONITE COMPANY, INC.
1421013	THE PROCTER AND GAMBLE PAPER PRODUCTS
1284134	THUNDER JONES CONTRACTING GROUP
1439024	TIMMONS WOOD PRODUCTS, INC.
1323991	TMC GENERAL CONSTRUCTION, INC.
1429105	TULARE COUNTY SOLID WASTE
1305641	TUTOR PERINI CORPORATION AND PARSONS
1330297	TWR ENTERPRISES, INC.
1449587	UNION SUPPLY GROUP, INC.

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1432801	URATA & SONS CONCRETE, LLC
1411072	VALERO REFINING COMPANY
1366159	VIDO ARTUKOVICH & SON, INC.
1441389	VIVINT SOLAR DEVELOPER LLC
1398990	WALTS TREE & LANDSCAPE SERVICE

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 12:51 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 12:52 p.m.