

State Of California
California Occupational Safety and Health Appeals Board
Minutes of the Public Meeting & Closed Session
Held On December 3, 2020
On Zoom

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
Elizabeth Clarke, Attorney
Lee Berlin, Staff Services Manager
Janis Jonas, Management Services Technician
Sam Lucas, Administrative Law Judge
Kerry Lewis, Administrative Law Judge
Rocio Reyes, Assistant Chief Counsel, DOSH
Kevin Bland, Ogletree, Deakins
Heather Gribben, Ogletree, Deakins
Lisa Baiocchi, Attorney, The Prince Firm
Michelle Bethge, Counsel, DOSH
Tuyet Tran, Counsel, DOSH
Cynthia Perez, DOSH
Chris Grossgart, Counsel, DOSH
Bruce Wick, Risk Management Director, CALPASC

Minutes of November 19, 2020 Meetings:

(Approve or amend minutes of previous Board meeting.)

Action: Board approved minutes of the November 19, 2020
Board meetings.
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.)

- The Board will receive any public input regarding suggested improvements to: (1) the zoom video hearing process, (2) the telephonic settlement conference process, and (3) calendaring of hearings and conferences.

Action: There was an open discussion with all in attendance regarding scheduling and conducting video hearings. Kevin Bland discussed scheduling concerns, exhibits being uploaded, and the difficulties with witnesses attending by cell phone and suggested that witnesses use computers instead because of connectivity issues and ability to more clearly view exhibits.

Chris Grossgart shared thoughts on telephonic settlement conferences, scheduling, and confirming the need for breakout discussions. Regarding video hearings Mr. Grossgart reiterated scheduling concerns and the need not to over-schedule DOSH attorneys.

Mr. Grossgart also expressed concerns regarding technical difficulties. He referenced Mr. Bland's comments regarding witnesses attending by cell phone and felt that witnesses should be allowed to use cell phones so not to impede their right to hearing.

There was lengthy discussion regarding scheduling hearings and avoiding scheduling conflicts within the division.

Judge Kerry Lewis shared experience attending and conducting many hearings and said she witnessed very few problems.

Lisa Baiocchi discussed physical evidence that cannot be uploaded to OASIS, and her concern with presenting these exhibits.

Ms. Baiocchi also expressed concern regarding cases with COVID related citations being expedited even after abatement. Chair Lowry explained the need to expedite these cases to document the importance and need to provide guidance to the public.

The Board explained that telephonic settlement conferences can be conducted by zoom upon request.

- Board to discuss progress on implementing video hearings.

Action: No report.

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: Office Technician new appointee has not been approved.
OSHAB has put in paper work for filling Presiding Administrative Law Judge position in West Covina.

Staff Reports:

(Reports from the Presiding ALJ and the Chief Counsel regarding matters from the Hearing Operation and Legal Unit.)

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: Discussion on proposed regulations related to COVID protocols currently before the Standards Board.

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

Action: Lee Berlin updated the Board on the ongoing research in making documents available in other languages.

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

Action: Board discussed the status of docketing cases With Citations Related to Covid-19. Judge Reedy updated the Board on current cases. There was a discussion on how to make public the existing cases that are COVID related. It is suggested a list of these cases be added to the Appeal Board's meeting agenda, including pending appeals identified by inspection number and name of employer. Once the appeal is completed/resolved or disposed, the case would drop off the list.

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4. 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 Decisions 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.)

1326355 Diversified Utility Services, Inc.

Action: The Board denied this Petition for Reconsideration.
Moved: Marvin Kropke
Seconded: Judith Freyman
Vote: 3-0

Petitions For Reconsideration (Second Review):

None

Orders Dismissing Appeal:

1341947 Acme Anything

Action: The Board discussed this matter.

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. |
| 1332715 | APTCO, LLC
Whether the ALJ Decision correctly analyzed the record in deciding employer had committed the alleged violation. |
| 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. |
| 1206788 | DPR Construction, Inc. Et al.
Whether the Division had jurisdiction. Whether the ALJ's Decision constituted an underground regulation. |
| 1199473 | FedEx Ground
Whether employer's supervision of the workplace was reasonable. |

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- 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.
- 1213886 Jace Varghese
Whether employer has satisfied requirements of Petition for Reconsideration.
- 1290383 JAFEC USA, Inc.
Whether the ALJ correctly decided the employer was in violation of a safety order, as alleged.
- 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.
- 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.
- Action: The Board discussed this matter.
- 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.

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- 1474264 Outdoor Keepers
Whether the ALJ acted appropriately in approving settlement terms offered by the division and not accepted by the employer
- 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.
Action: Remand to Hearing Operations.
Moved: Judith Freyman
Second: Marvin Kropke
Vote: 3-0
- 1303461 SSA Terminals (Oakland), LLC DBA SSA Marine Terminals
Whether employer violated section 3212(a)(2)(a) as alleged.
- 1153101 Sunview Vineyards of California, Inc.
Whether the Board should reconsider this interlocutory petition. Whether the Division should be required to provide a redacted copy of the complaint to employer.
- 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.

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- 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.

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. MCM Construction, Inc., 34-2016-80002312 (13-R1d2-3851-3854)
2. Solarcity Corp., 34-2016-80002345 (14-R3d2-3707)
3. Key Energy Service, LLC (12004280)
4. Barnard Impregilo Healy, JV, (317134021), CPF 17-515575
5. R N R Construction, Inc., (1092600) 34-2017-80002632
6. Ashley Furniture Industries, 34-2017-800002750, (1016514)
7. Blue Diamond Growers, (1040471) 34-2018-80003007
8. Robinson Mfg., Inc., 30-2019-01067631 (1169633)
9. West Coast Arborists, 37-2019-00026620 (1180192)
10. United Parcel Service, Inc. DBA Ups, 34-2019-80003174 (1116529)
11. Shimmick Construction Company, Inc., 34-2019-80003191 (1059365)
12. Process Cooling International, 34-2019-80003220 (1232555)
13. ACCO Engineered Systems, Inc., Rg19042824 (1195414)
14. Prestige Painting, 37-2019-00066143 (1367265)
15. Davis Development Company, 34-2020-80003373 (1226084)

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16. Vincent Tuomey, Rg20061099 (1152851)
17. Golden State Boring & Pipe Jacking, Inc. 34-2020-80003465 (1308948)
18. Shimmick Construction Co., Inc./Obayashi Corp., 34-2015-80002204
(12-R3d1-0781) (315525790)
19. Interline Brands, Inc., Civds2021813 (1251604)
20. Walsh Shea Corridor Constructors, S264760, (1093606)

Appellate Court:

1. Blue Diamond Growers, 34-2012-80001308 (10-R2d1-1280/1281)
2. Ventura Coastal, F077267 (317808970)
Action: The Board discussed this matter.
3. Lion Farms, LLC, Mcv075788 (1070258)
4. Atkinson Construction, LP, 34-2017-80002611, C091705 (317386084)
5. United Parcel Service, B308218, 18stcp03195 (1158285)

Other Items:

- New and/or interlocutory Petitions for Reconsideration not filed in time to be agendized.
Action: No report.
- Categorizing the Board's DARs and Denials on the DIR website.
Action: No report.
- Staff attorneys to provide legal analysis, advice and counsel regarding COVID-19 cases.
Action: No report.

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.)

1425994 4 Over LLC
1429492 Abundant Water Wells, Inc.

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1366921	Advanced Construction Southwest of California,
1189103	AJM Packaging
1452095	All Seasons Framing II Corp.
1249638	Ameresco, Inc.
1232030	Amigos Fuerza Inc.
1302675	Arborwell, Inc.
1421288	Armor Coatings
1450456	Ashley Pham, an individual
1437144	AT&T Services, Inc.
1400483	Basic Energy, Inc.
1377973	Best Way Disposal Co., Inc.
1449382	Ca State Water Resources Control Board
1479792	California Cross Dock Inc.
1452180	California Department of State Hospitals
1487576	CBC Framing, Inc.
1430951	Ceron Building Remodeling, Inc.
1378805	Citistaff Solutions, Inc.
1388114	Comco Commercial Real Estate and Development
1349917	Contra Costa Electric, Inc.
1453329	Custom Produce Sales
1333410	Douglas Hsiung and Amy Wang-Hsiung
1455277	Dr. Haridy Veterinary Emergency and Trauma
1317842	Dreisbach Enterprises, Inc.
1459864	Epic Ceramic & Stone, Inc.
1453020	Excel Property Management Services, Inc.
1471358	Fletchline Inc.
1431069	Fruity Ag, Inc.
1263269	Gaytan Foods
1433959	George Reed, Inc.
1482953	Giles Excavating & Paving
1346432	Gimbal Brothers, LLC
1464813	Gonzalez Lath & Plaster
1431669	GS Brothers, Inc.
1498484	Hal Stauff Construction
1235945	Hall Management Corp.
1390930	HAWA Corporation
1451177	Hayward Sisters Hospital
1366935	Holland Partner Group Management, Inc.
1472027	Ioniki Foods, Inc.
1329986	J & E Berry Farms, LLC.

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1443225 Jem Unlimited Iron, Inc.
1410388 Johnson Controls, Inc.
1435908 KBI Painting, Inc.
1290983 Klein Foods Inc.
1375220 La City Fire
1439813 La Verne Nursery Inc.
1308482 LICO, Inc.
1400817 Macas Corporation
1461814 Manuel Robert Monteiro, Michael Manuel
1414289 Michel's Corporation
1406488 Milgard Manufacturing Incorporated
1425586 Minturn Huller Cooperative, Inc.
1392841 No Toil Industries Inc.
1461022 Osbeth Construction, Inc.
1063574 Owens Corning Roofing & Asphalt LLC
1333857 Paris Valley Vineyard Services Company
1461687 Primoris ARB, Inc.
1422153 SA Recycling, LLC
1412929 Saul Ramirez, Individually
1366195 Save Mart Supermarkets
1239465 Southern California Edison Company
1450901 Sukut Construction Inc.
1460340 Tadin, LLC
1341136 Taylor Farms California, Inc.
1378368 TFR Builders, Inc.
1471893 The Alterian Ghost Factory, Inc.
1388974 The Wine Group, Inc.
1468860 Treesap Farms, LLC
1362628 Universal City Studios, LLC. / Universal Studios
1440279 Vision Media Management and Fulfillment, LLC
1282514 Walt Disney Parks and Resorts U.S., Inc.
1436937 Warnock Food Products, Inc.
1441622 Westech Sytems, Inc.
1461787 Westlake Cattle Company, LLC
1397730 Westland Flooring Inc.

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

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Personnel:

(Issues regarding staff)

Action: No report.

The closed session was adjourned at 12:52 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 12:53 p.m.