

State Of California
California Occupational Safety and Health Appeals Board
Minutes of the Public Meeting & Closed Session
Held On August 12, 2021
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
Sam Lucas, Presiding Administrative Law Judge
Aaron Jackson, Industrial Relations Counsel
Elizabeth Clarke, Attorney
Lee Berlin, Staff Services Manager
Janis Jonas, Executive Secretary
Kerry Lewis, Administrative Law Judge
Howard Chernin, Administrative Law Judge
Christopher Jessup, Administrative Law Judge
Bruce Wick, Risk Management Director, Housing Contractors of California
Barbara Jones, Tenet Healthcare

Minutes of July 29, 2021 Meeting:

(Approve or amend minutes of previous board meeting.)

Action: The Board approved the minutes of the July 29, 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: The Board led a discussion regarding 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: Chair Lowry reported on the quarterly meeting with the Federal OSHA.

Board Members Reports:

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

Action: Member Freyman raised the issue of DARs being posted on the OSHAB website. Alternative access to DARs was suggested and research will be done.

Member Kropke reported retirement of Robbie Hunter of the Building and Construction Trades Council of California. Member Kropke also reported the death of the President of the AFL-CIO, Richard Trumka, August 5, 2021. Elizabeth H. Shuler is the Acting President and Secretary-Treasurer of the AFL-CIO.

Executive Officer's Report:

(Report regarding administrative matters.)

Action: Patricia Hapgood, Acting Executive Officer, reported on the quarterly meeting with Federal OSHA. Ms. Hapgood updated the Board on staffing and the current interview and hiring status on various staff positions.

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: The Board discussed proposed changes to the regulations.

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

Action: Lee Berlin updated the Board on the status of creating documents in additional languages and having them posted on the website.

3. Discuss status of Video Hearings.

Action: Presiding Judge Reedy reported on hearings conducted by video platforms. Zoom links for hearings are now included on the Notice of Hearing for easy access. Also instructions for contacting OSHAB to request assistance uploading exhibits are listed on the notices.

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

Action: The Board discussed cases related to COVID-19.

5. 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: No report.

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.)

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| 1229599 | Murray Plumbing and Heating Corporation | Action: The Board reviewed this decision. |
| 1461476 | Walmart, 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.)

None

Petitions For Reconsideration (Second Review):

None

Orders Dismissing Appeal:

- | | | |
|---------|-----------------------|---|
| 1403702 | ACK Productions, LLC | Action: The Board reviewed this decision. |
| 1489226 | Mollie Stone's Market | Action: The Board reviewed this decision. |

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

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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.
- 1279492 Arriaga USA, LLC
Whether the cited employer's rights were adequately protected at the video hearing.
- 1141604 Boy Racer Inc. DBA Burning Angel
(Employer's Petition)
Whether adult film performers are employees or independent contractors.
Action: The Board discussed this matter.
- 1141604 Boy Racer Inc. DBA Burning Angel
(Dosh's Petition)
Whether adult film performers are employees or independent contractors.
Action: The Board discussed this matter.
- 1246527 Cemex
Whether the settlement in this matter was procured by fraud.
- 1133550 Hansford Industries, Inc. Dba Viking Steel
Whether Employer properly secured a load for movement within its facility, and whether employees were properly supervised.
Action: The Board voted to issue the DAR.
Moved: Marvin Kropke
Seconded: Judith Freyman
Vote: 3-0
- 1135350 Hill Crane Service Inc.
Whether Employer violated the safety orders as alleged.
- 1422951 Lineage Logistics
Whether Employer's motion to amend its appeal should be granted.
- 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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- 1334740 Olam West Coast, Inc. dba Olam Spices and Vegetable Ingredients
Whether the Employer committed the alleged violations.
- 1199064 SA Recycling
Whether employer established that, the alleged violation was abated at the time of inspection.
- 1155042 Signal Energy LLC
Whether Employer appropriately oversaw the actions of the subcontractors.
- 1306170 Siu's Products and Distributor, Inc.
Whether Employer complied with lockout/tagout requirements.
- 1303461 SSA Terminals (Oakland), LLC DBA SSA Marine Terminals
Whether Employer violated section 3212(a)(2)(A) as alleged.
- 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.
Action: The Board discussed this matter.

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. MCM Construction, Inc., 34-2016-80002312 (13-R1D2-3851-3854)
2. Key Energy Service, LLC (12004280)
3. Barnard Impregilo Healy, JV, CPF 17-515575, (317134021)
4. R N R Construction, Inc., 34-2017-80002632 (1092600)
5. Ashley Furniture Industries, 34-2017-800002750 (1016514)
6. United Parcel Service, Inc. DBA UPS, 34-2019-80003174 (1116529)

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7. Shimmick Construction Company, Inc., 34-2019-80003191 (1059365)
8. Process Cooling International, 34-2019-80003220 (1232555)
9. Prestige Painting, 37-2019-00066143 (1367265)
10. Davis Development Company, 34-2020-80003373 (1226084)
11. MWL Solutions, 34-2020-80003549 (1436014)
12. Hampton Tedder Electric, 34-2020-80003562 (1233597)
13. BMW West, LLC, 34-2021-80003574 (1399613)
14. Southern California Edison, 34-2021-80003580 (1320327)
15. APTCO, LLC, BCV-21-100421 (1332715)
16. Ventura Coastal, (317808970)
17. L&S Framing, Inc., SCV-0046603 (1173183)
18. Granite Construction, 34-2021-80003634 (1235643)
19. Pacific Utility Installation, Inc., 30-2021-01201020 (1321161)
20. Golden State FC, LLC dba Amazon Fulfillment, STK-CV-UWM-2021-0004380 (1310525)
21. USA Waste of California, Inc. dba Blue Barrel Disposal Services, 21STCP01729 (1384029)
22. Grimmway Enterprises, Inc., BCV-21-101503 (1477159)
23. Grimmway Enterprises, Inc., BCV-21-101554 (1238985)

Appellate Court:

1. Lion Farms, LLC, MCV075788 (1070258)
2. Atkinson Construction, LP, 34-2017-80002611, C091705 (317386084)
3. 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.

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2. Categorizing the Board's DARs and Denials on the DIR website.

Action: This topic was discussed under Board members' reports.

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.)

1485227	A and S Fire Protection, Inc.
1499522	Advanced Roof Design Inc.
1358246	Archibald Sheet Metal
1400327	Arco National Construction Company, Inc.
1419331	Baker Electric, Inc.
1393183	Bay Area Rapid Transit
1476505	Bodycote
1479063	Calavo/RMG/Garden Highway Foods
1492892	California Agriculture, Inc.
1385905	Contra Costa County Public Works Department
1327498	Cream of The Crop
1472997	David Rearick
1293194	Davis Development Company Inc.
1484106	DHL Express (USA), Inc.
1017588	DSS Company Dba Knife River Construction
1315651	FedEx Freight-ANH
1470934	Frank Alkakos
1487666	Frank Hyundai
1428990	Fry's Electronics, Inc.
1293127	Greystar LP
1508209	HMK Petro, Inc.

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1497239	Hormel Foods Corporation
1481270	Horvath Holdings, Inc.
1447212	Howood Company
1496516	Ikea North America Services, LLC
1413183	Isuzu Logistics North America, Inc.
1484973	J.C. Wattenbarger & Son
1507800	JZB Farming
1478378	Kaiser Foundation Hospitals
1463430	Kimball Hospitality Inc.
1436004	LMC Construction, LLC
1468848	Medical Management International Inc.
1476387	Meyer2meyer Entertainment, LLC
1477366	Miracle Mile Healthcare Center, LLC
1480864	Nansen Associates Inc.
1500814	National Construction and Remediation Inc.
1339807	National Response Corporation
1511121	Northridge Lumber Co. Inc.
1485615	OOMA, Inc.
1493806	PALP, Inc.
1475923	People Ready, Inc.
1491396	Republic Services
1491795	Salinas Farm Labor Contractor, Inc.
1396093	San Francisco Foods, LLC
1507799	Shannon Bros, Co.
1080515	Shimmick Construction Company, Inc.
1500767	Sierra Pacific Industries
1493851	The Walton Company Inc.
1476392	Towne Park LLC
1429142	Tulare County Resource Management Agency
1351560	Underground Construction Co, Inc.
1361853	USA Waste Of California, Inc. Erroneously Named U.

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1353214 Webcor Construction, LP
1479754 West Pico Terrace Healthcare & Wellness, LP
1445695 Wing Lee Fresh Poultry, Inc.
1424578 World Class Distribution, Inc.
1507217 WPUSD Twelve Bridges Elementary School

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 was adjourned at 11:53 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 11:54 a.m.