

State Of California
California Occupational Safety and Health Appeals Board
Minutes of the Public Meeting & Closed Session
Held on October 7, 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
Christopher Jessup, Administrative Law Judge
Kerry Lewis, Administrative Law Judge
Michelle Bethge, DIR Counsel
Dan Lucido, Chief Counsel, DOSH

Minutes of September 23, 2021 Meeting:

(Approve or amend minutes of previous board meeting.)

Action: The Board approved the minutes of the September 23, 2021 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.)

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. The latest version was reviewed. Public comments were accepted at this time.

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: 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: Patricia Hapgood, Acting Executive Officer, reported on the status of staff recruitment and interview schedule.

Ms. Hapgood updated the Board on upcoming meetings. There is an Agency round table, quarterly Fed/OSHA meeting, and the Advisory Committee meeting.

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

Action: Lee Berlin reported that this project is complete and documents in other languages are posted on the website.

3. Discuss status of Video Hearings.

Action: Judge Reedy updated the Board on Video Hearings.

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

Action: The Board discussed the cases relating to COVID-19.

5. 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 heard 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 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.)

1485458 SD Design Construction Corp.

Action: The Board issued an Order requiring Employer to file a Declaration, demonstrating good cause why its late appeal should be accepted and its appeal reinstated.

1372873 BFC Apparel, Inc.

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

1327187 Ontario Refrigeration Service, Inc.
Action: The Board voted to grant this petition.
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:

1476258 Juan Martinez
Action: The Board remanded this case to Hearing Operations to reinstate a hearing.

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.

1279492 Arriaga USA, LLC
Whether the cited employer's rights were adequately protected at the video hearing.

Action: The Board discussed this matter.

1141604 Boy Racer Inc. DBA Burning Angel
(Employer's Petition)
Whether adult film performers are employees or independent contractors.

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- 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.
- 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.
- 1334740 Olam West Coast, Inc. dba Olam Spices and Vegetable Ingredients
Whether the Employer committed the alleged violations.
- 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.
- 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)
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. APTCO, LLC, BCV-21-100421 (1332715)
15. Ventura Coastal, (317808970)
16. L&S Framing, Inc., SCV-0046603 (1173183)
17. Granite Construction, 34-2021-80003634 (1235643)
18. Pacific Utility Installation, Inc., 30-2021-01201020 (1321161)
19. Golden State FC, LLC dba Amazon Fulfillment, STK-CV-UWM-2021-0004380 (1310525)
20. USA Waste of California, Inc. dba Blue Barrel Disposal Services, 21STCP01729 (1384029)
21. Grimmway Enterprises, Inc., BCV-21-101503 (1477159)
22. Grimmway Enterprises, Inc., BCV-21-101554 (1238985)
23. RND Contractors, Inc., CIV SB 2119442 (1436785)
24. Sunview Vineyards of California, Inc. RG21111733 (1153101)

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.
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.)

1456209	AFC Trading & Wholesale, Inc.
1495502	AL Pak Labor Inc.
1499153	All Valley Solar, Inc.
1369386	Alliance Roofing Company, Inc.
1397958	America's Best, Inc.
1412205	Anderson Design, Inc.
1516009	Bed Bath & Beyond of California Limited Liability
1453397	Bed Bath and Beyond, Inc.
1314726	Blackjack Machinery, Inc.
1408098	Bright View Tree Care Services, Inc.
1473247	BTS Equipment Unlimited, Inc.
1316866	California State University Of Dominguez Hills
1511785	Chino Valley Unified School District - Anna A.
1491458	Cirilo Becerra FLC
1454292	Citistaff Solutions, Inc.
1458975	City Of Los Angeles Department Of Water and Power
1412708	Clayco, Inc.

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1490075	Cliff Brown Automotive
1512812	Compass Services
1475782	Concrete Builders Group, Inc.
1508198	Creative Comfort Design Inc.
1460771	Crest Steel Corporation
1417986	D7 Roofing Services, Inc.
1491157	DGK Plumbing, Inc.
1504387	Employbridge LLC
1490343	Ford Signs Inc.
1520763	Fred R. Rippy, Inc.
1472877	Full Steam Staffing, LLC
1482518	G.L. Mezzetta Inc.
1332200	Golden State FC, LLC
1472093	Guerra & Gutierrez Mortuary, Inc.
1504849	Hanford Grain Company LLC
1504132	Hanrich Corporation
1489299	Harvest Kings LLC
1407466	Interstate Hotels and Resorts
1454431	J A Gonsalves & Sons Construction Inc.
1462294	J.D.M.L., Inc.
1494077	Jacob Supplies, Inc.
1379075	JT2 Inc.
1474630	Kaiser Foundation Hospitals/Kaiser Permanente -
1476638	Kamlimullah Bayanzay, an Individual
1472309	Kern Oil & Refining Co.
1501456	KLS Doors, LLC
1505803	Lake View Tree Service & Landscaping Maintenance
1507580	Lifetime Brands, Inc.
1423464	Lineage Logistics LLC
1462284	McWane, Inc.
1285243	Memo's Scaffolding Norwalk, Inc.
1448211	Metro Logistics USA, Inc.
1516448	Miracleworks, Inc.
1466991	Norcal Solutions, Inc.
1496898	Olive Vista Behavioral Health Center
1490296	Pacific Heat Treating Company, Inc.
1516856	Pierson Company
1189444	Rafael A. Rosero
1493760	Recology Blossom Valley Organics South
1472682	Reiter Berry Farms, Inc.

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1488095	Reliable Rubber Products, Inc.
1471851	Robinson Helicopter Company
1423487	Roebbelen Contracting, Inc.
1494059	Royalite Mfg., Inc.
1223608	Sabor Farms, LLC
1423733	Sabor Farms, LLC
1460981	Santa Maria Harvesting, LLC
1499361	Secure Sheet Metal Inc.
1520484	Sierra View Dairy, LLC
1480779	Simplified Labor Staffing Solutions, Inc.
1468368	Snell Foundation, Inc.
1497918	Solar Watt Solutions
1498830	Sunland Aerospace Fasteners
1420289	Swift Beef Company
1510736	Tesoro Refining & Marketing Company LLC
1498443	Trademark Plastering Inc.
1509967	United Pumping Service, Inc.
1502864	Valero Refining Company - California
1498779	VCI Construction, LLC
1491237	Westland Distributing Partners, LLC
1495518	Xierun Garden USA Inc.

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 11:59 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 12:00 p.m.