

State Of California
California Occupational Safety and Health Appeals Board
Minutes of the Public Meeting & Closed Session
Held on November 4, 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
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
Rocio Reyes, Assistant Chief Counsel, DOSH

Minutes of October 21, 2021 Meeting:

(Approve or amend minutes of previous board meeting.)

Action: The Board approved the minutes of the October 21, 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: Chair Lowry reported meeting with DIR Director Katie Hagan. Also had regular quarterly meeting with the Fed OSHA representatives and the Advisory Committee meeting.

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.

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.

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

Action: No report.

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.)

1332867 Guy F. Atkinson Construction, LLC
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.)

1509967 United Pumping Service, Inc.
Action: The Board voted to grant this petition.
Moved: Marvin Kropke
Second: Judith Freyman
Vote: 3-0

Petitions for Reconsideration (Second Review):

1485458 SD Design Construction Corp.
Action: The Board issued a Denial for this petition.
Moved: Marvin Kropke
Second: Judith Freyman
Vote: 3-0

Orders Dismissing Appeal:

1485223 Forrest Machining, Inc.
Action: The Board reviewed this Order.

1451187 Stanley Healthcare Center Operating Company, LLC
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>

Action: The Board issued Order Extending Time to File Briefs.
Moved: Marvin Kropke
Second: Judith Freyman
Vote: 3-0 |
| 1141604 | Boy Racer Inc. DBA Burning Angel
(Dosh's Petition)
<i>Whether adult film performers are employees or independent contractors.</i>

Action: The Board issued Order Extending Time to File Briefs.
Moved: Marvin Kropke
Second: Judith Freyman
Vote: 3-0 |
| 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> |

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- 1334740 Olam West Coast, Inc. dba Olam Spices and Vegetable Ingredients
Whether the Employer committed the alleged violations.
- 1327187 Ontario Refrigeration Service, Inc.
- 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.
- 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)

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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.

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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.)

1391152	Abercrombie Pipeline Services, LLC
1489295	ACCO Engineered Systems
1481021	American Machine & Tool, Inc.
1547239	APL Logistics
1460449	Bay Club America Inc.
1446770	Ca Forestry And Fire Protection
1517348	Cardinal Health 200, LLC
1381082	Cassidy Landscape Maintenance, Inc.
1408940	Champion Home Builders, Inc.
1512391	Chun Yu Works (U.S.A.), Inc.
1447444	City Of Coronado Public Services & Engineering
1489304	Classic Distributing & Beverage Group, Inc.
1497916	Del Mar Food Products Corp.
1362121	Diamond PEO, LLC. & Diamond ZB Staffing Services,
1434284	Diamond Wipes International
1526872	Elite Comfort Solutions
1493178	Foley Electric, Inc.
1406761	General Coatings Corporation
1465669	Harvest Food Products Co., Inc.
1526787	Hathaway-Sycamores Children and Family Services
1483667	Howmet Global Fastening Systems, Inc.
1497114	JB Landscape Management, Inc.
1473517	Kaiser Foundation Hospitals
1470803	Krikorian Construction, Inc.
1508856	Ltd Construction Services, GP
1483034	Mike's Farm Labor, Inc.
1538365	Pabco Clay Products, LLC
1484580	Pearce Concrete And Masonry, Inc.
1491027	Peterson Tractor Co
1513213	Premier Wall Systems, Inc.
1482808	Primex Farms, LLC

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1350187	R & B Farms, LLC
1499117	Riverside Healthcare System, L.P.
1406778	Roger Tillis
1497899	Royal Interpack North America, Inc.
1497495	Ruggeri Marble And Granite, Inc.
1475744	Save Mart Supermarkets
1485410	SC Warehouses, Inc.
1429152	Sensitive Environment
1476811	Shirley Nosecchi, Dino Nosecchi & Robin Nosecchi
1493805	Simmons Real Estate, Inc.
1383807	Sims Group USA Corporation
1476256	Sterling Land Care, Inc.
1408117	Steve Winkler
1519742	Stout & Associates, Inc.
1474833	Sylvester Roofing Company, Inc.
1450936	The Better Cleaning Inc.
1491226	The Whiting-Turner Contracting Company
1434672	Tradesmen International
1482178	United Parcel Service Inc.
1482031	United Staffing Associates, LLC

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