

# DECISIONS AND ORDERS OF THE NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD: TIME TO LIFT THE VEIL OF SECRECY

By Stephen C. Yohay\*

## INTRODUCTION

When Congress enacted the federal Occupational Safety and Health Act of 1970 (the Act),<sup>1</sup> it effectively pre-empted state regulation of occupational safety and health.<sup>2</sup> However, in a political compromise that helped to assure passage, Section 18 of the Act permitted states to reassert jurisdiction over occupational safety and health by submitting a plan for OSHA's approval.<sup>3</sup> Currently, twenty-one states, including Nevada, operate approved state plans for safety and health enforcement in private sector workplaces.<sup>4</sup>

Few regulatory regimes so directly and pervasively affect the working lives of Americans as do OSHA requirements. OSHA regulates employers in

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<sup>1</sup> 29 U.S.C. §§ 651–78 (2012).

<sup>2</sup> See MARK A. ROTHSTEIN, OCCUPATIONAL SAFETY AND HEALTH LAW § 3:2 (2015 ed. 2015).

<sup>3</sup> 29 U.S.C. § 667.

<sup>4</sup> Twenty-two State Plans (twenty-one states and one U.S. territory) cover both private and state and local government workplaces. The remaining five State Plans (four states and one U.S. territory) cover state and local government workers only. See *State Plans*, OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/dcsp/osp/index.html> [<https://perma.cc/7TQM-KQ86>] (last visited Mar. 18, 2016). Most of the plans were approved and began to operate in the 1970s and 1980s. Nevada first submitted its proposed plan to federal OSHA on December 28, 1973. Final approval was granted on April 18, 2000. *Nevada State Plan*, OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/dcsp/osp/stateprogs/nevada.html> [<https://perma.cc/D2FN-PMG3>] (last visited Mar. 18, 2016).

most private sector workplaces.<sup>5</sup> It is especially important in industries whose workplaces present significant hazards. For example, OSHA standards and regulations affect how employers construct and operate their workplaces; how equipment is designed, operated and maintained; what types of protective devices and methods employers must provide and employees must use; and how employees are trained to perform their work so as to preserve their well-being.<sup>6</sup>

Despite its broad impact on Americans' daily working lives, OSHA law seems ordinary and obscure. It does not have the cachet of a high-profile crime or a juicy financial scandal. When a catastrophic workplace accident occurs, however, and workers lose their lives or are seriously injured, OSHA law catapults into the headlines, at least for a short time. Videos of accident scenes "go viral." Breathless reporters chime in with "exclusive" reports about the progress of investigations.

In Las Vegas, for example, local and national attention was focused on OSHA following nine major construction accidents in 2006 and 2007 resulting in seven employee fatalities<sup>7</sup> and a fire at a hotel/casino in 2007 in which two employees died.<sup>8</sup> Nevada OSHA (NOSHA) was accused of tepid responses to these accidents. The perception of feckless enforcement and toleration of substandard work practices triggered public criticism and became the subject of Congressional hearings. The then newly elected Obama administration directed federal OSHA to conduct an exhaustive review of NOSHA's enforcement program.<sup>9</sup>

Federal OSHA issued a detailed, highly critical report to pressure NOSHA to increase its enforcement activity. Among the criticism the federal govern-

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<sup>5</sup> Under Section 4(b)(1) of the federal OSH Act, OSHA does not apply to working conditions over which other federal agencies prescribe or enforce occupational safety and health standards. 29 U.S.C. § 653(b)(1). For example, the federal Mine Safety and Health Administration (MSHA) regulates the mining industry. The Federal Aviation Administration (FAA) regulates employee safety in most airline workplaces. The Department of Transportation (DOT) regulates the trucking industry. In many instances, OSHA regulates a portion of the work regulated by other agencies. *See generally* S. Pac. Transp. Co. v. Utery, 539 F.2d 386 (5th Cir. 1976); ROTHSTEIN, *supra* note 2, § 2.

<sup>6</sup> OSHA standards for so-called "general industry" are found at 29 C.F.R. § 1910 (2015). Standards for "construction work" are found at 29 C.F.R. § 1926 (2015). Regulations addressing matters such as injury and illness recordkeeping and reporting obligations are found in 29 C.F.R. § 1904 (2015).

<sup>7</sup> *See* Alexandra Berzon, *Employers Finding Way Around OSHA's Tougher Stance*, L.V. SUN (Dec. 29, 2008, 2:00 AM), <http://lasvegassun.com/news/2008/dec/29/employers-finding-way-around-oshas-tougher-stance> [<https://perma.cc/7YDG-8F3F>]; Alexandra Berzon, *OSHA Goes Easy*, L.V. SUN (Mar. 31, 2008, 2:00 AM), <http://lasvegassun.com/news/2008/mar/31/osha-goes-easy> [<https://perma.cc/EZH8-XR4N>].

<sup>8</sup> *See* Hubble Smith, *Nevada OSHA Officials Assure Action*, L.V. REV.-J (Apr. 24, 2010, 12:00 AM), <http://www.reviewjournal.com/business/nevada-osha-officials-assure-action> [<https://perma.cc/SF5S-DG98>].

<sup>9</sup> *See* Fred Hosier, *Has Nevada OSHA Set a Quota for Its Inspectors?*, SAFETY NEWSALERT (July 7, 2011), <http://www.safetynewsalert.com/has-nevada-osha-set-a-quota-for-its-inspectors> [<https://perma.cc/4HTJ-XRJF>].

ment leveled against NOSHA was its asserted failure to cite serious, willful, and repeat violations of safety and health regulations. These characterizations of violations carry increased penalties against a cited employer.<sup>10</sup> The former Administrator of NOSHA was quoted as saying: “The feds told us, ‘You guys need to improve your game. . . . Our performance basically has to work toward being as effective as federal OSHA’s.’”<sup>11</sup> Moreover, in 2010, federal OSHA opened its own office in Las Vegas to help oversee the state plan’s enforcement activities.<sup>12</sup>

As an element of its criticism, it would have seemed logical for federal OSHA to ensure that the public would be well-informed about all of NOSHA’s enforcement efforts. Despite the attention and pressure brought to bear by the federal government, however, a key aspect of the state’s regulation of occupational safety and health has been shrouded from public view. Namely, the decisions and orders issued by the agency that adjudicates the merits of employers’ challenges to NOSHA citations—the Nevada Occupational Safety and Health Review Board (the Board)—are not published or disseminated, and the public receives no notice of them.

NOSHA and the Board are established under the Nevada Department of Business and Industry (DI), Division of Industrial Relations (DIR).<sup>13</sup> These agencies do not make available to the public the Board’s decisions or its orders adopting settlements or other case resolutions, except in response to established specific information requests.<sup>14</sup> The Board itself has no statutory or regulatory authority to publish or disseminate its decisions and orders.<sup>15</sup>

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<sup>10</sup> See U.S. DEP’T OF LABOR, REVIEW OF THE NEVADA OCCUPATIONAL SAFETY AND HEALTH PROGRAM, at ii–v (2009), <https://www.osha.gov/dcsp/final-nevada-report.pdf> [<https://perma.cc/998H-XJ2D>]. Under NRS § 618.635, an employer “who willfully or repeatedly violates any . . . standard, rule, regulation or order promulgated or prescribed pursuant to this chapter, may be assessed an administrative fine of not more than \$70,000 for each violation, but not less than \$5,000 for each willful violation.” NEV. REV. STAT. § 618.635 (2013). Under NRS § 618.645, an employer “who has received a citation for a serious violation of any requirement of this chapter, or any standard, rule, regulation or order promulgated or prescribed pursuant to this chapter, must be assessed an administrative fine of not more than \$7,000 for each such violation. If a violation is specifically determined to be of a nonserious nature an administrative fine of not more than \$7,000 may be assessed.” NEV. REV. STAT. § 618.645 (2013).

<sup>11</sup> Hosier, *supra* note 9.

<sup>12</sup> Press Release, U.S. Dep’t of Labor, US Department of Labor’s OSHA Announces Opening of Area Office in Las Vegas (Sept. 2, 2010), [https://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=NEWS\\_RELEASES&p\\_id=18291](https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=18291) [<https://perma.cc/JA2J-UNNU>]; Eglet Wall Christiansen, *Federal OSHA Officials Prepare for Active Role in Nevada OSHA Overhaul*, HG.ORG, <http://www.hg.org/article.asp?id=18721> [<https://perma.cc/LY7D-QBGE>] (last visited Mar. 24, 2016).

<sup>13</sup> See Nevada Occupational Safety and Health Act, NEV. REV. STAT. §§ 618.005–.990.

<sup>14</sup> In Nevada, freedom of information is provided under the Open Records Law and the Open Meetings Law. The Open Records Law is found under NRS chapter 239. *Id.* §§ 239.001–.330; see also *Nevada Freedom of Information*, USLEGAL, <http://freedomofinformationacts.uslegal.com/state-freedom-of-information-acts/nevada/#sthash.HtFYIV0S.dpuf> [<https://perma.cc/EB5Y-6MWH>] (last visited Mar. 24, 2016). A sample request may be

Even though DIR and DI are charged with protecting worker safety and health in Nevada, there seems to be no recognition of the obligation, let alone the many benefits and values, of assuring easy public access to the Board's decisions and orders. Further, especially with regard to settlements of contested cases or other resolutions reached after cases are filed before the Board, the absence of disclosure inevitably fosters concern about the nature of the factors that may have been allowed to influence the outcome. Inexplicably, federal OSHA has not addressed this issue either in its scathing 2009 report on the Nevada state plan<sup>16</sup> or in its ongoing active oversight of the state's activities.

The purpose of this article is to show that it is long since time for the Board's decisions, approvals of settlements, and final case resolution orders to be made readily available to the public. The means for doing so are not difficult, and they are inexpensive. Whatever reasoning may account for prior non-disclosure is beyond the scope of this article. The key now is to ensure disclosure, and thereby enhance transparency, accountability, and due process in OSHA regulation in Nevada.

In this article, I describe briefly the Nevada State Plan for Occupational Safety and Health, including the operation of the Board. I compare the disclosure practices implemented by the federal Occupational Safety and Health Review Commission (OSHRC)—the independent agency that adjudicates contested federal OSHA citations. Next, I provide examples of the important decisions and orders that the Board issues, but which are not made public. Finally, I discuss reasons why DIR's failure to publish and disseminate the Board's decisions and case resolution orders is contrary to the public interest and the goal of protecting Nevada's workers, and propose means of curing this deficiency.

#### I. THE NEVADA OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (NOSHA)

Section 18(a) of the federal OSH Act provides that if the Secretary of Labor determines that a state has adopted safety and health standards that are comparable to federal OSHA's and has an enforcement program that satisfies the criteria in Section 18(c) of the Act, jurisdiction could be returned to the state by approving its state plan.<sup>17</sup> Section 18(c) contains broadly stated criteria

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found at: *Nevada Sample FOIA Request*, NAT'L FREEDOM OF INFO. COALITION, <http://www.nfoic.org/nevada-sample-foia-request> (last visited Apr. 13, 2016) [<https://perma.cc/W3T7-KE8E>].

<sup>15</sup> See Nevada Occupational Safety and Health Act, NEV. REV. STAT. §§ 618.005–.990; Nev. ADMIN. CODE §§ 618.001–.9927 (2015).

<sup>16</sup> See generally U.S. DEP'T OF LABOR, *supra* note 10.

<sup>17</sup> 29 U.S.C. § 667(a)–(c) (2012). It is beyond the scope of this article to explore the extent to which a state regained jurisdiction upon gaining approval of a plan. The Nevada State Plan applies to all public and private sector places of employment in the state with the exception of federal government employees including those employed by the United States Postal Service; private sector maritime, employment on Indian Lands, and areas of exclusive federal jurisdiction. These workplaces are covered under federal OSHA jurisdiction. See *Nevada*

to govern plan approval. Twenty-five states, Puerto Rico, and the Virgin Islands have OSHA-approved state plans.<sup>18</sup> Under the Nevada state plan, the Administrator of the Occupational Safety and Health Administration is charged with responsibility for the operation of NOSHA.<sup>19</sup> The Enforcement Section of NOSHA conducts workplace inspections. If appropriate, the Section issues any resulting citations, identifying the NOSHA safety or health standards or regulations allegedly violated by the employer,<sup>20</sup> the proposed penalties, the degree of severity of the violation,<sup>21</sup> and the date by which alleged hazards are to be abated (i.e., corrected).<sup>22</sup> A cited employer has fifteen working days following its receipt of a citation within which to challenge it, a process known as a “contest.”<sup>23</sup> If a Notice of Contest is not submitted to NOSHA within that period, the citation becomes a final and unreviewable order of the Board.<sup>24</sup>

## II. THE NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

Under the federal OSH Act, Congress created the federal Occupational Safety and Health Review Commission (OSHRC), an *independent* agency purposely established outside the federal Department of Labor.<sup>25</sup> The point of OSHRC was to ensure that employers could receive review of OSHA citations by an agency not aligned with the enforcement arm of federal OSHA.<sup>26</sup>

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*State Plan, supra* note 4. The precise limits of state and federal jurisdiction are a frequent issue in controversy. *See* ROTHSTEIN, *supra* note 2, § 2:15. It is important to note in Nevada that worker safety and health in mining is regulated by the Federal Mine Safety and Health Administration (MSHA).

<sup>18</sup> Press Release, U.S. Dep’t of Labor, Agency Calls for Corrective Actions to Keep Workers Safe (Sept. 28, 2010), [https://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=NEWS\\_RELEASES&p\\_id=18414](https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=18414) [<https://perma.cc/PS6E-9L58>].

<sup>19</sup> NEV. ADMIN. CODE § 618.002 (2015). NOSHA is within the Nevada Division of Industrial Relations, Department of Business and Industry. NEV. REV. STAT. § 618.235 (2013).

<sup>20</sup> In OSHA parlance, there is a difference between an OSHA “standard” and a “regulation.” This became significant because under the federal statute, judicial review of a new standard must be brought in the appropriate United States Court of Appeals. Judicial review of a regulation must be brought in a federal district court. The Fifth Circuit held that standards are “remedial measure[s] addressed to a specific and already identified hazard, not as a purely administrative effort designed to uncover violations of the Act and discover unknown dangers.” *La. Chem. Ass’n v. Bingham*, 657 F.2d 777, 782 (5th Cir. 1981). *See generally* ROTHSTEIN, *supra* note 2, § 4:31.

<sup>21</sup> The various degrees of OSHA violations are set forth in the Nevada Operations Manual. NEV. DEP’T OF BUS. & INDUS., NEVADA OPERATIONS MANUAL (NOM) 9 (2013), <http://dir.nv.gov/uploadedFiles/dirnv.gov/content/Governance/nom.pdf> [<https://perma.cc/635C-BP5T>]; *see also* ROTHSTEIN, *supra* note 2, §§ 14:1–9.

<sup>22</sup> NEV. ADMIN. CODE § 618.6458 (2015).

<sup>23</sup> *See id.* § 618.6488.

<sup>24</sup> NEV. REV. STAT. § 618.475 (2015).

<sup>25</sup> *See* ROTHSTEIN, *supra* note 2, §§ 1:4, 3:1.

<sup>26</sup> *Id.* § 16:1. Professor Rothstein describes the decision to separate the enforcement and adjudicatory functions as “an experiment in administrative bureaucracy.” *Id.*

Federal OSHA promulgated regulations that states were required to satisfy to secure approval of a proposed state OSHA plan. The regulations set forth tests for determining whether a proposed plan contained sufficient provisions as to enforcement of OSHA standards and regulations and assessment of penalties.<sup>27</sup> A state plan must also provide a means for adjudicating contested citations. Federal OSHA's regulation requires that the state plan:

(xii) Provides for an employer to have the right of review of violations alleged by the State, abatement periods, and proposed penalties and for employees or their representatives to have an opportunity to participate in review proceedings, *by such means as providing for administrative or judicial review, with an opportunity for a full hearing on the issues.*<sup>28</sup>

The federal regulations do not specify what mechanisms are required to ensure administrative or judicial review. The Nevada plan establishes a five-member Occupational Safety and Health Review Board whose members are appointed by the Governor.<sup>29</sup> The Board consists of two members representative of "management," two members representative of "labor," and one member representative of "the general public."<sup>30</sup> The members serve no more than two four-year terms.<sup>31</sup> "A quorum consists of at least three members of the Board, at least one of whom must represent labor and one of whom must represent management."<sup>32</sup> While it is not a requirement, several of the Board members have been attorneys. Typically, the Board members have significant experience in occupational safety and health matters. In keeping with the theme of independent review, none of the Board members may be employed by the Division of Industrial Relations.<sup>33</sup> Also, the Nevada legislature authorized the Board to engage a private attorney to advise it, so that the Board receives independent advice from counsel not employed by the state.<sup>34</sup>

The role of the Board is to adjudicate the merits of a contested citation, including the substance of the alleged violations, its characterization, the proposed penalty, and the date for abating cited hazards.<sup>35</sup> Often, employers and NOSHA will arrive at a settlement before the contest period expires, which can bring the matter to a close before the case is brought before the Board. If no settlement is reached and the employer files a timely Notice of Contest, the Chief of NOSHA "shall" file a Complaint before the Board within twenty days

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<sup>27</sup> Federal OSHA's regulations describing the procedures for state plan approval are at 29 C.F.R. § 1902 (2015).

<sup>28</sup> *Id.* § 1902.4(c)(2)(xii) (emphasis added).

<sup>29</sup> NEV. REV. STAT. § 618.565(1) (2015).

<sup>30</sup> *Id.* § 618.565(2).

<sup>31</sup> *Id.* § 618.565(3).

<sup>32</sup> *Id.* § 618.585(4).

<sup>33</sup> *Id.* § 618.565(4).

<sup>34</sup> *Id.* § 618.585(2).

<sup>35</sup> *See generally* NEV. ADMIN. CODE §§ 618.650–.848 (2015) ("Practice Before the Occupational Safety and Health Review Board").

after receiving the Notice.<sup>36</sup> The Complaint must set forth the elements of the alleged violation, and must include a statement of the Board's "jurisdiction."<sup>37</sup>

The Board generally meets only two days each month. Hearing locales alternate between Las Vegas and Reno, NV. Under recent changes in Nevada's statute on open meetings of public agencies,<sup>38</sup> notices of forthcoming hearings are published on the state government website.<sup>39</sup> The information provided, however, consists only of a case name and docket number.<sup>40</sup> No information is given about the issues involved. When meetings are in Reno, the notices are also posted at the Carson City, NV Library, the Carson City Court House, the Washoe County Courthouse, NIOSHA'S offices in Reno, and the location where the hearing will be held. When meetings are in Las Vegas, notices are posted at the Enterprise Branch of the Las Vegas, NV Library (where the Board's hearings in Las Vegas are held), NIOSHA's office in Henderson, NV, the Regional Justice Center, and the Carson City Library.<sup>41</sup>

The Nevada Administrative Code (NAC) contains elaborate regulations governing practice and procedure before the Board.<sup>42</sup> Discovery before the Board is very constrained. The employer may obtain NIOSHA's investigative file (redacted to protect the informer's privilege) and serve requests for admissions.<sup>43</sup> Only a very limited right exists to serve document requests, interrogatories, or to notice depositions in special circumstances.<sup>44</sup> Prehearing exchanges of exhibits and witness lists by Nevada OSHA's attorney and the employer often occur on the morning of a hearing, sometimes only minutes before the hearing begins. In the author's experience, the process sometimes approaches "trial by ambush."

The lack of more robust discovery, especially depositions, is unfortunate. While perhaps intended to streamline litigation and control costs, as a practical matter, it diminishes the frequency of settlement, especially in significant or

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<sup>36</sup> NEV. ADMIN. CODE § 618.746(2)(a) (2015).

<sup>37</sup> *Id.*

<sup>38</sup> NEV. REV. STAT. § 241.010 (2015). The purpose clause of the statute states: "In enacting this chapter, the Legislature finds and declares that all public bodies exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly." *Id.*

<sup>39</sup> *See, e.g.*, Notice, Meeting of the Nevada Occupational Safety and Health Review Board (Apr. 27, 2015), <http://business.nv.gov/uploadedFiles/businessnv.gov/content/About/Meetings/January%202016%20OSHA.pdf> [<https://perma.cc/M7HS-RYZY>].

<sup>40</sup> *See, e.g.*, Notice, Meeting of the Nevada Occupational Safety and Health Review Board (Dec. 28, 2015), <http://business.nv.gov/uploadedFiles/businessnv.gov/content/About/Meetings/May%202015%20OSHA.pdf> [<https://perma.cc/EGZ6-A8DJ>].

<sup>41</sup> *See generally* NEV. PUB. NOTICE WEBSITE, <https://notice.nv.gov/> [<https://perma.cc/Q326-PCEE>] (last visited Mar. 27, 2016); Notice, *supra* note 39.

<sup>42</sup> *See* NEV. ADMIN. CODE §§ 618.650–.848 (2015).

<sup>43</sup> *Id.* § 618.800.

<sup>44</sup> *Id.* § 618.797 ("Except by special order of the Board, discovery depositions of parties, interveners or witnesses are not allowed.").

complex cases. In federal OSHA litigation, more robust discovery is allowed, which often facilitates settlement.<sup>45</sup>

Employees who are affected by a citation, or their authorized representative (such as a labor organization with a collective bargaining relationship with the cited employer), may participate as parties before the Board.<sup>46</sup>

Hearings before the Board are formal, open to the public, and conducted on the record. An official transcript is created, and witnesses give sworn testimony.<sup>47</sup> The Board's regulations state that "[h]earings before the Board must be in accordance with the Nevada Administrative Procedure Act, chapter 233B of NRS, and, if practicable, must be governed by the rules of evidence applicable in the district courts of this State."<sup>48</sup>

Hearings are conducted before all five Board members, sitting together as a trial court. NOSHA is represented before the Board by an attorney employed by the Division of Industrial Relations. A party may represent itself or appear through a representative who often is, but is not required to be, an attorney. Evidence in support of the citations issued by Nevada OSHA is presented, and the employer has the opportunity to cross-examine witnesses and object to the introduction of evidence. Then the employer presents its case, and NOSHA may likewise cross-examine and challenge evidence.<sup>49</sup>

Each member of the Board may question each witness. Procedural or evidentiary objections or questions are discussed openly by the Board members, and if necessary, a vote is conducted to decide how the Board Chairman should rule on the point. The Board's outside counsel sits with the Board during hearings and provides nonbinding, impartial legal guidance on such issues as they arise. As a practical matter, because some parties are not represented by counsel, the Board's counsel helps assure that a full record is developed.

#### *A. The Board's Decisions and Orders*

Typically, the Board does not allow the parties to submit post-hearing briefs; rather, closing arguments, if any, may be presented at the close of the hearing. The Board's outside counsel prepares drafts of the Board's Decision and Orders for the Board members' review and approval. These documents typically consist of a detailed recitation of the alleged violations of OSHA standards and regulations set forth in the citations being challenged, the evidence adduced at the hearing (often including a witness-by-witness summary of tes-

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<sup>45</sup> See generally 29 C.F.R. §§ 2200.50–.57 (2015).

<sup>46</sup> NEV. ADMIN. CODE §§ 618.653, .656, .698 (2015).

<sup>47</sup> *Id.* § 618.842.

<sup>48</sup> *Id.* § 618.803.

<sup>49</sup> See generally *id.* §§ 618.650–.848.



timony), a summary of the parties' positions and arguments, and a discussion of the Board's determination on each citation item and proposed penalty.<sup>50</sup>

The decisional discussions typically include citations and discussion of legal precedent. The Board will often reference its own prior decisions. Typically, the Board also cites federal OSHA case law in decisions issued by federal OSHRC or federal courts that have reviewed OSHRC decisions.

The Decision is then provided to the parties. The prevailing party is typically ordered to submit and share with the opposing party Proposed Findings of Fact and Conclusions of Law and a Proposed Order. The Board then adopts those findings and conclusions as it deems proper. Once the Finding and Conclusions are formally issued, they are considered to constitute the final order of the Board.<sup>51</sup>

#### B. *The Board's Orders Approving Settlements and Other Case Resolutions*

NOSHA's ability to withdraw a citation is without apparent limitation.<sup>52</sup> In its Complaint, however, NOSHA is required to articulate, and thus acknowledge, the Board's "jurisdiction" over the case.<sup>53</sup> Thus, once a case has been placed before the Board, if NOSHA wishes to amend the citations in its Complaint, it must present reasons for the proposed amendment.<sup>54</sup> Similarly, if the parties agree to settle a contested case, they must submit a proposed settlement and proposed order to the Board, which will approve it, but only "if the settlement is consistent with the provisions and objectives of chapter 618 of NRS."<sup>55</sup> Often in a settlement, an employer will withdraw its Notice of Contest, but such withdrawals are "subject to the approval of the Board."<sup>56</sup>

Disclosure of this aspect of the Board's functions can be as important as disclosure of its decisions on the merits. By its oversight function, the Board assures that settlements of contested cases are consistent with the statutory purposes and with the requirements of NOSHA standards and regulations. The Board may also inquire as to how abatement (i.e., correction of hazards) is to be achieved and the timetable it is to be accomplished.<sup>57</sup> For example, in a case observed by the author in 2014, the Board denied approval of a settlement until

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<sup>50</sup> See, e.g., *Chief Admin. Officer v. Cat House, Inc.*, No. LV 12-1512 (Nev. Occupational Safety & Health Review Bd. May 20, 2013).

<sup>51</sup> NEV. ADMIN. CODE § 618.836 (2015).

<sup>52</sup> This would be consistent with the Supreme Court's decision in *Cuyahoga Valley Ry. Co v. United Transp. Union*. 474 U.S. 3 (1985). In that case, the Supreme Court held that only federal OSHA has the authority to withdraw a citation. *Id.* at 6–8.

<sup>53</sup> NEV. ADMIN. CODE § 618.746(2)(a) (2015).

<sup>54</sup> *Id.* § 618.746(3).

<sup>55</sup> *Id.* § 618.833.

<sup>56</sup> *Id.* § 618.773.

<sup>57</sup> The federal Review Commission has insisted that it has jurisdiction to consider settlements, including how abatement is to be accomplished. See generally *Nashua Corp.*, 9 BNA OSHC 1113 (No. 78–2146 1980).

NOSHA provided proof that it would have the authority to enforce a proposed abatement agreement against an employer performing work as a contractor to a federal agency on federal land. Thus, it is important that the public have access to orders approving settlement or withdrawal of notices of contest so that the reasons and manner in which cases are resolved are revealed, and so that they can provide guidance as to NOSHA's enforcement policies and positions.

*C. The Board's Decisions are Not Made Public Unless a Specific Request Is Made*

The Board's final decisions and orders are sent to DIR's attorney at the Office of Division Counsel of the Department of Business and Industry. NOSHA also receives a copy, either from the Board or NOSHA's counsel. The employer involved, and its representative, if any, also receive a copy.

The state's public access law requires that hearings before agencies, such as the Board, are open to the public and that minutes or other records of the proceeding be kept.<sup>58</sup> However, no explicitly stated requirement mandates that such decisions be published. DIR has chosen not to distribute the Board's decisions or orders anywhere in the state. They are not sent to or published by any commercial reporting service, either in hard copy or online. The State does not maintain a website where the Board's decisions or orders are even mentioned, much less posted or made available.<sup>59</sup> Indeed, the Nevada OSHA website contains no link to the Board's decisions.<sup>60</sup> The Nevada OSHA Operations Manual, which contains detailed information about the agency's procedures and processes, states that it "reserved" Chapter 16, titled "Disclosure under the Freedom of Information Act (FOIA) Disclosure." In other words, nothing appears there about the Board, or about anything else for that matter.<sup>61</sup>

DIR Counsel, which represents Nevada OSHA before the Board, has acknowledged its obligation to respond to public access requests for copies of Board decisions. For example, in 2013, Division Counsel responded to a written request for all decisions issued since 1998 by providing a selection of decisions issued between 2008 and 2010, but stating that no decisions issued between 1998 and 2007 were available.<sup>62</sup> This was attributed to a five-year

<sup>58</sup> See NEV. REV. STAT. § 241.020 (2015); *id.* § 241.035.

<sup>59</sup> See, *Business and Industry Divisions*, DEP'T OF BUS. AND INDUS., [http://business.nv.gov/Business/Business\\_and\\_Industry\\_Divisions](http://business.nv.gov/Business/Business_and_Industry_Divisions) [<https://perma.cc/NW2C-QY6K>] (last visited Apr. 11, 2016).

<sup>60</sup> See, *Occupational Safety and Health Administration*, NEV. DEP'T OF BUS. AND INDUS., <http://dir.nv.gov/OSHA/Home> [<https://perma.cc/L8QE-67KT>] (last visited Apr. 11, 2016). As discussed below, the federal Occupational Safety and Health Review Commission (OSHRC) maintains a website where the Commission's decisions, and those of its administrative law judges, are available. See OCCUPATIONAL SAFETY & HEALTH REV. COMMISSION, [www.oshrc.gov](http://www.oshrc.gov) [<https://perma.cc/QC94-8FS7>] (last visited Apr. 11, 2016).

<sup>61</sup> NEV. DEP'T OF BUS. & INDUS., *supra* note 21, at 218.

<sup>62</sup> Letter from Donald C. Smith, Senior Division Counsel, Dep't of Bus. & Indus., to Stephen C. Yohay, (Apr. 25, 2013) (on file with the author).

retention policy. A promise to produce additional decisions was also stated.<sup>63</sup> Other than this rather hit-and-miss means of securing copies of decisions, however, there appear to be no other means for the public to know of or gain access to Board decisions and orders.

The Board's adjudicative decisions, as final orders, may be appealed as of right by either party to the Nevada District Court in the District in which the case arose.<sup>64</sup> The District Court's decision may be appealed to the Nevada Supreme Court.<sup>65</sup> In the history of Nevada OSHA, only a relative handful of the Board's decisions have been appealed to district courts. Those decisions are not officially reported. Further, as of this writing, there appears to have been very few reported cases involving review of Nevada OSHA citations that have been decided by the Nevada Supreme Court on the merits of a citation.<sup>66</sup>

The result, therefore, is that a substantial body of administrative law has developed in Nevada in the form of decisions and orders issued by the Board. Decisions have been issued interpreting and applying important NOSHA standards and addressing how NOSHA inspections are to be conducted. Orders approving settlements reflect how NOSHA approaches enforcement and allocates its enforcement resources. The problem, however, is that while NOSHA knows of this law, it is nearly invisible to the general public and the legal community.

As a reason for non-publication, some have contended that the Board's decisions are not binding precedent, and that the Board sits only as a fact finder. This argument ignores the fact that Board decisions are often replete with sophisticated legal analysis, with reference to prior Nevada and federal decisions. It is not sensible to suggest, moreover, that prior Board decisions and orders approving settlements or other resolutions do not suggest how NOSHA and the Board may approach similar issues in the future, or that a litigant who will appear before the Board would learn nothing from reviewing prior Board decisions and orders.

This argument also ignores the critical value of subjecting NOSHA's enforcement, the conduct of employers, and the Board's decisions to the important effect of public review and scrutiny. Disclosure also promotes compliance with NOSHA requirements by clarifying the requirements of NOSHA standards and regulations, and illustrating the consequences of non-compliance.

Given that the purpose of NOSHA's state plan is to help protect the safety and health of Nevada workers, it is hard to understand the rationale for making it difficult, if not impossible, for the regulated community to have access to these decisions. If anything, this approach undermines NOSHA's primary goal.

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<sup>63</sup> *Id.*

<sup>64</sup> NEV. DEP'T OF BUS. & INDUS., *supra* note 21, at 217; *see* NEV. REV. STAT. § 233B.130 (2015).

<sup>65</sup> NEV. REV. STAT. § 233B.150 (2015).

<sup>66</sup> *Century Steel, Inc. v. Div. of Indus. Relations*, 122 Nev. 584, 586 (2006); *Div. of Occupational Safety and Health v. Pabco Gypsum*, 105 Nev. 371, 373 (1989) (a supervisor's knowledge of deviations of standards is properly imputed to the employer).

### III. THE NEVADA OPEN MEETINGS LAW AND THE NEVADA ADMINISTRATIVE PROCEDURE ACT.

In enacting Nevada's Opening Meetings statute, the legislature stated that "public bodies exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly."<sup>67</sup> The Nevada Supreme Court has stated that

[t]he purpose of Nevada's Open Meeting Law is dispositively set forth in NRS 241.010. . . . "[T]he spirit and policy behind NRS chapter 241 favors open meetings." Further, "a statute promulgated for the public benefit such as a public meeting law should be liberally construed and broadly interpreted to promote openness in government."<sup>68</sup>

As noted, in compliance with the statute, the Board publishes notice of forthcoming hearings, which are open to the public. It is plainly inconsistent with the statute, however, for the Board's decisions and orders not to be equally disclosed and available. The Utah Supreme Court has construed that state's open meetings statute to mean that "[t]he formal record [of a public proceeding] consists of the minutes of the hearing and the *formal findings and order*."<sup>69</sup> Clearly, the Nevada Board's decisions and orders should likewise be considered part of the record that is open and readily available to the public.

Further, the Nevada Administrative Procedure Act (NAPA) applies to all proceedings conducted under the Occupational Safety and Health Act.<sup>70</sup> The Nevada Supreme Court, construing the NAPA, has said that "the rudiments of fair play" must be observed in administrative hearings.<sup>71</sup> It is patently unfair, if not highly unseemly and irregular, for NOSHA's attorneys to have access to prior Board decisions and orders approving settlements and case resolutions, while cited employers likely do not even know of them. Indeed, this would seem to approach a due process violation. Employers who contest NOSHA citations should consider adding this point as an affirmative defense in Answers filed in response to NOSHA complaints. This would arguably allow the issue to be raised before the Board itself, as well as before a reviewing court on appeal.

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<sup>67</sup> NEV. REV. STAT. § 241.010 (2015).

<sup>68</sup> *Dewey v. Redevelopment Agency of Reno*, 119 Nev. 87, 94 (2003).

<sup>69</sup> *Xanthos v. Bd. of Adjustment of Salt Lake City*, 685 P.2d 1032, 1034 (Utah 1984) (emphasis added); *see also* 62 CORPUS JURIS SECUNDUM, C.J.S. MUNICIPAL CORPORATIONS § 317 (2015) (because minutes are only evidence of municipality's official actions, authenticated minutes provide record for such actions).

<sup>70</sup> *See* NEV. REV. STAT. § 233B.130 (2015); *id.* § 618.005; *Frith v. Harrah S. Shore Corp.* 92 Nev. 447, 449 (1976).

<sup>71</sup> *Checker, Inc. v. Pub. Serv. Comm'n*, 84 Nev. 623, 634 (1968).

#### IV. THE FEDERAL OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION (OSHRC)

OSHRC's website illustrates the importance of making such decisions readily available to the public.<sup>72</sup> As noted, OSHRC is an independent federal agency, not part of OSHA or the Department of Labor.<sup>73</sup> It provides administrative trial and appellate review to decide contests of citations or penalties resulting from federal OSHA inspections of American workplaces.

OSHRC functions as a two-tiered administrative court. Its Administrative Law Judges conduct formal evidentiary hearings and render detailed written decisions. An unsuccessful party may seek discretionary review of an ALJ decision by three Commissioners who are nominated by the President and confirmed by the Senate.<sup>74</sup> If no Commissioner directs review, the ALJ decision becomes a "final order" of the Commission, and an appeal as of right may be taken to the appropriate United States Court of Appeals.<sup>75</sup> OSHRC is subject to federal statutes and regulations compelling disclosure, such as the Freedom of Information Act (FOIA).<sup>76</sup> OSHRC's regulations implementing FOIA include the following:

(c) Record availability at the OSHRC e-FOIA Reading Room. The records of Commission activities are publicly available for inspection and copying, and may be accessed electronically through the Commission's Web site at [http://www.oshrc.gov/foia/foia\\_reading\\_room.html](http://www.oshrc.gov/foia/foia_reading_room.html). These records include:

(1) Final decisions, including concurring and dissenting opinions, remand orders, as well as Administrative Law Judge decisions pending OSHRC review, issued as a result of adjudication of cases.<sup>77</sup>

Several commercial reporting services also routinely publish OSHRC decisions in hard-copy, and the decisions are available from electronic research sources.<sup>78</sup>

Additionally, in accordance with the OPEN Government Act of 2007,<sup>79</sup> and an implementing directive issued by the federal Office of Management and Budget, the Commission recently updated its practices to ensure that its work complies with the objective of transparency in government.<sup>80</sup> This includes enhancing the public's access to the decisions issued by its Administrative Law

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<sup>72</sup> See OCCUPATIONAL SAFETY & HEALTH REVIEW COMMISSION, *supra* note 60.

<sup>73</sup> ROTHSTEIN, *supra* note 2, § 16.1.

<sup>74</sup> See 29 C.F.R. § 2201.2 (2015). Unfortunately, in the history of OSHRC, there have often been only two, and occasionally only one, sitting Commissioner, as politics have sometimes intervened to interfere with the process of appointing and confirming Commissioners.

<sup>75</sup> ROTHSTEIN, *supra* note 2, § 18.1.

<sup>76</sup> 5 U.S.C. § 552 (2012).

<sup>77</sup> Regulations Implementing the Freedom of Information Act, 29 C.F.R. § 2201.4 (2010).

<sup>78</sup> See OCCUPATIONAL SAFETY & HEALTH REVIEW COMMISSION, *supra* note 60.

<sup>79</sup> OPEN Government Act of 2007, S. 2488, 110th Cong. (2007).

<sup>80</sup> U.S. OCCUPATIONAL SAFETY & HEALTH REVIEW COMM'N, U.S. OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION OPEN GOVERNMENT PLAN 1 (2015).

Judges, as well as the appellate decisions issued by the full Review Commission.<sup>81</sup> The OPEN Act amended the Freedom of Information Act, and it quotes the laudable principle stated by Mr. Justice Black in a concurring opinion in *Barr v. Mateo*:

The effective functioning of a free government like ours depends largely on the force of an informed public opinion. This calls for the widest possible understanding of the quality of government service rendered by all elective or appointed public officials or employees. Such an informed understanding depends, of course, on the freedom people have to applaud or to criticize the way public employees do their jobs, from the least to the most important.<sup>82</sup>

In addition to the overall goal of transparency in government, the way OSHRC has implemented these principles enhances the goals of the federal OSH Act to protect working Americans by disseminating decisions that interpret and apply OSHA requirements. This should be the same set of goals and principles followed by the Nevada DIR. This is especially so inasmuch as assuring access to Board decisions and orders would require no change in the way these agencies conduct business, as shown below.

#### V. THE LION BITE CASE: A NEVADA OSH BOARD DECISION THAT SHOULD HAVE BEEN PUBLISHED

Most Board decisions address relatively traditional safety and health issues, such as construction safety, electrical hazards, manufacturing processes, or exposure to toxic substances. One recent decision, however, involved an unusual and intriguing issue—direct human contact with wild animals—that has been the focus of national attention. Few outside those involved likely know, however, that the Nevada Board directly addressed this point.

The tragic death of an orca (sometimes called “killer whale”) trainer at Sea World of Florida in 2010 stimulated much national debate on whether direct contact between wild animals and humans should be permitted in entertainment contexts, and whether federal OSHA should regulate this activity.<sup>83</sup> OSHA responded to the Sea World accident by issuing citations alleging willful violations of its “General Duty Clause.” The General Duty Clause requires employers to provide a workplace “free of recognized hazards likely to cause death or serious physical harm.”<sup>84</sup> It may be used as a basis for a citation where there is no specific standard that addresses a recognized hazard.<sup>85</sup>

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<sup>81</sup> *Id.* at 4.

<sup>82</sup> *Barr v. Mateo*, 360 U.S. 564, 577 (1959) (Black, J., concurring).

<sup>83</sup> *See, e.g.*, Aditi Mukherji, *D.C. Circuit Weighs in on “Blackfish” and SeaWorld’s OSHA ‘Tale’*, FINDLAW: DC CIRCUIT (Nov. 19, 2013, 2:57 PM), [http://blogs.findlaw.com/dc\\_circuit/2013/11/dc-circuit-weighs-in-on-blackfish-and-seaworlds-osh-tale.html](http://blogs.findlaw.com/dc_circuit/2013/11/dc-circuit-weighs-in-on-blackfish-and-seaworlds-osh-tale.html) [https://perma.cc/5ZWH-4XXW].

<sup>84</sup> *See Gen. Dynamics Corp. v. Occupational Safety & Health Review Comm’n*, 599 F.2d 453, 458, 464 (1st Cir. 1979); *Titanium Metals Corp. of Am. v. User*, 579 F.2d 536, 543–44 (9th Cir. 1978); *Getty Oil Co. v. Occupational Safety & Health Review Comm’n*, 530 F.2d

OSHA invested significant resources in pursuing the Sea World case, and a federal OSHRC Administrative Law Judge affirmed the citations.<sup>86</sup> Sea World unsuccessfully sought discretionary review by the full OSHRC.<sup>87</sup> Sea World then sought judicial review and OSHA'S citations were upheld by the United States Court of Appeals for the District of Columbia Circuit.<sup>88</sup> The Court rejected Sea World's argument that when a risk is inherent in a business activity, it cannot be considered a "recognized hazard" under the General Duty Clause.<sup>89</sup> How useful it might have been to know that, while federal OSHA and the D.C. Circuit Court of Appeals were dealing with Sea World, Nevada's OSH Review Board had previously considered and dismissed Nevada OSHA Citations arising from an incident involving human contact with wild animals in which a lion on display in a Las Vegas casino exhibit bit one of its trainers.<sup>90</sup>

For many years, a major hotel and casino on "The Strip" in Las Vegas housed a public exhibit, known as the "Lion Habitat," where two adult lions and several lion cubs were displayed in an enclosure while working with their trainers. The owner of the Habitat sought to show that hand and voice controls are the best techniques to control lions. As such, the trainers did not control the lions with artificial or physical means such as chairs, whips, chains or drugs. The lions could be seen engaging in activities such as eating raw meat out of their trainers' hands, lying down with the trainers, sleeping, walking around their enclosure and simply coexisting in apparent calm with their trainers. The owner of the exhibit contended that the lions responded to him and the trainers because he raised the cats from the time they were cubs and used a special method to permit himself and the trainers to safely deal with the large cats in a controlled environment.

On September 1, 2010, however, one of the adult lions attacked and bit one of the handlers. The episode ended quickly, and the handler recovered from his

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1143, 1145 (5th Cir. 1976); *Brennan v. Occupational Safety & Health Review Comm'n*, 501 F.2d 1196, 1198, 1201 (7th Cir. 1974); *Brennan v. Occupational Safety & Health Review Comm'n*, 502 F.2d 946, 951 (3d Cir. 1974); *REA Express, Inc. v. Brennan*, 495 F.2d 822, 826 (2d Cir. 1974); *Nat'l Realty & Constr. Co. v Occupational Safety & Health Review Comm'n*, 489 F.2d 1257, 1265 (D.C. Cir. 1973); ROTHSTEIN, *supra* note 2, § 6:2.

<sup>85</sup> ROTHSTEIN, *supra* note 2, § 6:2.

<sup>86</sup> *Sec'y of Labor v. SeaWorld of Fla., L.L.C.*, 24 BNA OSHC 1303 at \*2 (No. 10-1705 2012).

<sup>87</sup> *SeaWorld of Fla., L.L.C., v. Perez*, 748 F.3d 1202, 1207 (D.C. Cir. 2014).

<sup>88</sup> *Id.* at 1216.

<sup>89</sup> *Id.* at 1210.

<sup>90</sup> *Chief Admin. Officer v. Cat House, Inc.*, No. LV 12-1512 (Nev. Occupational Safety & Health Review Bd. May 20, 2013). Regrettably, the author knows of no internet or other link that would permit the reader to obtain a copy of this Decision. Presumably, one could make a public information request of the Board. The *Cat House* case and its significance are discussed in an article written by the author: Stephen C. Yohay, *The Lion Bite Case Sleeps in Nevada, But It's a Whale of a Story*, BEST LAW., <http://www.bestlawyers.com/Article/lion-bite-case-sleeps-nevada-but-s-whale-story/218> [<https://perma.cc/CY3A-5RUV>].

injuries and eventually returned to work with the lions.<sup>91</sup> The event happened to be recorded by tourists visiting the exhibit, and the video went “viral.”<sup>92</sup> NOSHA investigated, and issued two citations to The Cat House, the company that operated the exhibit.<sup>93</sup>

Under the Nevada equivalent of the federal General Duty Clause, the first citation item alleged that, by requiring employees to work in direct contact with lions located in an enclosed environment, the employer failed to furnish employment free from recognized hazards likely to cause death or serious physical harm.<sup>94</sup> This was essentially the same legal issue as later raised in *Sea World*.<sup>95</sup> In the second citation item, under the Nevada equivalent of an OSHA standard on personal protective equipment, 29 C.F.R. 1910.132(d)(1), NOSHA alleged that The Cat House failed to perform a hazard assessment to determine if the handlers needed to use personal protective equipment when working directly with the lions. NOSHA asserted that the trainers should have been provided with pepper spray or air horns to ward off an onrushing lion.<sup>96</sup>

In its decision dismissing the citations, the Board adopted an approach contrary to that of federal OSHA and the D.C. Circuit. The Board noted that federal OSHA has not developed any specific standard addressing the issue of human contact with animals. The Board held that occupational safety regulators have no business becoming involved in issues related to human-animal contact in the workplace without clear direction from Congress. The Board stated:

Congress has not promulgated or codified specific standards to control the wide based entertainment industry for direct contact work with wild animal acts, shows or performances. The Nevada Occupational Safety & Health Review Board is without authority or jurisdiction to create new law or legislate an industry that is surely well known to the nations [sic] lawmakers.<sup>97</sup>

The two cases present fascinating and divergent approaches to whether, and how, human contact with wild animals in an entertainment context should be regulated. However, it is unfortunate that, because the Board’s Decision was not published or made known when it was issued, the rationale the Board adopted did not become part of the subsequent robust public or judicial discourse on this controversial issue. Locally, if the Nevada Board had affirmed the citations and prohibited human contact with wild animals, one can only

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<sup>91</sup> *Trainer Bitten in MGM Grand Lion Habitat*, L.V. SUN (Sept. 2, 2010, 11:45 AM), <http://lasvegassun.com/news/2010/sep/02/trainer-bitten-in-vegas-strip-resort-lion-habitat> [<https://perma.cc/G8JL-6SED>].

<sup>92</sup> *See Lion Attacks Trainer at MGM Grand (VIDEO)*, HUFFINGTON POST (Sept. 8, 2010, 9:59 AM), [http://www.huffingtonpost.com/2010/09/08/lion-attacks-trainer-at-mgm-grand-video-watch\\_n\\_708777.html](http://www.huffingtonpost.com/2010/09/08/lion-attacks-trainer-at-mgm-grand-video-watch_n_708777.html) [<https://perma.cc/R5R2-K9Z3>] (last updated May 25, 2011).

<sup>93</sup> *Inspection Detail*, OCCUPATIONAL SAFETY & HEALTH ADMIN., [https://www.osha.gov/pls/imis/establishment.inspection\\_detail?id=314884727](https://www.osha.gov/pls/imis/establishment.inspection_detail?id=314884727) [<https://perma.cc/7SKJ-APPY>].

<sup>94</sup> *Cat House, Inc.*, at 2.

<sup>95</sup> *SeaWorld of Fla., L.L.C., v. Perez*, 748 F.3d 1202, 1206–08 (D.C. Cir. 2014).

<sup>96</sup> *Cat House, Inc.*, at 3.

<sup>97</sup> *Id.* at 14.



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wonder how it would have affected other popular and financially important events in Nevada, such as rodeos. In sum, albeit an unusual case, this illustrates what is lost to Nevada employees, their representatives, employers, and the public because of DIR's failure to disclose Nevada OSH Board decisions.

#### VI. AN INEXPENSIVE, EASY SOLUTION IS AVAILABLE TO DIR

Several Nevada state agencies have their own websites. NOSHA has a website, however, there is no separate website for the Review Board.<sup>98</sup> It is difficult to understand why DIR and NOSHA do not simply post the Board's decisions and orders to the NOSHA website. This is a simple electronic exercise with little, if any, cost.

Another simple option is available. The Weiner-Rogers Library at UNLV's William S. Boyd School of Law in Las Vegas would be an appropriate repository for decisions of a sister state agency, such as the Board. As is shown on its website, the Library maintains the largest collection of American legal materials in the state, and it provides reference services to members of the public who request it.<sup>99</sup> If DIR were simply to email copies of the Board's decisions and orders to the Library, they could be housed in the Library's collection, as well as posted online through a link in the Library's website, all without significant cost or inconvenience to any state agency. Perhaps modest funds could be found for a law student to create an index of the decisions.

#### CONCLUSION

It is difficult to discern a defensible reason for the Nevada Division of Business and Industry to continue failing to publish and disseminate the Board's decisions and orders. Simple, inexpensive means are available to do so. It is time for the veil of secrecy to be lifted and for openness in government to reach this corner of Nevada regulatory agencies in the interest of occupational safety and health in Nevada.

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<sup>98</sup> *Occupational Safety and Health Administration*, *supra* note 60.

<sup>99</sup> *Library: Services for General Public*, UNLV WILLIAM S. BOYD SCH. OF L., <http://law.unlv.edu/academics/law-library/general-public> [<https://perma.cc/MX5C-LNGB>].