

**MINUTES
FOR THE REGULAR MEETING
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD
Docket No. 5627**

Open Session

The Appeals Board convened at 1:00 p.m., February 21, 2018, in Sacramento with Chair Marty Block presiding.

1. Roll Call: <u>Members</u>	<u>Present</u>	<u>Absent</u>
Marty Block, Chair	x	
Michael Allen, Vice Chair	x	
Ellen Corbett	x	
Robert Dresser	x	

2. Approval of the Minutes:

The January 17, 2018 Meeting Minutes were approved as amended, 3 to 0 by all members present. Member Corbett arrived after the vote.

3. Chair's Report:

Chair Block welcomed the new Chief Counsel, Autumn Gonzalez. He stated it was good to have Ms. Gonzalez on board and gave a brief summary highlighting her prior accomplishments. Ms. Gonzalez previously worked for the Cal/OSHA's Appeals Board where she provided legal counsel on Board proceedings, Bagley Keene, Administrative Law and precedential decisions. Chair Block stated she will be doing many of the same things for CUIAB. He commented that Ms. Gonzalez also reviewed administrative law judge decisions and Board orders. She drafted regulations and represented the Board in its writ practice involving both superior court and appellate court work. He stated the Ms. Gonzalez graduated from Mount Holyoke College in Massachusetts and that she has a law degree from Columbia University. Chair Block invited her to address the Board. Chief Counsel Gonzalez thanked Chair Block and stated she was happy to be with CUIAB.

4. Board Member Reports:

Vice Chair Allen also welcomed Chief Counsel Gonzalez. Vice Chair Allen expressed his appreciation to all staff and stated it takes a village to run an agency that works well. He thanked staff for the materials provided to the Board for the Board meeting and noted there were additional documents due to the review of the 2017/18 Budget Proposal. Vice Chair Allen said he hoped the process for the budget was as transparent as possible. He noted some budgets for agencies can cause consternation as to why some items on the budget are approved as opposed to why other items are not approved. For this reason Vice Chair Allen stated it was important to be mindful of being as transparent as possible for budget decisions and for all decisions. Lastly, he expressed his gratitude for his great Board member colleagues.

Member Dresser also welcomed Ms. Gonzalez. He stated the Chief Counsel position is a good job and he was confident she would do well. Member Dresser reported he was working on a training memo, to include ideas for training for all CUIAB judges. He hoped to have it completed and distributed to Chair Block, Chief Counsel Gonzalez and acting Presiding ALJ Bach soon.

Chair Block commented the Board would move to Public comment and that Member Corbett would be allowed to make comments once she arrived.

5. Public Comment:

Attorney James Bourbeau, representing the California Trucking Association (CTA) addressed the Board. He introduced himself and introduced Mr. Shawn Yaden, Chief Executive Officer (CEO) of the CTA.

CEO Yaden opened by stating he wanted to emphasize the importance of Mr. Bourbeau's comments and the central role that small business, independent truckers, play in their industry. He stated any action or guidance that restricts the ability of independent truckers to associate themselves with motor carriers jeopardizes one of the best entrepreneurial opportunities that are open to the working class in California. He went on to say, the state estimates one third of California's economy and jobs relies on goods movement and these independent truckers are one of the true back bones of our system. CEO Yaden thanked the Board for their time and asked the Board to please consider the comments from Mr. Bourbeau regarding the Precedent Tax Decision P-T-511.

Mr. Bourbeau distributed a position paper to the Board members and the Chief Council which stated their concerns regarding Precedent Tax Decision P-T-511. The position paper will be posted to the CUIAB public website.

Mr. Bourbeau stated they came to the Board because of concerns they have with precedent decision P-T-511, which the Board was familiar with because it had been granted precedential status. Mr. Bourbeau stated he would try to limit his discussion to a reasonable time and he would do his best to summarize the position paper.

First, he stated they have some grave concerns over specific language in P-T-511 which could be interpreted to alter the well-established California hierarchy of worker classification factors; essentially reassigning the so-called regular part of the business factor from a secondary to a primary status. Second, they are concerned with a potential over reliance on, an inordinate elevation of, the so called “modern tendency” from *Borello*.

Finally, Mr. Bourbeau stated they are concerned that P-T-511 represents a general departure from the seminal decisions in this area of law; meaning the owner operator and truck driving cases on which *RWI* focuses; including *State Compensation Ins. Fund v. Brown*; and the recently reversed case, *Divine and Sons Trucking*, decided in Sacramento County Superior Court which granted the trucking company plaintiff’s Claim for Refund and reversed the Board’s previous decision finding the contract truck drivers to have been misclassified.

Mr. Bourbeau stated the primary concern with P-T-511 is the language regarding the Board’s analysis of secondary factor number eight from *Tieberg v. Unemployment Ins. Appeals Board*; the “regular course” or “integral part” of the business prong. He said it also occurs in the “modern tendency” which he would approach later.

Mr. Bourbeau stated the case concerns “owner-operator” truck drivers and it reversed the ALJ’s decision finding that owner-operator truck drivers were properly classified as independent contractors. He went on to say, P-T-511 states the following as a basis for its decision in its application of secondary factor number eight. Mr. Bourbeau quoted from P-T-511, “The work performed by drivers was part of the regular business of Petitioner, the interstate transport of produce and other goods. This is a powerful indication of an employment relationship.” Mr. Bourbeau said he would agree with that sentence but they found the following sentence very troubling and he asked the Board to consider their comments. “In recent history, this single factor has become by far the most significant to courts

when analyzing whether a worker is an employee or independent contractor.” Mr. Bourbeau stated that there is no citation to accompany this direct sentence. He continues by stating the Board does cite, *Borello*, *JKH Enterprises* and *Air Couriers* in support of this general statement. However, Mr. Bourbeau stated they could not find any direct, on point or other citations saying that the most significant factor to courts, when analyzing such an issue, is whether or not the work was a part of the regular business of the petitioner.

Mr. Bourbeau said the concern they have is in what they are hearing from the Board itself through ALJ’s and through EDD. Mr. Bourbeau stated he wanted to be clear that they are actually hearing from ALJs and some EDD tax auditors is that this is the entire test for employment. Mr. Bourbeau stated that he knew that everyone in the room knows that not to be the case, but he went on to say that really is the real world effect of this trend. They found it especially troubling because they expect this type of language to be cut and pasted into EDD audits, as a short cut to a finding of employment status; whether or not it includes other factors which it undoubtedly would, but they believe it provides an opportunity for EDD auditors to hang their hat on this language by the Board. He hoped the Board shared their concern with this language. In addition, he said they are hearing from some ALJs, through his own practice, that essentially if the work is integral to the nature of the business then that person is an employee. Mr. Bourbeau commented we all know that is not the case, that is not reflective of California authority and we want to avoid that. They want to make sure the Board’s decision reflects the larger body of law as they know that is the aim of the Board. This language stood out to them and they found it to be a concern.

Mr. Bourbeau continued stating they are seeing what they believe is an over application of the “modern tendency”. He would not go into great detail on this issue as it was spelled out rather comprehensively in the position paper. He knows many in the room are aware the “modern tendency” comes from *Borello*, the seminal case in worker classification in California. They believe *Borello* should be followed, but should be followed comprehensively and completely. What they have seen in some decisions and certainly in some EDD audits is a cutting and pasting of the “modern tendency” and then an over emphasis on this integral part of the business factor. He stated that the “modern tendency” is a two part test and that test includes whether or not the work is integral to the regular course of the business, and secondly whether or not that individual provides a distinct professional or business service. It cuts both ways and they have used the “modern tendency” in cases to find contractor status. But they are concerned that it is a short cutting of the full common law factors and that is really their concern.

Mr. Bourbeau commented that *Borello* cites in a parenthetical the “modern tendency” case which actually comes from a treatise on Worker Compensation Law by Arthur Larson, an esteemed law professor and practitioner. Mr. Larson is deceased but his work goes on. *Borello* focuses on the permanent integration of the work, and for permanent integration of the work it cites two cases, *Lauritzen* and *Kokesch*. *Lauritzen* and *Kokesch* are both pickle farmer cases, very on point, one is a federal case and the other is a Minnesota Court of Appeals case. They see no problem there. The California Supreme Court is doing what a court should do. They are applying on point cases from other jurisdictions and providing support for their analysis.

Mr. Bourbeau said they cite to this “modern tendency” from Larson. It always bothered him and he always wondered from where the “modern tendency” derived. He said as it turns out they tracked it down and it is from Larson’s treatise in section 45 of his 1986 treatise. The problem with the “modern tendency” is it appears to be dicta, and two other California Appeals court cases have cited to this “modern tendency”. Mr. Bourbeau said they know here it is cited too on a regular basis at this Board and at EDD but it is dicta and they feel it is circumvention of the process. The “modern tendency”, because it is in California Appellate Court law, is listed as a holding in *Messenger Courier Association* and *Santa Cruz Transportation*. It has become a bit of a lodestar for California courts. They believe it is troubling because that language comes from Larson’s Treatise but Larson’s Treatise only mentions cases out of jurisdiction. It is very vague as to how he derived the “modern tendency”. Mr. Bourbeau said it certainly does not go through any analysis in full and here we are it is being citing too really as a major holding and what we feel is a circumvention of an application of the full factors. He invites the Board to please read the position paper in that regard and they appreciate the Board’s attention to this matter.

Finally, they believe P-T-511 represents a general departure from recognized California authority regarding truck driving cases, especially the owner operator cases, and they would ask that the Board generally instruct their ALJ’s to rely on cases like *State Compensation Insurance Fund vs. Brown*. They invite the Board to also look at the recent superior court case, not as precedent, but look at what the court did in *Divine and Son* case which reversed a decision of this Board. Those cases do not cite to the “modern tendency” and also *Ruiz v. Affinity Logistics Corp.* cited to in our position paper as well.

In summary they invite the Board to look at those cases, well written, not all of them found for independent status by the way, but they feel that it represents the greater body of California authority and they know the esteemed Members of the

Board and the employees of the Board want to see a reliance on those higher courts. He thanked the Board for their time and appreciates their interests in CTA's concerns.

Chair Block thanked Mr. Bourbeau for his presentation. Chair Block stated public comment was not open for argument or discussion but, if any Board Members wanted to ask clarifying questions to points made, they could.

6. Chief ALJ/Executive Director Report:

Chief ALJ/Executive Director Gonzales reported Field Operations (FO) did not meet 30-day time lapse standards for the month. She reported during the first 10 months of the reporting year FO did issue 64.1% of UI decisions within 30 days which means as long as the percentage exceeds 39.7 for the next two months FO would be able to meet the 30-day time lapse goal for March. She reported the 45-day time lapse met the DOL mandates for 13 straight months and is running at 86% for reporting year. The average case age was at 27%.

Chief ALJ/Executive Director Gonzales reported new Presiding Judge, Felicitia Ngo, started working in the Inglewood Office of Appeals. Chief Gonzales stated Presiding Judge Ngo was enjoying the opportunity and she was sure Judge Ngo would be successful in her new role. She reported that John Martin who previously was the Presiding Judge at Inglewood was now Presiding Judge for the Los Angeles field office.

Chief ALJ/Executive Director Gonzales welcomed Chief Counsel Gonzalez. She looked forward to working with Ms. Gonzalez and once March was over they would begin working on the many items which have been waiting for a new Chief Counsel. Chief Gonzales stated her focus for March was to make all the numbers for the month.

Chief ALJ/Executive Director Gonzales commented there would be a presiding judges meeting the following week. They had a number of issues to go through on the agenda. There would be presentations from senior staff to update the judges on the budget, IT issues such as Winscribe, and compliance with the Budget Change Proposal (BCP). They would be going through the judicial complaint process so that the presiding judges could ensure the judges from FO can maintain the level of quality and demeanor expected. They are also working on making sure managers and supervisors meet the requirement of twenty hours of continuing education or training, by the June 30 deadline.

Chair Block noted Member Corbett had arrived. Member Corbett would have an opportunity to give her report following Chief ALJ/Executive Director Gonzales.

Vice Chair Allen asked Chief Gonzales if the Board Members could have copies of the training modules for the judges, stating it would be helpful. Chief Gonzales stated she would provide the materials to the Board Members.

Member Corbett had no report.

7. Chief ALJ of Appellate Operations Report:

Acting Presiding Judge Bach reported Appellate Operation (AO) numbers for January. The time lapse requirement for completion of cases within 45-days is 50% but AO had a completion rate of 87.1% which was very good. She also reported the time lapse requirement for 75-days is 80% but that AO had a completion rate of 96.8% which is also good. The case aging standard for AO is 40 days but the average case age for January was 23.2. She reported AO opened 1,283 cases and closed 1,206 cases which left a balance of 955 cases of which 889 cases were Unemployment Insurance (UI).

Vice Chair Allen commented he appreciated the efforts of Acting PALJ Bach to keep the Board Members apprised of the work being done by the Precedent Committee and also her efforts in keeping Board Members in line with the Bagley Keene limits.

Member Dresser commented he appreciated all the Board authors prompt responses to his questions and his occasional edits.

Member Corbett added that she appreciated the team work shown by the administrative law judges (ALJ) and Acting PALJ Bach when the Board Members from time to time rely on their expertise on various law issues.

Chair Block stated the February numbers looked good and he thanked Chief Gonzales and Acting PALJ Bach along with their staff for the work being done.

8. Chief Information Officer, Nick Dressler Report:

CIO Dressler introduced and welcomed the new IT Help Desk Supervisor, Joyce Lorta. Supervisor Lorta came from the Department of Motor Vehicles, with many years of state service. He looks forward to all her help with the IT Help Desk.

CIO Dressler reported the Winscribe project, which replaced the Dictaphone recording system, was complete. He stated everything went smoothly and he looked forward to the presiding judges meeting so he could hear feedback from the judges. So far there had been no negative impact and he was confident the project was a success.

9. Chief Administrative Services, Robert Silva Report:

Chief Silva gave the 2017/18 Budget Proposal via PowerPoint presentation.

The Board voted unanimously to approve the 2017/18 Budget as presented. A copy of the 2017/18 Budget Proposal will be posted on the CUIAB public website.

Closed Session:

The Board adjourned Open Session at 1:58 p.m. The Board commenced a Closed Session at 2:00 p.m. Closed Session was adjourned at approximately 2:26 p.m.

Open Session:

The Board reconvened in Open Session at approximately 2:27 p.m. Chair Block reported that no votes were taken in Closed Session and that there was nothing further to report.

Chair Block adjourned Open Session at 2:28 p.m.

Adjournment