

MINUTES OF MEETING
OF THE INDUSTRIAL COMMISSION OF ARIZONA
Telephonic Meeting
Held at 800 West Washington Street
Phoenix, Arizona 85007
Thursday, December 9, 2021 – 1:00 p.m.

Present:	Dale L. Schultz	Chairman (Telephonic)
	Joseph M. Hennelly, Jr.	Vice Chair (Telephonic)
	Scott P. LeMarr	Commissioner (Telephonic)
	D. Alan Everett	Commissioner (Telephonic)
	James Ashley	Director (Telephonic)
	Gaetano Testini	Chief Legal Counsel (Telephonic)
	Jason M. Porter	Deputy Director (Telephonic)
	Trevor Laky	Legislative Affairs Chief/Public Information Officer (Telephonic)
	Renee Pastor	Self Insurance (Telephonic)
	Ruby Tate	Claims Manager (Telephonic)
	Charles Carpenter	MRO Manager (Telephonic)
	Renee Englen	MRO Admin (Telephonic)
	Jessie Atencio	ADOSH Director (Telephonic)
	Karen Schomburg	ADOSH Compliance (Telephonic)
	Charlie Preciado	ADOSH Compliance (Telephonic)
	Ron Mills	ADOSH Compliance (Telephonic)
	Hans Schmidt	ADOSH Compliance (Telephonic)
	Casey Ruyle	ADOSH Compliance (Telephonic)
	Anna Maria Stonerock	ADOSH Admin (Telephonic)
	Kara Dimas	Commission Secretary (Telephonic)

Chairman Schultz convened the meeting at 1:02 p.m. Also in attendance on the telephone, confirmed by roll call were Barry Aarons (representing Injured Workers Pharmacy “IWP”); Laura Clymer (Brian Clymer Attorney at Law/Arizona Association of Lawyers of Injured Workers); Sandy Shtab (HealtheSystems); Brian Allen (Mitchell Pharmacy Solutions); Zach Cook (AAPAN The American Association of Payers, Administrators and Networks); Mark Kendall (CopperPoint); Shi Tang (Innova Engineering LLC); Yvette Torres (Next of Kin); Doug Mahoney, Josh Iturio, Jimmy Candelaria, Amanda Parker, and Kelly Hedberg (Legacy Foods); Tomi Sullivan (Five Guys Services LLC DBA Five Guys Roofing); Savannah Scharnhorst (Snell & Wilmer); Zachary Barnett and Loren Delicana (Federal OSHA); Emily Rice (Arizona Self Insurers Association); Brett Barratt (NCCI); Lisa Romero (Corvel); and Kevin Tribout (Optum); Greg Gilbert (Concentra); Ellen Poole and John Fetherston (American Property and Casualty Insurance Association); Sean Chitwood (One Point Patient Care); Ellen Bublick (University of Arizona); Wendy Cloe (My Matrix); and Lisa Anne Bickford (Enlyte Mitchell and Coventry).

Legislative Stakeholders’ Meeting.

Chairman Schultz discussed the purpose of and process for the Commission’s Legislative Stakeholders’ Meeting.

Barry Aarons (Injured Workers Pharmacy “IWP”) suggested a timeframe for posting of Fee Schedule changes prior to the public hearing and that the Commission convene a meeting of all interested parties to review the proposed recommendation. He also suggested timelines for the Commission to post the final proposal the Commission intends to vote on.

Laura Clymer, (Arizona Association of Lawyers of Injured Workers “AALIW”) commented on a recommended process when the Commission proposes changes to fee schedules, administrative rules and other proposals that affect injured workers’ constitutional rights. Article 18, Section 8 of the Arizona Constitution outlines the mission to administer a system that was set up to benefit injured workers’ and dependents to compensate workers for injuries suffered in the course of and arising out of their employment from the necessary risk of their employment and to protect injured workers from burdensome expenses and litigious remedies. AALIW has a couple of areas of concern such as the minimum average monthly wage, dependent’s benefits, and appearance fees for doctors.

Chairman Schultz reminded everyone that the Commission takes suggestions and recommendations continuously, it is not just formal meetings to hear from Stakeholders. We are happy to meet with anyone at any time as we consistently engage with the public.

Sandy Shtab (HealthSystems), representing an ancillary and pharmacy benefits manager serving injured workers’, employers, carriers and TPAs in Arizona for about 20 years. She heard the criticism or concerns from the prior two speakers around transparency of the rulemaking process and that has not been their experience and have found the Commission to be very communicative and open to having conversations on the interim around different types of issues that have been brought forward such as addressing drug utilization, problematic dispensing trends and overall rising drug costs. They have supported the Commission’s efforts including the most recent implementation of the drug formulary, benchmarks and increasing accountability for opioid prescribers and other medications that are not properly monitored. She has seen positive steps in attempting to address medication costs via changes in the fee schedule. There is no secret that Arizona has higher drug costs overall compared to the region and overall national numbers, starting with repackaged medications, reformulated medications that are in new strengths, drugs that are placed in packs or kits, medications that are marketed specifically to physicians, but only for workers’ compensation patients – for some reason it “doesn’t seem that any other patient group needs these types of medications”. The latest cost driver is direct mail order or out of network mail order pharmacies. They think the best path forward to control drug utilization and costs is to enable the Commission to have some commonsense changes put into place, like allowing payors to direct care into their pharmacy networks if they have one. In Arizona very few payors have this type of control, and it does not impact the injured worker because they do not see the bill, as long as they get the right medication at the right time, but the carriers and employers, and some of the employers are public funded entities, they are definitely seeing those bills. This would be a change for the overall comp system and still preserve broad access to pharmacies in the state and even mail order if needed.

Brian Allen, (Mitchell Pharmacy Solutions) echoed Ms. Shtab’s comments and suggested that the Commission should be able to institute a point-of-sale adjudication for pharmacy care. It may not control costs or some of the other issues that have been dealt with in the pharmacy world, but the one thing it will do is implement some clinical controls at the point of sale that there is some sort of immediate enforcement of the formulary and appropriate clinical guidelines.

Chairman Schultz noted the Commission always appreciates a solution and thinks that the Commission has taken extraordinary measures to improve the performance of the Commission in every area under its jurisdiction through using the Arizona Management System and consistently looking for opportunities for ways to not only improve the performance of the functions that it provides within the agency, but also looking at improving the overall system to make it easier to get benefits and for injured employees to get treatment without having to resort to litigation.

Zach Cook (AAPAN The American Association of Payers Administrators and Networks) stated in Arizona member networks provide numerous benefits to the workers' compensation market, even without employer or payor direction of care, such as credentialing, clinical oversight, efficient scheduling and tracking of patient visits and oversight of pharmacy dispensing and payment. Studies has shown that networks could help injured workers find qualified services without being left on their own. Pharmacy networks can address the issue of pressing variances of prescription drugs without sacrificing choice of providers. They look forward to being a resource to the Commission.

Mark Kendall (CopperPoint) commended Commission staff for the degree of accessibility and responsiveness that they have experienced on a regular basis with their interactions with the Commission, as well as the bench/bar committee, the applicant's bar, and defense bar. They are willing to sit down and discuss issues and do what they can to lend any assistance in crafting solutions moving forward.

Chairman Schultz noted the Commission tries to maintain a balance and be responsive to anyone who is asking for assistance.

Chairman Schultz asked if there were any other comments relative to the Stakeholder meeting. Hearing none, he read a closing statement, encouraged Stakeholders to submit comments in writing and closed that part of the meeting.

Approval of Minutes of December 2, 2021 Regular Meeting Minutes.

Commissioner Everett moved to approve the Minutes of the December 2, 2021 regular session meeting and Vice Chair Hennelly seconded the motion. Chairman Schultz, Vice Chair Hennelly and Commissioner Everett voted in favor of the motion. Commissioner LeMarr abstained. The motion passed.

Consent Agenda:

All items following under this agenda item are consent matters and will be considered by a single motion with no discussion unless a Commissioner asks to remove an item on the consent agenda to be discussed and voted on separately. The Commission may move into Executive Session under A.R.S. § 38-431.03(A)(2) to discuss records exempt by law from public inspection. Legal action involving a final vote or decision shall not be taken in Executive Session. If such action is required, then it will be taken in General Session.

a. Approval of Proposed Civil Penalties Against Uninsured Employers.

1. 2CNP20/21-0706 Noble Homes LLC \$5,000

Commissioner LeMarr moved to approve the item on the Consent Agenda as presented and Commissioner Everett seconded the motion. Chairman Schultz, Vice Chair Hennelly, Commissioner LeMarr and Commissioner Everett voted in favor of the motion. The motion passed.

Discussion and Action of Arizona Division of Occupational Safety and Health Proposed Citations and Penalties.

Chairman Schultz discussed the purpose of and process for the Commission's consideration of ADOSH citations and proposed penalties.

Innova Engineering, LLC 2141 N Alveron Way <u>Tucson, AZ 85712</u>	Fatality/Accident Years in Business: 19 Empl. Covered by Inspection: 3
Site Location: 124 Via Palestra Rio Rico, AZ 85648	
Inspection No: E7721 - 1539402	
Inspection Date: 6/30/2021	

Mr. Atencio corrected the date in the first paragraph of the report to June 30, 2021. He summarized ADOSH's investigation and reviewed the file and photographs. Mr. Preciado, the Compliance Officer, was available for questions. ADOSH was not recommending a citation for Innova Engineering, LLC.

Chairman Schultz extended condolences to Ms. Torres, and explained the Commission is here to try to reduce injuries and prevent fatalities and every fatality is looked at very carefully and it is heart breaking when these continue to happen.

The Commission took no action.

Five Guys Services LLC dba Five Guys Roofing 1275 W Houston Ave <u>Gilbert, AZ 85233</u>	Fatality/Accident Years in Business: 8 Empl. Covered by Inspection: 4
Site Location: 2501 E Magnolia St Phoenix, AZ 85009	
Inspection No: CP-2022-F9669-0001	
Inspection Date: 10/19/2021	

Mr. Atencio removed this file for further review with staff noting there are no deadline issues.

Legacy Foods LLC 601 N 43 rd Ave <u>Phoenix, AZ 85009</u>	Fatality/Accident Years in Business: 7 Empl. Covered by Inspection: 12
Site Location: 601 N 43 rd Ave Phoenix, AZ 85009	
Inspection No: B5049 - 1539786	
Inspection Date: 7/1/2021	

SERIOUS – Citation 1 - Item 1 –

- a) 601 N 43rd Ave, Phoenix, AZ 85009: An employee passed away while at work and it was not reported to ADOSH within 8-hours. 29 CFR 1910.39(a)(1)
Div. Proposal - \$1,000.00 Formula Amt. - \$1,000.00

SERIOUS – Citation 1 - Item 2 –

- a) Oven, southeast wall: One employee was exposed to an unguarded oven opening, brand, model and serial numbers unknown.
- b) Below oven sheeter head: One employee was exposed to an unguarded sheeter oven opening, brand, model and serial numbers unknown. 29 CFR 1910.212(a)(1)
Div. Proposal - \$1,500.00 Formula Amt. - \$1,500.00
TOTAL PENALTY - \$2,500.00 TOTAL FORMULA AMT. - \$2,500.00

Mr. Atencio discussed ADOSH's planned inspection, summarized the citation and proposed penalties, and reviewed the photographs. , Mr. Mills, the Compliance Officer, was available for questions.

Chairman Schultz checked if anyone from Legacy Foods would like to comment.

Mr. Iturio reviewed the Citations and stated Legacy Foods took corrective action on Item 1 hoping to reduce the penalty.

Mr. Atencio explained that abatement information can be submitted after the Commission votes, and Legacy Foods will have the opportunity to request an informal conference within 15 days of receiving the citation.

Mr. Candelaria commented that their failure to report the death within eight hours was based on faulty legal advice since it was not work related.

Chairman Schultz explained the requirement to report a fatality within eight hours is to allow ADOSH an opportunity to investigate and determine if it was work related.

Commissioner LeMarr moved to approve the citation and proposed penalties as presented and Commissioner Everett seconded the motion. Chairman Schultz, Vice Chair Hennelly, Commissioner LeMarr and Commissioner Everett voted in favor of the motion. The motion passed.

The order of Item 5 and Item 6 were changed at the request of Mr. Porter

Discussion, Action, and Potential Resolution regarding Final Exempt Rulemaking to Title 20, Chapter 5, Article 14: Municipal Firefighter Cancer Reimbursement Fund And Firefighter And Fire Investigator Cancer Claim Reporting.

Mr. Testini noted that rulemaking was initiated to implement Article 14 for the Municipal Firefighter Cancer Reimbursement Fund And Firefighter And Fire Investigator Cancer Claim Reporting for the first four rules. On October 7, 2021 the Commission granted approval to initiate the rulemaking process, on November 30, 2021 there was a public hearing and written comments were allowed until November 29, 2021; the Commission did not receive any written

comments or oral comments, so there are no changes to the proposed rules. He requested authorization to move forward with the final rulemaking process by seeking approval from the Governor's Office and Secretary of State and asked that the Resolution be signed electronically to present to the Secretary of State expeditiously.

Vice Chair Hennelly moved to approve final rulemaking for Title 20, Chapter 5, Article 14: Municipal Firefighter Cancer Reimbursement Fund And Firefighter And Fire Investigator Cancer Claim Reporting and the Resolution signed electronically. Commissioner Everett seconded the motion. Chairman Schultz, Vice Chair Hennelly, Commissioner LeMarr and Commissioner Everett voted in favor of the motion. The motion passed.

Discussion and Action regarding Final Rulemaking regarding the COVID-19 Healthcare Standards Adopted by Federal OSHA in 29 C.F.R. § 1910(U).

Mr. Porter noted he was requesting approval for final rulemaking to adopt Administrative Code R20-5-602.02 that pertains to Subpart U of the Code of Federal Regulations relating to COVID-19 Healthcare Standards. As the Commission is aware, pursuant to A.R.S. §23-405 and §23-410, the Commission has authority and jurisdiction to promulgate all standards and rules which are reasonably required in the performance of its duties and Occupational Safety and Health in the State of Arizona Adopted by Federal OSHA in 29 C.F.R. § 1910(U). ADOSH and the Legal Division presented to the Commission the rulemaking for adoption of a new section 602.02 the Subpart (U) for COVID-19 which will incorporate by reference the OSHA Interim Final Rule published on June 21, 2021 entitled Occupational Exposure to COVID-19 Emergency Temporary Standard Interim Final Rule. The Commissioners were provided information about the healthcare standard included in the interim rule as well as links to other information pertaining to the scope of the rule, who it applies to and the standards that will be required. On October 7, 2021 the Commission granted approval to initiate rulemaking, and a notice of proposed rulemaking was filed with the Secretary of State on October 15, 2021 and published in the next available Arizona Administrative Register on November 5. A public hearing was conducted on December 7, 2021 and as required under Arizona law to provide at least 30 days before conducting a public hearing. During the 30-day period, one written comment was received from the Arizona Hospital and Healthcare Association which was considered and addressed in the proposed notice of final rulemaking as provided to the Commission. ADOSH and the Legal Division requested authorization to move forward with the final rulemaking process by seeking an exemption from Executive Order 2021-02 from the Arizona Governor's Office and upon receiving an exemption filing with the Arizona Attorney General's Office. When it comes to adopting OSHA Standards the Commission is required to file a Notice of Final Rulemaking with the Attorney General rather than with the Governor's Regulatory Review Counsel and upon approval, those proposed rules are filed with the Secretary of State.

Chairman Schultz thanked the Arizona Hospital and Healthcare Association and Debbie Johnston for providing a formal written response. He noted this is such an incredibly important issue and read the Resolution to point out the timeliness of the Commission actions.

Chairman Schultz asked if Federal OSHA and Zachary Barnett had any comments. Mr. Barnett did not have any comments. Chairman Schultz thanked Mr. Barnett for joining the meeting today and for the collaboration with Federal OSHA.

Mr. Porter also requested that the Resolution be signed electronically.

Commissioner LeMarr moved to approve the Resolution as drafted with the correction that the hearing was held in the Auditorium for final rulemaking for COVID-19 Healthcare Standards Adopted by Federal OSHA in 29 C.F.R. § 1910(U) and the Resolution signed electronically. Vice Chair Hennelly seconded the motion. Chairman Schultz, Vice Chair Hennelly, Commissioner LeMarr and Commissioner Everett voted in favor of the motion. The motion passed.

Announcements, Scheduling of Future Meetings and Retirement Resolutions.

Mr. Ashley thanked everyone for joining the call today and appreciated the diverse group that joined and provided comments.

Mr. Ashley updated the Commissioners with the AMS scorecard metrics for the fiscal year-to-date. He reviewed the metrics for Claims: Loss of Earning Capacity (LEC) Awards; Average Monthly Wage Determinations Time Limit; Inbound and Outbound Communication; Age of Oldest Properly-Filed Claim to be Notified; Targeted Claims Trainings.

Chairman Schultz congratulated Ms. Tate and the entire team on how effectively it has implemented the Arizona Management System. It is truly a leading entity in the state.

Mr. Ashley thanked Chairman Schultz and Commissioner Everett for joining our Voluntary Protection Program presentation of the VPP flag and plaque which is a very important recognition for the Agency as the first State Agency in the first state to achieve this recognition and the great example we can set for others throughout the state. Chairman Schultz commented on how the program generated and involved the Safety Committee, the materials that have been developed, the process and involvement of the Special Government Employees (SGEs), it is a designation to be earned and how the efforts continue to improve to provide a safer workplace.

Ms. Dimas confirmed Commission meeting dates through February 2021.

Ms. Dimas presented a retirement resolution for Steven Ripple for 7 years of service as an Investigations Supervisor in the Legal Division

Public Comment.

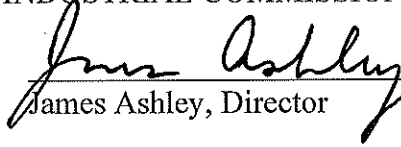
Chairman Schultz wanted to remind everyone, even though we had the specific Stakeholder Meeting, we have the opportunity for public comment at every one of our meetings which take place usually three times a month. Another element of our transparency, sometimes we put out the specific call to make sure people understand that they have the opportunity to comment, but each and every meeting and in between, we are more than willing to meet with any stakeholder at any time and as quickly as they possibly can and try to be as accommodating as we can. We are also open to written comments, recommendations, suggestions, complaints, or concerns over anything at any time which can be sent to Chairman Schultz or to Mr. Ashley. All of the questions and comments are reviewed and taken to heart; the Commission strives in not only being open and transparent but also responsive.

There was no other public comment.

Commissioner Everett moved to adjourn and Commissioner LeMarr seconded the motion. Chairman Schultz, Vice Chair Hennelly, Commissioner LeMarr and Commissioner Everett voted in favor of the motion and the meeting was adjourned at 2:47 p.m.

THE INDUSTRIAL COMMISSION OF ARIZONA

By


James Ashley, Director

ATTEST:


Kara Dimas, Commission Secretary