

MINUTES OF MEETING
OF THE INDUSTRIAL COMMISSION OF ARIZONA

Held at 800 W. Washington

Conference Room 308

Phoenix, Arizona 85007

Thursday, August 5, 2010 – 1:00 p.m.

Present:	Brian Delfs	Chairman
	David Parker	Vice Chairman (video conference)
	John A. McCarthy, Jr.	Member
	Kathleen Oster	Member
	Susan Strickler	Member
	Laura McGrory	Director
	Andrew Wade	Chief Legal Counsel
	Bill Wright	Asst. Director, ADOSH
	Bruce Hanna	Industrial Hygienist
	Jesus Maeda	Industrial Hygienist
	Renee Pastor	Self Insurance Manager
	Kara Dimas	Office Manager, Legal Div.
	Teresa Hilton	Commission Secretary

Chairman Delfs convened the Commission meeting at 1:00 p.m. noting a quorum present. Also present was Teresa Yi of Snell & Wilmer, Leah Hubbard of Jeff Gray R & R Partners, and Christine Latou of Road Runner.

Approval of Minutes of July 22, 2010 Meeting

The Commission approved the Minutes of July 22, 2010 on motion of Ms. Strickler, second of Mr. Parker. Mr. McCarthy abstained.

Discussion & Action of Proposed OSHA Citations and Penalties

Ames Construction, Inc.	Fatality
8333 E. Hartford Drive	Yrs/Business – 24
Scottsdale, AZ 85255	Empl. Cov. by Insp. – 15
Site Location: Hwy 74 & Lake Pleasant Road, Phoenix, AZ 85382	
Inspection #: I7163/314310137	
Insp. Date: 03/04/10	

SERIOUS – Citation 1, item 1 – One employee was driving a Mack truck without utilizing the seat belt of the vehicle (1926.0095(a).

(No inspection history in the past three years).

Div. Proposal - \$7,000.00

Formula Amt. - \$7,000.00

SERIOUS – Citation 1, item 2 – Traffic signs were not posted to warn employees of road hazards (1926.200(g)(1).

Div. Proposal - \$7,000.00

Formula Amt. - \$7,000.00

SERIOUS – Citation 1, item 3 – The service brake system and the emergency brake system on a side dump trailer were not maintained in operable condition (1926.601(b)(1)).

Div. Proposal - \$2,250.00

Formula Amt. - \$2,250.00

SERIOUS – Citation 1, item 4 – All defects were not documented and corrected on a side dump trailer when placed in service (1926.601(b)(14)).

Div. Proposal - \$ 2,250.00

Formula Amt. - \$ 2,250.00

TOTAL PENALTY - \$19,000.00

TOTAL FORMULA AMT. - \$19,000.00

Bill Wright summarized the citations and proposed penalty as listed and responded to questions from the Commissioners. The Division recommendation for Citation 1 item 1 and item 2 was for the gravity-based penalties with no adjustment factors since the violations resulted in, caused, or contributed to the death of a worker. In response to questions from Mr. Parker regarding the standard for traffic warning signs, further consideration of this matter was tabled in order to allow ADOSH the opportunity to explore the issues raised.

Midwestern Noble Development, LLC
P.O. Box 988
Peoria, AZ 85380

Complaint
Yrs/Business – 7
Empl. Cov. by Insp. – 3

Site Location: 2915 W. Northern Avenue, Phoenix, AZ 85051

Inspection #: R0738/314617846

Insp. Date: 06/08/10

GROUPED SERIOUS – The alleged violations below have been grouped because they involve similar or related hazards that may increase the potential for injury resulting from accident.

Citation 1, item 1a – One employee was working from an aerial lift at a height of 24' without wearing a body harness or body belt to prevent a fall (1926.453(b)(2)(v)).

Citation 1, item 1b - Three employees operated an aerial lift at various heights above 24' thereby exceeding load limits specified by the manufacturer (1926.453(b)(2)(vi)).

(No inspection history in the past three years).

Div. Proposal - \$ 750.00

Formula Amt. - \$ 750.00

SERIOUS – Citation 1, item 2 – Two employees' personal fall arrest systems were rigged in such a way that the employees could contact the ground in the event of a fall (1926.502(d)(16)(iii)).

Div. Proposal - \$ 750.00

Formula Amt. - \$ 750.00

TOTAL PENALTY - \$1,500.00

TOTAL FORMULA AMT. - \$1,500.00

Bill Wright summarized the citations and proposed penalty as listed and responded to questions from the Commissioners. Following discussion and inspection of photographs of these violations, the Commission unanimously approved issuing the citations and assessed the recommended penalty of \$1,500.00 on motion of Mr. Parker, second of Mr. McCarthy.

Pinal County Fleet Service
85 N. Florence Street, #8
Florence, AZ 85132

Complaint
Yrs/Business – 100
Empl. Cov. by Insp. – 11

Site Location: 900 S. Pinal Parkway, Florence, AZ 85132
Inspection #: N5645/314667767
Insp. Date: 06/30/10

SERIOUS – Citation 1, item 1 – A 4" vertical portable grinder was not equipped with a guard (1910.243(c)(3)). There was another instance of this violation.

(No inspection history in the past three years).

Div. Proposal - \$2,250.00

Formula Amt. - \$2,250.00

SERIOUS – Citation 1, item 2 – A circuit breaker panel had openings in the dead front that were not effectively closed, allowing potential contact with the energized bus bar (1910.305(b)(1)(ii)).

Div. Proposal - \$2,250.00

Formula Amt. - \$2,250.00

TOTAL PENALTY - \$4,500.00

TOTAL FORMULA AMT. - \$4,500.00

Bill Wright summarized the citations and proposed penalty as listed and responded to questions from the Commissioners. Following discussion and inspection of photographs of these violations, the Commission approved issuing the citations and assessed the recommended penalty of \$4,500.00 on motion of Mr. McCarthy, second of Ms. Oster. Ms. Strickler recused herself.

Precision Auto Diagnostic Incorporated dba
Precision Auto Parts
1024 E. Broadway Road
Phoenix, AZ 85040

Planned
Yrs/Business – 56
Empl. Cov. by Insp. – 38

Site Location: 1024 E Broadway Road, Phoenix, AZ 85040
Inspection #: Z5838/314617705
Insp. Date: 06/09/10

SERIOUS – Citation 1, item 1 – The industrial steel storage racks were not anchored nor did they have load capacity plaques in place to state the storage capacity of the system (23.403(A)). There were two other instance of this violation.

(No inspection history in the past three years).

Div. Proposal - \$1,250.00

Formula Amt. - \$1,250.00

SERIOUS – Citation 1, item 2 – The second floor, 8'3" above the concrete floor below, was lacking standard guardrails or other equivalent means to prevent a fall on all open sides (1910.23(c)(1)). There were two other instance of this violation.

Div. Proposal - \$1,000.00

Formula Amt. - \$1,000.00

SERIOUS – Citation 1, item 3 – One employee was not wearing the manufacturer installed seatbelt on a forklift (1910.132(a)).

Div. Proposal - \$1,250.00

Formula Amt. - \$1,250.00

SERIOUS – Citation 1, item 4 – One untrained employee was operating a forklift (1910.178(l)(1)(i)).

Div. Proposal - \$1,250.00

Formula Amt. - \$1,250.00

GROUPED SERIOUS – The alleged violations below have been grouped because they

GROUPED SERIOUS – The alleged violations below have been grouped because they involve similar or related hazards that may increase the potential for injury resulting from accident.

Citation 1, item 5a – One forklift operator did not receive safety refresher training after being involved in an accident (1910.178(l)(4)(ii)(B)).

Citation 1, item 5b - The forklift had defects and had not been removed from service (1910.178(p)(1). There was another instance of this violation.

Div. Proposal - \$1,250.00

Formula Amt. - \$1,250.00

NONSERIOUS – Citation 2, item 1 – The employer did not maintain and retain the OSHA 300 Log of Occupational Injuries and Illnesses for five years, in that the employer did not have available upon request the OSHA 300 logs for calendar years 2005 through 2009 (1904.0001(a)(2))

Div. Proposal - \$ 500.00

Formula Amt. - \$ 500.00

TOTAL PENALTY - \$6,500.00

TOTAL FORMULA AMT. - \$6,500.00

Bill Wright summarized the citations and proposed penalty as listed and responded to questions from the Commissioners. Following discussion and inspection of photographs of these violations, the Commission unanimously approved issuing the citations and assessed the recommended penalty of \$6,500.00 on motion of Mr. McCarthy, second of Ms. Strickler.

Roadrunner Pharmacy, Inc.
711 E. Carefree Highway, #140
Phoenix, AZ 85085

Complaint
Yrs/Business – 10
Empl. Cov. by Insp. – 13

Site Location: 711 E. Carefree Highway, #140, Phoenix, AZ 85085

Inspection #: L3419/314617895

Insp. Date: 06/16/10

SERIOUS – Citation 1, item 1 – Employees exposed to bulk pharmaceutical grade ingredients including but not limited to antineoplastic agents, androgens, steroids and estrogens were not protected by effective engineering controls (i.e. biological safety cabinets)(23.403.A).

(No inspection history in the past three years).

Div. Proposal - \$2,500.00

Formula Amt. - \$2,500.00

SERIOUS – Citation 1, item 2 – Employees performing compounding operations from hazardous bulk pharmaceutical grade ingredients including but not limited to antineoplastic agents, androgens, steroids and estrogens did not utilize appropriate eye and respiratory protection (1910.132(d)(1)(i)).

Div. Proposal - \$2,500.00

Formula Amt. - \$2,500.00

SERIOUS – Citation 1, item 3 – A written hazard communication program had not been developed, implemented and maintained for employees who were exposed to hazardous bulk pharmaceutical ingredients (i.e. antineoplastic agents, androgens, steroids and estrogen)(1910.1200(e)(1)).

Div. Proposal - \$2,500.00

Formula Amt. - \$2,500.00

SERIOUS – Citation 1, item 4 – Employees exposed to hazardous bulk pharmaceutical ingredients (i.e. antineoplastic agents, androgens, steroids and estrogen) were not adequately

trained as to the hazards of these materials (1910.1200(h)).

Div. Proposal - \$ 2,500.00

Formula Amt. - \$ 2,500.00

TOTAL PENALTY - \$10,000.00

TOTAL FORMULA AMT. - \$10,000.00

Bill Wright summarized the citations and proposed penalty as listed and responded to questions from the Commissioners. In response to a question from Ms. Oster, Bruce Hanna stated that the employer is under the jurisdiction of the Arizona State Board of Pharmacy since they fall under the "retail pharmacy" classification and that he did report the violations to the Board. Mr. Parker recommended that a citation be added related to the lack of a respiratory protection program.

Following further discussion and inspection of photographs of these violations, the Commission unanimously approved adding a citation for lack of a respiratory protection program, approved issuing the citations and assessed a total penalty of \$12,500.00 on motion of Mr. Parker, second of Ms. Oster.

Citation 1, item 3 is renumbered to item 4 and Citation 1, item 4 is renumbered to item 5. The additional citation is as follows: Citation 1, item 3 – A written respirator program had not been developed or implemented for employees who were required to use respirators when working with highly hazardous materials such as antineoplastic agents (1910.134(c)(1)). The new citation has a gravity based penalty of \$5,000.00, and after applying the adjustment factors results in a \$2,500.00 penalty for this citation. Adding this penalty to the other penalties results in the total penalty of \$12,500.00.

Thoroughbred Cars, Inc. dba
Thoroughbred Nissan
5163 E. 22nd Street
Tucson, AZ 85711

Complaint
Yrs/Business – 40
Empl. Cov. by Insp. – 4

Site Location: 5152 E. 22nd Street, Tucson, AZ 85711

Inspection #: T3633/314667478

Insp. Date: 06/18/10

GROUPED SERIOUS – The alleged violations below have been grouped because they involve similar or related hazards that may increase the potential for illness.

Citation 1, item 1a – A blower fan and an electric garage door opener were used in the spraying area and were not approved for locations containing both deposits of readily ignitable residues and explosive vapors (1910.107(c)(5).

Citation 1, item 1b - Employees painted sections of cars using flammable paints and paint spraying equipment and mechanical ventilation was not provided to remove flammable vapors and/or mists (1910.107(d)(2).

Citation 1, item 1c - Employees painted sections of cars using flammable paints and paint spraying equipment, and a "NO SMOKING" sign was not posted at the spraying area (1910.107(g)(7).

(No inspection history in the past three years).

Div. Proposal - \$1,250.00

Formula Amt. - \$1,250.00

NONSERIOUS – Citation 2, item 1 – The company did not maintain a log and summary of recordable injuries and illness (OSHA 300 Form)(1904.0001(a)(2).

Div. Proposal - \$ 500.00	Formula Amt. - \$ 500.00
TOTAL PENALTY - \$1,750.00	TOTAL FORMULA AMT. - \$1,750.00

Bill Wright summarized the citations and proposed penalty as listed and responded to questions from the Commissioners. Following discussion and inspection of photographs of these violations, the Commission unanimously approved issuing the citations and assessed the recommended penalty of \$1,750.00 on motion of Mr. McCarthy, second of Ms. Oster.

Discussion & Action of Request for Renewal of Self Insurance Authority

Wal-Mart Associates, Inc. - Renee Pastor presented staff's renewal report along with current Moody's, Fitch, and Dunn and Bradstreet credit ratings. She responded to questions from the Commissioners. Ms. Pastor advised that Administration is recommending renewal of workers' compensation self-insurance authority based on the financial stability and profitability, with total assets of just over \$170.7 billion, a clean audit report and acceptable credit ratings. Mr. Parker asked whether it would be appropriate to recommend the ADOSH consultation program. It was discussed that ADOSH could work with the employer to put together a safety program to help reduce injuries. Following discussion, the Commission approved continuance of self insurance authority conditional upon the company contacting ADOSH for consultation and review of safety management programs on motion of Mr. Parker, second of Ms. Strickler. Mr. McCarthy recused himself.

Discussion & Action of Attorney Fee Petitions

Andrew Wade summarized the status of the 14 attorney fee petitions filed in fiscal year 2010 and compared the total to the prior five years. He stated that there was one more petition ready to submit to the Commission and two more in process.

Ryan Skiver, Warnock, MacKinlay & Carman, P.L.L.C. v Alejandro Amaro-Munoz – Andrew Wade advised that Ryan Skiver of the firm Warnock, MacKinlay & Carman, PLLC has petitioned the Industrial Commission to set attorney' fees with respect to work that he performed on behalf of Mr. Amaro-Munoz in connection with his December 18, 2009 industrial injury claim. Mr. Wade presented a history of the case and summarized the work performed by Mr. Skiver on behalf of Mr. Amaro-Munoz. Shortly before the first scheduled hearing, Mr. Amaro-Munoz terminated the attorney/client relationship and hired a new attorney. No attorney fees have been paid to date, and staff estimates that Mr. Skiver spent 24 to 26 hours working on the case.

Mr. Wade presented several options to the Commission. After reviewing those options, staff recommends an award granting attorneys' fees based on a contingency basis. This would respect not only the agreement between the parties, but also the risk that Mr. Skiver was taking of receiving no fee and would recognize that the claimant would not have had to pay anything if they were not successful in obtaining benefits. Mr. Skiver has also requested reimbursement of costs, and Mr. Wade explained that the applicable statute does not provide the Commission with any authority to award costs.

Ms. Oster stated she was more inclined to award fees based on an hourly basis. Ms. Strickler asked how the Commission had handled attorney fee petitions historically. It was discussed that generally, awards have been based on an hourly basis but that the Commission has the authority to award a reasonable fee which can be based on a percentage, contingency basis for a certain length of time. Mr. Wade summarized how the Commission had determined the reasonable hourly rates for certified specialists and non-certified attorneys' in workers compensation cases. Ms. McGrory described the "appeal" process. Mr. Wade added the case may still settle and any award should provide for such a possibility. Following further discussion, the Commission unanimously awarded attorneys' fees based on 25 hours being spent on the case at \$110 per hour to be paid at a rate not to exceed 10% of all benefits check or settlement but not to exceed the total amount of \$2,750.00 on motion of Mr. McCarthy, second of Ms. Oster.

Harlan Crossman v. Francisco Pacheco – Mr. Wade summarized Harlan Crossman's petition to set attorney' fees with respect to work that he performed on behalf of Mr. Pacheco in connection with his January 10, 1996, October 21, 2003, and November 1, 2004 industrial injury claims. Mr. Wade presented a history of the claims and the work performed by Mr. Crossman on behalf of Mr. Pacheco. Mr. Pacheco terminated the attorney/client relationship, apparently due to his dissatisfaction with settlement negotiations. Attorney fees in the amount of \$24,552.40 have been paid to date.

Mr. Wade presented several options to the Commission. After reviewing those options, Mr. Wade stated that his recommendation is to issue an award granting attorneys' fees based on 25% of benefits or any settlement related to or that involves permanent disability benefits for a period up to five years from the date of the award of attorneys' fees, but in no event more than \$37,500.00. This would respect the contingent fee agreement between the parties. In response to a question from Ms. Oster regarding settlement negotiations that took place before the attorney / client relationship ended, Mr. Wade stated that he could obtain clarification on that topic and report his findings to the Commission. Chairman Delfs stated that the matter would be tabled until more information is obtained.

Trace Bartlett v Maria Palomino – Mr. Wade advised that Trace Bartlett has petitioned the Industrial Commission to set attorney' fees with respect to work that he performed on behalf of Ms. Palomino in connection with her July 28, 2006 industrial injury claim. Mr. Wade presented a history of the claim and the work performed by Mr. Bartlett on behalf of Ms. Palomino. Ms. Palomino has terminated the attorney/client relationship. Staff estimates that Mr. Bartlett could have invested as much as 100 hours working on the case.

Mr. Wade presented several options to the Commission. After reviewing those options, Mr. Wade stated that staff recommends an award granting attorneys' fees based on 25% of benefits or any settlement related to or that involves permanent disability benefits for a period up to five years from the date of the award of attorneys' fees, for a maximum fee of \$6,850.00. This would respect the contingent fee agreement between the parties and compensate the attorney for the work he performed. Following discussion, the Commission unanimously awarded attorneys' fees based on 25% of benefits or any settlement related to or that involves permanent disability benefits for a period up to five years, but not more than \$6,850.00, on motion of Ms. Oster, second of Mr. McCarthy.

Discussion & Action of Proposed Civil Penalties Against Uninsured Employers

2C09/10-3483	American's Club, Inc. dba Devil's Martini
2C10/11-0169	First Class Auto Glass LLC
2C09/10-2918	Fountain Outdoor Recreation Company, LLC dba Elk Ridge Ski & Outdoor Recreation
2C10/11-0217	Nobilka, L.L.C. dba Trade Embossing & Finishing
2C09/10-2162	Townsend Enterprises, L.L.C. dba Steve's Sports Bar and Grill dba The Lounge

Mr. Wade summarized staff's attempts to notify employers #0169 and 0217 that they would be under consideration for a \$5,000 civil penalty and his recommendation with respect to proceeding with these two employers. Mr. Parker ask about the injunction process and Mr. Wade explained the process and the impact of the present limited resources on that process Ms. Strickler asked if the civil penalty amounts could be increased to be more effective as a deterrent. Ms. McGrory explained the civil penalty process.

With regard to all of the listed employers, Mr. Wade advised that a compliance investigation confirmed that they were operating (or had operated) a business with employees, but without workers' compensation insurance. Giving consideration to the factors of A.R.S. §23-907(K), civil penalties of \$1,000.00 are recommended against employers #3483, 2918 and 2162. Following further discussion, Mr. Delfs made a motion to assess \$5,000.00 penalties against employers #0169 and 0217 since they do not have the required insurance coverage, and to assess civil penalties of \$1,000.00 against employers #3483, 2918 and 2162 which was seconded by Mr. Oster and unanimously approved.

Discussion &/or Action regarding Legislation

Ms. McGrory advised that there is a possibility of a Special Session to address the ballot proposition. Mr. Butler will give a legislative update at the August 18th meeting.

Discussion & Action regarding 2010-2011 Physicians' and Pharmaceutical Fee Schedule pursuant to A.R.S. §23-908(B)

Ms. McGrory advised that a summary of actions has been provided to the Commissioners. At the last several Commission meetings, individual issues have been discussed and addressed. To ensure that everything in the recommendations has been covered, she is requesting that the Commission adopt sections B and C of the staff document. Following discussion, the Commission unanimously approved staff's summary and adopted sections B and C on motion of Mr. Parker, second of Ms. Oster. Ms. McGrory stated that the document would be available on the Commission's website tomorrow and that the actual updated fee schedule to be effective October 1, 2010 would be on the web site on September 1st.

Announcements and Scheduling of Future Meetings

Ms. Hilton reminded the Commissioners that the next meeting is scheduled for Wednesday, August 18th and there is also a meeting scheduled for Thursday, August 26th. Chairman Delfs stated that an item for discussion is whether meetings should be held twice monthly, perhaps the first and third or the second and fourth weeks. Ms. McGrory stated that,

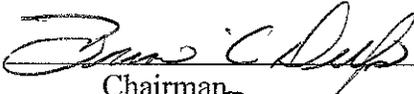
from a staff standpoint, it would be helpful knowing in advance when meetings would be held and that it could pose a challenge for OSHA citation lapse time since Arizona is already 14 days behind the national average. She stated that the current Commission policy is that any fine over \$1,000.00 be brought before the Commission and wondered if we could look at adjusting that amount. It was discussed that Arizona is the only state that brings the citations before the Commissioners. Following further discussion, Ms. McGrory stated that she would ask Mr. Perkins to put together a proposal regarding the threshold policy and that the Commission could delegate the authority to ADOSH. This will be an issue for further discussion.

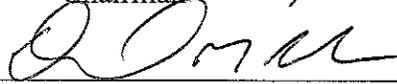
Ms. McGrory stated that consideration of setting assessment rates will also be a future agenda item. It was agreed it will be an agenda item for August 26th.

There being no further business to come before the Commission and no public comment, Chairman Delfs adjourned the meeting at 3:05 p.m.

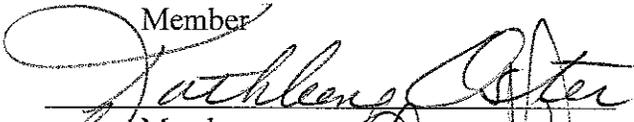
APPROVED:

THE INDUSTRIAL COMMISSION OF ARIZONA

By 
Chairman

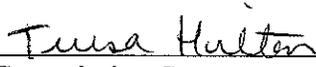
By 
Vice Chairman

By _____
Member

By 
Member

By 
Member

ATTEST:


Commission Secretary