

MINUTES OF MEETING
OF THE INDUSTRIAL COMMISSION OF ARIZONA

Held at 800 West Washington Street

Conference Room 308

Phoenix, Arizona 85007

Thursday, December 21, 2017 – 1:00 p.m.

Present:	Dale L. Schultz	Chairman
	Joseph M. Hennelly, Jr.	Vice Chair
	Scott P. LeMarr	Commissioner (Telephonic)
	Robin S. Orchard	Commissioner
	Steven J. Krenzel	Commissioner
	James Ashley	Director
	Jason M. Porter	Chief Legal Counsel
	Trevor Laky	Legislative Affairs Chief / Public Information Officer
	Sylvia Simpson	Chief Financial Officer
	Renee Pastor	Self Insurance
	Jacqueline Kurth	Medical Resource Office
	William Warren	ADOSH Director
	Brian Downen	Compliance Officer
	Brooks Rogers	Compliance Officer
	Kara Dimas	Commission Secretary

Chairman Schultz convened the meeting at 1:00 p.m. Also in attendance were Jon Fast with Rincon Safety Consultants, Inc.; Eddie O'Hare and Frank Orozco with The Paint Kings, Inc.; Cathy Vines; Mark Kendall, Becky Stingle, and Tammy McCoy with CopperPoint; Ken Eichler with ODG by MCG Health; Emily Rice with Arizona Self-Insurers Association; and Jessica Aceves with Snell & Wilmer.

Chairman Schultz changed the order of the agenda by reversing Item 4 (Discussion and Action of Arizona Division of Occupational Safety and Health Proposed Citations and Penalties) and Item 5 (Discussion and/or Action regarding expanding applicability of the Official Disability Guidelines Under Arizona Administrative Code R20-5-1301(C)).

Approval of Minutes of December 14, 2017 Regular Meeting Minutes.

Commissioner Krenzel moved to approve the Minutes of the December 14, 2017 regular session meeting and Vice Chair Hennelly seconded the motion. Chairman Schultz, Vice Chair Hennelly, Commissioner LeMarr, and Commissioner Krenzel voted in favor of the motion. Commissioner Orchard 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. Alpine Clock Shop, Inc.
2. Extreme Framing L.L.C.
3. JDD Enterprises, dba Rancho Verde Communities

b. Approval of Requests for Renewal of Self-Insurance Authority.

1. Dignity Health

c. Discussion and Action of Application for Self-Insurance Authority.

1. McKee Foods Corporation

Chairman Schultz moved Consent Agenda Item (c)(1) (Application for Self-Insurance Authority – McKee Foods Corporation) forward to the regular agenda.

Commissioner Orchard moved to approve the remaining items on the Consent Agenda and Vice Chair Hennelly seconded the motion. Chairman Schultz, Vice Chair Hennelly, Commissioner LeMarr, Commissioner Orchard, and Commissioner Krenzel voted in favor of the motion. The motion passed.

Discussion and Action of Application for Self-Insurance Authority.

1. McKee Foods Corporation

Chairman Schultz noted that McKee Foods is an important part of Arizona's business community. He discussed the length of time McKee Foods has been doing business, the number of McKee Foods' employees in Arizona, and the company's payroll. He discussed the experience modification rating of the company nationwide and in Arizona. He noted his support for approving the application with a stipulation that McKee Foods work with ADOSH Consultation to help the company identify areas of weakness and develop a safety program that can sustain or improve upon an experience modification rating of 1.0.

Ms. Pastor noted McKee Foods' interest in partnering with the Commission to improve their safety program. She noted that the company was planning on becoming self-insured in other states.

Commissioner Krenzel moved to grant self-insurance authority to McKee Foods with a stipulation that the company work with ADOSH Consultation to identify areas of weakness and develop a safety program. Commissioner Orchard seconded the motion. Chairman Schultz, Vice Chair Hennelly, Commissioner LeMarr, Commissioner Orchard, and Commissioner Krenzel voted in favor of the motion. The motion passed.

Discussion and/or Action regarding expanding applicability of the Official Disability Guidelines Under Arizona Administrative Code R20-5-1301(C).

Ms. Kurth discussed the Commission's June 29, 2017 directive that the Medical Resource Office ("MRO") conduct an investigation and study regarding the criteria for expansion of the

Official Disability Guidelines (“ODG”) enumerated in A.A.C. R20-5-1301(C). She noted that study materials, physician reviews, and public comments gathered by MRO had been publicly posted to the Commission’s website. She discussed the procedure and criteria for expansion, as set forth in R20-5-1301(C).

Ms. Kurth summarized steps taken to research and study criteria 1 and 3 in R20-5-1301(C), including obtaining physician reviews from 18 Arizona-based, board-certified medical providers, representing various specialties. She noted that the physician reviews were provided to ODG for response. Ms. Kurth summarized the conclusions reflected in the physician reviews, noting that nearly all of the physicians concluded that the use of evidence based medical treatment guidelines would improve medical care for injured workers and that the ODG chapters reviewed adequately covered the body parts and conditions.

Ms. Kurth summarized steps taken to research and study criteria 2 in R20-5-1301(C), including research into published data regarding the impact of evidenced based medical treatment guidelines in workers’ compensation. She discussed her review of data from states that have adopted evidence based medical treatment guidelines, noting that the data supported the conclusion that usage of evidence based treatment guidelines reduces treatment delays, reduces time needed for injured workers to return to work, and decreases overall medical costs. She noted that 31 states currently use evidence based medical treatment guidelines in their workers’ compensation programs, 12 of which use ODG. Ms. Kurth discussed published studies related to the impact of evidence based treatment guidelines, including a study entitled “A New Method of Assessing the Impact of Evidence Based Medicine on Claims Outcomes” and a position paper entitled “Advancing Value Based Medicine While Integrating Functional Outcomes with Clinical Measures is critical to our healthcare future.” Ms. Kurth concluded that the reviewed studies and data support a finding that expansion of ODG will make treatment and claims processing more efficient and cost effective.

Ms. Kurth discussed the Commission’s November 30, 2017 public hearing and summarized the comments received - both during the hearing and in writing. She noted that supporters of expansion include insurance carriers, employers, and some physicians. She noted that, in other areas of insurance, such as group health, Medicare, and AHCCCS, evidence based medical treatment guidelines are already being used for authorization of medical treatment and services. She noted that those opposed to expansion include some attorneys who represent injured workers, the Arizona Association of Lawyers for Injured Workers, and some union representatives.

Ms. Kurth concluded that the criteria for expansion enumerated in R20-5-1301(C) are supported.

Commissioner Orchard, Ms. Kurth, and Mr. Eichler discussed ODG’s response to the physician reviews and the frequency/process for ODG updates. Ms. Kurth noted that ODG’s Medical Editor in Chief replied specifically to Dr. Lederman and invited him to participate in updating the shoulder chapter. She noted that ODG had also extended an invitation to other Arizona physicians to participate in updating the guidelines. Ms. Kurth discussed the structure of ODG, the review schedule, and the makeup of ODG medical staff who review new medical evidence and update guidelines. Mr. Eichler discussed ODG’s updating process and the importance of an open process where physicians can submit comments or additional evidence for review. He and Ms. Kurth noted that some of the changes recommended by Arizona physicians had already been made in the guidelines. Ms. Kurth noted that the Commission receives monthly updates from ODG regarding the drug formulary, which are posted on the Commission’s website.

Ms. Kurth provided a brief history related to evidence based medicine in Arizona, beginning with the 2012 statute (A.R.S. § 23-1062.02) that required the Commission develop and implement a process for the use of evidence based medical treatment guideline for workers' compensation, where appropriate. She discussed the evidence based medicine committee established by the Commission, the decision to select ODG, and the process for adopting the Treatment Guidelines in Title 20, Chapter 5, Article 13 of the Arizona Administrative Code.

Chairman Schultz discussed the number of states already using evidence based medical treatment guidelines and the length of time evidence based medical guidelines have been used. He discussed his personal search for evidence or studies that do not support the criteria in R20-5-1301(C). He noted that he was unable to find any such evidence and assumes that other were similarly not able to find anything negative, as no studies or data of this nature had been submitted by stakeholders. He concluded that expanding ODG would be a significant step forward for Arizona's employees.

Chairman Schultz, Ms. Kurth, and Mr. Porter discussed whether the Commission could, in the future, select evidence based medical treatment guidelines other than ODG or otherwise modify the guidelines in Arizona, if the Commission were to vote to expand the use of ODG to all body parts and conditions. Mr. Porter discussed the rulemaking that would be necessary should the Commission elect in the future to select guidelines other than ODG.

Chairman Schultz and Mr. Porter discussed the impact of Commission action to expand applicability of ODG and the requirements of R20-5-1301(D). He recommended that, if the Commission votes to expand applicability of ODG, the Commission select a future effective date to give the Commission time to educate the medical and payer community about the changes. He discussed the non-substantive rulemaking process necessary to update the rules to reflect changes to the applicability of ODG and recommended that such non-substantive rulemaking be combined with the rulemaking related to streamlining the Treatment Guidelines.

Chairman Schultz, Ms. Kurth, and Mr. Porter discussed an effective date of October 1, 2018, to correlate with proposed rule changes related to streamlining the Treatment Guidelines.

Commissioner Krenzel inquired whether any information had been submitted in response to the Chairman's request during the public hearing for information supporting the comment that Arizona medical providers might exit the workers' compensation system based on expansion of ODG. Chairman Schultz, Mr. Ashley, Ms. Kurth, and Mr. Porter indicated that they had not received any information related to the Chairman's request.

Vice Chair Hennelly thanked Ms. Kurth for her work and commented on the useful data gathered from other states.

Mr. Porter suggested that the Commission first make a determination on the three criteria stated in R20-5-1301(C) and then take action on expansion of ODG.

Vice Chair Hennelly moved to adopt the determination of staff that expanding the applicability of ODG will: (1) improve medical treatment for injured workers; (2) make treatment and claims processing more efficient and cost effective; and (3) the guidelines adequately cover the body parts or conditions. Commissioner Krenzel seconded the motion. Chairman Schultz, Vice Chair Hennelly, Commissioner LeMarr, Commissioner Orchard, and Commissioner Krenzel voted in favor of the motion. The motion passed.

Commissioner Krenzel moved to expand the applicability of the Official Disability Guidelines in Arizona's workers' compensation system to all body parts and conditions, effective October 1, 2017. Vice Chair Hennelly seconded the motion. Chairman Schultz, Vice Chair Hennelly, Commissioner LeMarr, Commissioner Orchard, and Commissioner Krenzel voted in favor of the motion. The motion passed.

Mr. Porter noted that, based on the action taken, the Legal Division would prepare a formal resolution for the Commissioners to sign at the next Commission meeting. He noted that the resolution would subsequently be posted on the website pursuant to R20-5-1301(D).

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.

Mr. Warren indicated that he would be taking the items out of order since the same compliance officer investigated both Hawthorne Hydroponics, LLC, and Tolleson Elementary School District No. 17.

Hawthorne Hydroponics LLC dba Botanicare 6975 W. Frye Rd. Chandler, AZ 85226	Referral Years in Business: 7 Empl. Covered by inspection: 30
Site Location: 6975 W. Frye Rd. Chandler, AZ 85226	
Inspection No: Y8817-1269593	
Inspection Date: 10/12/2017	

SERIOUS – Citation 1 - Item 1 – a) Scrap Area: One employee was operating a Powermatic Bandsaw, Model Number PM1800, Serial Number 100118000013, without the non-working portion of the blade being fully guarded. (29 CFR 1910.213(i)(1)).

Div. Proposal - \$5,000.00	Formula Amt. - \$1,250.00
TOTAL PENALTY - \$5,000.00	TOTAL FORMULA AMT. - \$1,250.00

Mr. Warren summarized the citation and proposed penalty and reviewed the photographs. Mr. Rogers discussed his investigation findings regarding the guarding violation.

Commissioner Orchard, Mr. Warren, and Mr. Rogers discussed whether the company had submitted any evidence of abatement.

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

Tolleson Elementary School District No. 17 – Maintenance/Warehouse 9261 W. Van Buren St. Tolleson, AZ 85353	Complaint Years in Business: 103 Empl. Covered by inspection: 16
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Div. Proposal - \$5,000.00

Formula Amt. - \$1,750.00

SERIOUS – Citation 1 - Item 2 –

a) 320 E. Warner Rd., Gilbert, AZ 85296 - Phase 2 Living Room: Two employees used a Werner brand 6-foot fiberglass stepladder, model 6006S, to access the first tier working level of a tubular welded frame scaffold. (29 CFR 1926.1053(b)(4)).

b) 320 E. Warner Rd., Gilbert, AZ 85296 - Phase 2 Living Room: The employer did not provide a training program for one employee, who used stepladders regularly during the course of his job duties, to enable the employee to recognize hazards related to ladders and train the employee in the procedures to be followed to minimize these hazards. (29 CFR 1926.1060(a)).

Div. Proposal - \$5,000.00
TOTAL PENALTY - \$10,000.00

Formula Amt. - \$1,750.00
TOTAL FORMULA AMT. - \$3,500.00

Mr. Warren summarized the citation and proposed penalties and reviewed the photographs, including photographs provided by the general contractor.

Commissioner Krenzel, Mr. Downen, Chairman Schultz, and Mr. Warren discussed the circumstances leading to use of the scaffolding at the worksite, the owner of the scaffolding, the scaffolding owner's plan to remove the scaffolding, and the scaffolding company's policy that prohibits other trades from using the scaffolding.

Mr. O'Hare, President of Paint Kings, noted that the injured worker has returned to work. He discussed the background of the company, the company's focus on workplace safety and its training program, the company's prior inspection history (with no citations), the company's experience modification rating over the last three years, the company's policy regarding use of third-party equipment, and training provided to the injured worker. He noted that the company had worked with a safety consultant to put together a new-hire training video and new company policy regarding, among other topics, usage of another company's equipment and ladder safety. He noted that the company had a stand-down where employees were provided training on usage of third-party equipment and ladder safety.

Mr. Fast discussed his long-standing relationship with Mr. O'Hare and noted Mr. O'Hare's commitment to workplace safety.

Mr. O'Hare noted that the company self-reported the incident and wants to cooperate with ADOSH.

Chairman Schultz thanked Mr. O'Hare and Mr. Fast for attending the meeting. He discussed the opportunity that employers have to attend Commission meetings and the importance of transparency on the part of the Commission. He noted the Commission's focus on keeping workers safe in the state of Arizona and efforts to assist employers in developing a culture of workplace safety.

Commissioner Orchard, Mr. Warren, and Mr. Downen discussed the employees involved, including a foreman, and the decision to use the scaffolding. Mr. Downen summarized interview testimony regarding management direction to use the scaffolding, including the testimony of the injured foreman.

Commissioner Krenzel and Mr. Downen discussed the circumstances leading to the injury.

Commissioner Orchard discussed the company's recognition of the hazard and efforts to promptly abate.

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

Discussion and/or action regarding Industrial Commission goals, objectives and key initiatives for 2018. This Agenda Item may include discussion regarding the Commission budget and review of Division, Department, and Section specific objectives.

Mr. Ashley discussed the Commission's efforts to model best practices regarding AMS deployment for other agencies. He noted that the Commission had hosted AMS deployment meetings and Gemba walks with the Corporation Commission and the Department of Juvenile Corrections. He discussed Commission plans to conduct monthly AMS benchmark sessions for other agencies. Chairman Schultz and Mr. Ashley commended Commission staff for their outstanding AMS efforts.

Mr. Ashley discussed an interview with Arizona Public Media (in Tucson) regarding Proposition 206. He noted that the main message was that the Commission is here as a resource for employers and employees.

Chairman Schultz discussed conversations with employers regarding implementation of earned paid sick time policies. Mr. Ashley discussed the concept of front-loading earned paid sick time in lieu of using the accrual methodology. Commissioner Krenzel noted that his wife's small business had decided to front-load earned paid sick time.

Mr. Laky provided with Commission with an overview regarding public usage of the Commission website and social media.

Mr. Laky discussed legislation proposed by the Commission aimed at reducing the regulatory burden on single and two-member limited liability companies with no employees. He noted that the bill (HB 2047) was sponsored by Representative Livingston.

Mr. Laky discussed data related to usage of the Commission website related to Proposition 206 and the related Frequently Asked Questions.

Mr. Laky noted the Commission will be seeking increased media exposure related to the great work the Commission is doing. Chairman Schultz mentioned that it would be good to have more radio spots.

Announcements, Scheduling of Future Meetings and Retirement Resolutions.

Mr. Ashley invited the Commissioners to attend the Arizona Food Marketing Alliance's Legislative Reception on January 10, 2018.

Ms. Dimas confirmed Commission meeting dates through February 2018.

Ms. Dimas presented retirement resolutions for Dorina Hoover (Claims Specialist in the Claims Division), who has provided 21 years of state service. Chairman Schultz congratulated Ms. Hoover on her retirement.

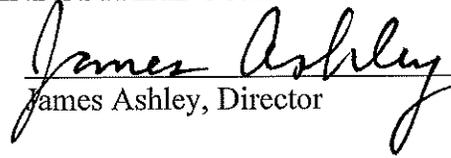
Public Comment.

There was no public comment.

Commissioner Krenzel moved to adjourn and Vice Chair Hennelly seconded the motion. Chairman Schultz, Vice Chair Hennelly, Commissioner LeMarr, Commissioner Orchard, and Commissioner Krenzel voted in favor of the motion and the meeting was adjourned at 2:28 p.m.

THE INDUSTRIAL COMMISSION OF ARIZONA

By


James Ashley, Director

ATTEST:


Kara Dimas, Commission Secretary

RESOLUTION OF AUTHORIZATION

THE INDUSTRIAL COMMISSION OF ARIZONA

WHEREAS, under Arizona Revised Statutes (“A.R.S.”) § 23-1062.03, the Industrial Commission of Arizona (the “Commission”) was directed to “develop and implement a process for the use of evidence-based treatment guidelines, where appropriate, to treat injured workers”;

WHEREAS, the Commission developed and implemented a process for the use of evidence-based treatment guidelines effective October 1, 2016 (*see* Arizona Administrative Code (“A.A.C.”) Title 20, Chapter 5, Article 13 (the “Treatment Guidelines”));

WHEREAS, under A.A.C. R20-5-1301(A), the Commission “adopted the Work Loss Data Institute’s *Official Disability Guidelines – Treatment in Workers Compensation* (ODG) as the standard reference for evidence-based medicine used in treating injured workers within the context of Arizona’s workers’ compensation system”;

WHEREAS, under A.A.C. R20-5-1301(B), the Commission limited the applicability of the guidelines to “the management of chronic pain and the use of opioids for all stages of pain management” until “further action of the Commission”;

WHEREAS, under A.A.C. R20-5-1301(C), the Commission is authorized to “modify or change the applicability of the guidelines as described in subsection B [of R20-5-1301] if the Commission determines that modification or changing the applicability of the guidelines will: 1) improve medical treatment for injured workers, 2) make treatment and claims processing more efficient and cost effective, and 3) the guidelines adequately cover the body parts or conditions”;

WHEREAS, by resolution dated June 29, 2017, the Commission directed the Medical Resource Office (“MRO”) of the Commission to conduct an investigation and study regarding the criteria for expansion enumerated in A.A.C. R20-5-1301(C);

WHEREAS, under A.A.C. R20-5-1301(C), the Commission is required to provide an opportunity for public comment and hold a public hearing before taking action to modify or change the applicability of the guidelines;

WHEREAS, the Commission posted a “Notice of Public Hearing Under Arizona Administrative Code R20-5-1301(C) Regarding Expanded Applicability of the Official Disability Guidelines” on October 27, 2017, soliciting written comment and scheduling a public hearing;

WHEREAS, a public hearing was held on November 30, 2017, in the auditorium of the Commission, 800 West Washington Street, Phoenix, Arizona, at which time stakeholders and members of the public were extended the opportunity to present oral and written comments;

WHEREAS, under A.A.C. R20-5-1301(C), a decision of the Commission regarding modifying or changing the applicability of the Official Disability Guidelines must be made by a majority vote of a quorum of Commission members present at a public meeting;

WHEREAS, on December 21, 2017, the Commission, in exercise of its foregoing authority, reviewed materials and data gathered by the MRO and took action to modify the applicability of the Official Disability Guidelines to cover all body parts and conditions;

WHEREAS, under A.R.S. §§ 23-107(A)(1) and 23-921(B), the Commission has full power, authority, and jurisdiction to make rules that are reasonably required to effectuate the purposes of, and to implement the Commission's duties and responsibilities under A.R.S. §§ 23-901 *et seq.*

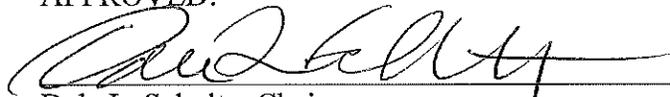
NOW THEREFORE, BE IT DETERMINED BY THE INDUSTRIAL COMMISSION OF ARIZONA, that modifying the applicability of the Official Disability Guidelines to cover all body parts and conditions will: (1) improve medical treatment for injured workers; (2) make treatment and claims processing more efficient and cost effective; and (3) the Official Disability Guidelines adequately cover the body parts and conditions.

BE IT FURTHER RESOLVED BY THE INDUSTRIAL COMMISSION OF ARIZONA, that, **effective October 1, 2018**, the Official Disability Guidelines shall serve as the standard reference for evidence-based medicine used in treating injured workers within the context of Arizona's workers' compensation system for all body parts and conditions.

BE IT FURTHER RESOLVED BY THE INDUSTRIAL COMMISSION OF ARIZONA, that the Legal Division of the Commission shall initiate rulemaking, consistent with this Resolution, to update A.A.C. R20-5-1301(B) and R20-5-1311(A), by seeking approval from the Office of the Arizona Governor pursuant to Executive Order 2017-02.

Dated the 11th day of January, 2018, at the office of the Industrial Commission of Arizona, 800 W. Washington Street, Phoenix, Arizona.

APPROVED:



Dale L. Schultz, Chairman



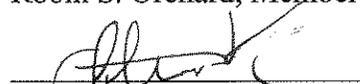
Joseph M. Hennelly, Jr., Vice Chairman



Scott P. LeMarr, Member

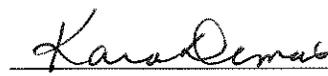


Robin S. Orchard, Member



Steven J. Krenzel, Member

ATTEST:



Kara Dimas, Commission Secretary