MINUTES OF MEETING OF THE INDUSTRIAL COMMISSION OF ARIZONA

Telephonic Meeting Held at 800 West Washington Street Phoenix, Arizona 85007 Thursday, January 13,2022-1:00 p.m.

Present: Dale L. Schultz

Chairman (Telephonic)

Joseph M. Hennelly, Jr.

Vice Chair (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 Jessie Atencio

Self Insurance (Telephonic) ADOSH Director (Telephonic)

Steve Black Anna Maria Stonerock ADOSH Compliance (Telephonic)

ADOSH Admin (Telephonic)

Kara Dimas

Commission Secretary (Telephonic)

Chairman Schultz convened the meeting at 1:00 p.m. Also in attendance on the telephone, confirmed by roll call were Debbie Baker (Valley Schools Workers' Compensation Group); Darren VandeVoorde, Helen Singmaster, Joe Wisto, Elva Vivas and Ken Mueller (Raley's Arizona dba Bashas'); Kate Pokorski (Snell & Wilmer representing Raley's Arizona); Douglas Chappell (Drexel Heights Fire District); Corey Reeder, Kelly Johnson, Taylor Kloss and Amy Perez (Alsco Uniforms); Chris Patton, Jessie Rudolf, Robert Dye and Aaron Hendricks (Diamond Plastics Corporations); Bob Hasulak (QuickFrames USA, LLC); and Christine Glover (Snell & Wilmer).

Approval of Minutes of December 16, 2021 Regular Meeting Minutes.

Commissioner Everett moved to approve the Minutes of the December 16, 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. 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 Requests for Renewal of Self-Insurance Authority.
 - Valley Schools Workers' Compensation Group
- b. <u>Discussion and Action of Application for Self-Insurance Authority.</u>

1. Raley's Arizona dba Bashas'

Chairman Schultz commented on the number of years that Valley Schools has been in business and the wonderful experience modification factor they maintain.

Chairman Schultz noted that Bashas' has been with us for many years and is well known. Ms. Pastor noted this is an initial application for self-insurance but they will be handling and administering all of Bashas' old claims as well. Chairman Schultz noted that often in an acquisition a new experience modification factor applies if there are other operations.

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

Chairman Schultz thanked Valley Schools Workers' Compensation Group and Raley's Arizona for joining and looks forward to their continued participation for self-insurance and welcomed Raley's and their new leadership team.

Discussion and Action of Attorney Fee Petition. This agenda item may include discussion concerning the processing of attorney fee petitions and the reasonable hourly rates used in analyzing fee petitions.

Garza and Montenegro - Mr. Testini summarized that the Petitioner Mr. Garza was hired by the Respondent in June 2019 with respect to her April 2019 workers' compensation claim. The fee agreement allowed for the Petitioner to receive fees equal to 25% of the workers' compensation indemnity benefits, which is the standard of the industry. In July 2019 the claim was accepted as a no time loss claim and shortly thereafter the Respondent started receiving indemnity benefits. In December 2020 the ICA established the Respondent's average monthly wage at \$1,581.02 and the carrier issued a notice of claim status finding the Respondent stationary as of December 10, 2020, without permanent impairment. On December 31, 2020, the Petitioner requested a hearing challenging both the average monthly wage and the need for further active medical treatment. After numerous hearings the ALJ issued an award mailed on September 14, 2021 which found the Respondent was not entitled to further active medical treatment but also found Respondent's average monthly wage should be increased to \$3,627.41. On November 2, 2021 the attorney client relationship terminated. To determine the appropriate fees the Legal Division looked at two different approaches. first based upon the usual established hourly rate of \$185 the Petitioner would be due \$2,775 for the 15 hours of work completed. The second looked at the increase in benefits that the Respondent received as a result of the litigation and based on the increase in average monthly wage and period of time that the Respondent received indemnity benefits, the Respondent received an additional \$1,884.12. Based on the increase in indemnity benefits the Petitioner would be due 25% or \$471.03. It is the Legal Divisions recommendation that the Commission utilize the second method which provides a more equitable result.

Chairman Schultz and Mr. Testini discussed that since the claim is closed the benefits would be received by award if the claim was reopened from any future indemnity benefits that would be awarded to the Respondent and would be due to the Petitioner.

Vice Chair Hennelly moved to adopt the recommendation from the Legal Department for the Findings and Award granting attorney's fees in the amount of \$471.03 and to allow electronic signatures of the Award and Commissioner Everett seconded the motion. Chairman Schultz, Vice Chair Hennelly 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.

Drexel Heights Fire District

Fatality/Accident

5950 S Cardinal Ave

Years in Business: 67

12

Tucson, AZ 85746

Empl. Covered by Inspection:

Site Location:

3255 S Kinney Rd

Tucson, AZ 85713

Inspection No:

FC-2022-T3633-0010

Inspection Date:

11/18/2021

SERIOUS – Citation 1 - Item 1 –

a) 3255 S Kinney Rd, Tucson, AZ, 85713: Employees were required to wear N95 filtering facepiece respirators and had not been fit tested. 29 CFR 19134(f)(1)

Div. Proposal - \$5,600.00

Formula Amt. - \$5,600.00

TOTAL PENALTY - \$5,600,00

TOTAL FORMULA AMT. - \$5,600.00

Mr. Atencio discussed the fatality inspection, summarized the citation and proposed penalty, and reviewed the photographs. Mr. Atencio noted that the Compliance Officer, Mr. Black was available for questions.

Vice Chair Hennelly asked if there was information providing some tie between the fitting issue and the actual exposure of the individual to COVID on the job. Chairman Schultz noted he wanted to ask if tracing was done, if any other employees had COVID in or around that time, and if we know if the employee was exposed to COVID in the community from other family members or the community outside of work.

Mr. Atencio noted that the fire district did their own assessment and determined that this was work related and that is why ADOSH has the file. He noted that fit testing has to be done when it comes to ensuring the seal is correct on the face and to prevent any type of whatever you are protecting the employee from crossing over the barrier.

Mr. Black noted that OSHA has taken the position that for respirators to be effective, an employer needs to have a respirator protection program to ensure certain factors are there to make sure the respirators work right and fit testing is one of them, without doing the fit test you cannot tell if the employee had the correct style and size of respirator that can actually do what the respirator is rated to do. That is a general principal of respirators that ADOSH enforces, not only for COVID but for all places where respirators are required by an employer.

Chairman Schultz asked the representative from Drexel Heights Fire District, Mr. Chappell if he would be willing to respond to questions. Chairman Schultz wanted to verify that Drexel believed the exposure did occur from the employee attending to a person in the course of work that was positive with COVID. Mr. Chappell noted the assumption was based on two things, the

employee lived alone and no one else in his family or inner circle had tested positive or had any issues with COVID and his crew of firefighters have handled several cases involving patients with COVID during the tour. They made the assumption that in the five-day window he could have come in contact with a patient that was positive for COVID and therefore it was the most likely cause, there is no confirmation of that other than it's most likely.

Chairman Schultz applauded Drexel Heights Fire District for their robust program. He appreciated the way Mr. Chappell thought about it and tracked it back and made the connection.

Mr. Chappell also commented that they had suspended the fit testing program this year based on the recommendation of the CDC and if they misunderstood or missed something that they should have been doing, that's on them, but when you do not have enough masks to cover running calls where there is an exposure because of testing that tend to fly in the face of logic on their side. They are doing the best they can, but if anyone can come up with a supply system that will ensure they have the same masks from the same vendor every time they order, then they would be in good shape, but they cannot get that right now.

Mr. Atencio agreed with Mr. Chappell, that there was guidance from OSHA in 2020 to suspend fit testing but the guidance has since changed and fit testing is required.

Mr. Atencio explained the FOM has a section for a hazard contributing to the fatality and that is what was assessed here. In such cases, the FOM only allows for a size reduction.

Chairman Schultz noted that he appreciated the explanation and Mr. Atencio looking for opportunities for adjustment. This is a very difficult situation, and the facts surrounding, this is an interesting case.

Commissioner Everett moved to amend the proposed penalty noting the District has a good program but was in a difficult situation and recommended the maximum 25% good faith reduction for a total penalty of \$4,200.00. Commissioner Everett seconded the motion. Chairman Schultz, Vice Chair Hennelly and Commissioner Everett voted in favor of the motion. The motion passed.

Alsco Uniforms

4707 W Camelback Rd

Phoenix, AZ 85031

Site Location:

4707 W Camelback Rd

Phoenix, AZ 85031

Inspection No:

CP-2022-T3633-0006

Inspection Date:

11/5/2021

<u>SERIOUS</u> – Citation 1 - Item 1 –

a) Soiled laundry area: The end rollers on the soiled laundry sorting conveyor were not guarded. 29 CFR 1910.212(a)(1)

Div. Proposal - \$1,625.00

Formula Amt. - \$1,625.00

Complaint

Years in Business:

Empl. Covered by Inspection:

11

185

SERIOUS – Citation 1 - Item 2 –

a) Ironing area: The chain drive powering the ironing rollers on the Leonard brand ironing machine #7, unknown model and serial number, was not guarded.

b) Washing area: The chain drives located between the sections of the Milnor brand tunnel washer, unknown model and serial number, were not guarded. 29 CFR 1910.219(f)(3)

Div. Proposal - \$1,625.00 Formula Amt. - \$1,625.00

SERIOUS – Citation 1 - Item 3 –

- a) Soiled laundry station #5: The electrical panel below the station had a cover which was broken so that it would not completely close and latch.
- b) Soiled laundry station #1: The electrical panel below the station had a cover which was broken so that it would not completely close and latch.
- c) Washing area: The motor start panel for the washer loading rack had a cover which was damaged so that it would not close completely.
- d) Drying area: The main electrical panel for the Jensen brand dryer #2, unknown model and serial number, had a cover which was damaged so that it would not close completely. 29 CFR 1910.303(b)(1)

Div. Proposal - \$1,625.00

Formula Amt. - \$1,625.00

TOTAL PENALTY - \$4,875.00

TOTAL FORMULA AMT. - \$4,875.00

Mr. Atencio discussed ADOSH's inspection of a complaint that was filed, summarized the citation and proposed penalties, and reviewed the photographs. Mr. Atencio noted that the Compliance Officer, Mr. Black was available for questions.

Chairman Schultz checked if anyone on the phone would like to comment.

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

Diamond Plastics Corporation

Planned

1086 N Thornton Rd

Years in Business:

14 42

Casa Grande, AZ 85122

1086 N Thornton Rd

Empl. Covered by Inspection:

Phoenix, AZ 85122

Inspection No:

Site Location:

PP-2022-T3633-007

Inspection Date:

10/28/2021

SERIOUS - Citation 1 - Item 1 -

a) Blend area: Horizontal surfaces on the third level of the blend area had accumulations of explosive dust exceeding one-quarter inch. 29 CFR 1910.22(a)(1)

Div. Proposal - \$1,125.00

Formula Amt. - \$1,125.00

SERIOUS - Citation 1 - Item 2 -

a) Maintenance area: A Dayton brand ten-inch bench grinder, unknown model and serial number, had the right work rest more than 1/4" open.

b) Maintenance area: A Dayton brand ten-inch bench grinder, unknown model and serial number, had the left work rest more than 1/4" open. 29 CFR 1910.215(a)(4)

Div. Proposal - \$1,125.00 Formula Amt. - \$1,125.00

SERIOUS - Citation 1 - Item 3 -

a) Blending area, third level: An employee was exposed to a chain powering the mixing paddle on the raw material hopper without a guard installed. 29 CFR 1910.219(f)(3)

Div. Proposal - \$750.00

Formula Amt. - \$750.00

SERIOUS - Citation 1 - Item 4 -

a) Manufacturing areas: Employees used electrical insulating gloves that had not been periodically inspected or tested. 29 CFR 1910.335(a)(1)(ii)

Div. Proposal - \$1,125.00

Formula Amt. - \$1,125.00

TOTAL PENALTY - \$4,12500

TOTAL FORMULA AMT. - \$4,125.00

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

Chairman Schultz and Mr. Atencio discussed the inspection of the gloves and the date stamp on the gloves is the born-on date and noted the gloves need to be tested. Mr. Black noted the plant had a maintenance staff and the staff did live electrical work when required but not on a daily basis. Chairman Schultz wanted to make sure that there was work being done that required the gloves and confirmed that the work they were doing on live feeds had an exposure to electrocution. Mr. Black noted maybe not the feeds but things like motor centers and equipment where they were working around some power sources were live.

Mr. Patton had a question pertaining to sending the gloves to get tested, how does it pertain to gloves that are still in the box and in the packaging that have never been used. Mr. Atencio noted that generally its OSHA's position that the employer have PPE available to employees and there are some requirements to have inspections done and NFP requires that independently they get tested twice a year and it is a validated test, and nobody can assume that the gloves are going to perform the same every single time even if they were just in a box, it is like the respirator programs, just because you have it does not mean it could perform if something was wrong with it. A lot of the burden is on the employer to have to test these out to make sure that they perform when needed. If you have them and are providing them, you need to follow up with what the NFP says, which clearly requires twice a year testing.

Chairman Schultz understood that even if it is still boxed and not used it needs to checked and needs to be either tested or discarded.

Chairman Schultz checked if there were any other comments from Diamond Plastics.

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

QuickFrames USA, LLC

710 West Broadway Rd, Ste 503

Referral

Years in Business:

7 10

Mesa, AZ 85210

Empl. Covered by Inspection:

Site Location:

710 West Broadway Rd, Ste 503

Mesa, AZ 85210

Inspection No:

B5049 - 1543408

Inspection Date:

7/19/2021

SERIOUS – Citation 1 - Item 1 –

710 W Broadway Rd Ste 503, Mesa, AZ 85210: An employee used a tight-fitting half-mask respirator, brand, model and serial numbers unknown, without a written respiratory program in place. 29 CFR 1910.134(c)(1)

Div. Proposal - \$1,000.00

Formula Amt. - \$1,000.00

SERIOUS - Citation 1 - Item 2 -

710 W Broadway Rd Ste 503, Mesa, AZ 85210: Employees provided service and maintenance for equipment without a written energy control program in place to prevent the unexpected energizing, startup or release of stored energy. 29 CFR 1910.147(c)(1) Div. Proposal - \$1,000.00 Formula Amt. - \$1,000.00

<u>SERIOUS</u> – Citation 1 - Item 3 –

710 W Broadway Rd Ste 503, Mesa, AZ 85210: Four employees operated a Yale forklift, model #D970103 and serial #5021352-05, without initial training. 29 CFR 1910.178(1)(1)(i) Formula Amt. - \$1,200.00 Div. Proposal - \$1,200.00

SERIOUS – Citation 1 - Item 4 –

- a) 710 W Broadway Rd Ste 503, Mesa, AZ 85210: An employee operated a Cincinnati press brake, model and serial numbers unknown, without a point of operation guard installed.
- b) 710 W Broadway Rd Ste 503, Mesa, AZ 85210: An employee operated a Cincinnati press brake, model #90FM2 and serial #48715, without a point of operation guard installed. 29 CFR 1910.212(a)(1)

Div. Proposal - \$1,000.00

Formula Amt. - \$1,000.00

SERIOUS – Citation 1 - Item 5 –

- a) 710 W Broadway Rd Ste 503, Mesa, AZ 85210: Four employees operated a Heim 70-ton mechanical punch press, model 7GA-F and serial number 2171, to punch sheets of metal without a point of operation guard installed.
- b) 710 W Broadway Rd Ste 503, Mesa, AZ 85210: An employee operated a Heim 45-ton mechanical punch press, model 7TAOBIF and serial number 2324, to punch sheets of metal without a point of operation guard installed. 29 CFR 1910.217(c)(1)(i)

Div. Proposal - \$2,000.00

Formula Amt. - \$2,000.00

TOTAL PENALTY -\$6,000.00 TOTAL FORMULA AMT. - \$6,000.00

Mr. Atencio discussed ADOSH's inspection, summarized the citation and proposed penalties, and reviewed the photographs.

Chairman Schultz thanked Mr. Atencio for pointing out a range of ways that an employer can create administrative controls, as simple and inexpensive as signage or markings on the floor that indicate danger zones or where people should stand and, in this case, fixing the foot pedal outside of the zone to be able to reach the machine.

Chairman Schultz checked if anyone on the phone would like to comment.

Mr. Hasulak commented that the employee did return to work on a limited basis per his doctor, and the company put him to work at something they hoped would not strain him, but started feeling the pain and went back to the doctor. He did come back with no restrictions.

Mr. Hasulak also noted there were a number of issues and wondered when he would address those. Chairman Schultz explained the process to Mr. Hasulak.

Mr. Hasulak wants to have a safe environment, and this inspection has raised some questions for him regarding what is adequate guarding. He has talked to the experts in the field who have done the maintenance and they said there is no guarding for the gray press brake because it is mechanical and not hydraulic. He would like to get an explanation on what is adequate guarding.

Mr. Atencio noted that what the industry experts are telling him is right, there are no guards for this when it comes to a big press brake, but explained the point of operation guarding, with distances and what the employee is supposed to do to prevent them from putting their hand in the machine.

Chairman Schultz also noted that ADOSH has two parts, compliance and consultation. Mr. Atencio will give Mr. Hasulak more information. Chairman Schultz noted it sounds like Mr. Hasulak wants what the Commission wants and that is a safer workplace.

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

Announcements, Scheduling of Future Meetings and Retirement Resolutions.

Mr. Ashley noted that shortly before the Commission Meeting, it was announced that the U.S. Supreme Court has blocked Federal OSHA's COVID vaccine mandate for large workplaces. This was a very definitive stay of that mandate but it also allowed the CMS vaccine mandate for workers at federally funded healthcare facilities to take effect.

Mr. Ashley noted that he and Mr. Atencio toured an organization called New Freedom which is located at the former Sheraton Hotel at Peoria Avenue and I-17 who are doing an important job of recidivism reduction work for recently released inmates. Those who choose to be a part of this program upon their release, with a capacity of 400 individuals at this location, enter a 90-day program for men and women to help them integrate back into society and back into the workforce. He noted the several services that they provide to help get people back on track. The program also helps with workforce certifications and Mr. Atencio will be putting together a plan where we can assist by teaching OSHA 10-hour classes at no charge which will help the roofing industry, the

home building industry and almost every industry in need of workers, as we have a significant labor demand in Arizona and some industries were also struggling pre-COVID.

Chairman Schultz noted that it sounded amazing and he was sorry his schedule did not allow him to join, but asked Mr. Atencio to get him, and any other members of the Commission that are interested, involved to see the program. It is a wonderful extension of the work ADOSH is already doing at the prisons. We want to be a positive force in furthering the economy of Arizona and this is another way to help get people back to work and to work safely and to give folks opportunities. The skills and certifications give them a leg up on others in applying for virtually any sort of position.

Mr. Ashley updated the Commissioners with the AMS scorecard metrics for the fiscal year-to-date. He reviewed the two metrics for Legal: WC Insurance Obtained and Approved Settlements.

Chairman Schultz noted it is about the education of what we are trying to do and would like to see every issue resolved through settlement, it would save on resources all around, and applauds what they are doing and the focus and the concept of setting goals, you do not get anywhere if you do not start out with a goal and work towards that goal.

Ms. Dimas confirmed Commission meeting dates through March 2022.

Public Comment.

There was no other public comment.

Commissioner Everett moved to adjourn and Vice Chair Hennelly seconded the motion. Chairman Schultz, Vice Chair Hennelly and Commissioner Everett voted in favor of the motion and the meeting was adjourned at 3:00 p.m.

THE INDUSTRIAL COMMISSION OF ARIZONA

James Ashley, Director

ву

Kara Dimas, Commission Secretary