

MINUTES OF MEETING  
OF THE INDUSTRIAL COMMISSION OF ARIZONA

Held at 800 W. Washington

Conference Room 308

Phoenix, Arizona 85007

Wednesday, January 7, 2009 – 1:00 p.m.

Present:	Brian Delfs	Chairman
	Joe Gosiger	Vice Chairman (telephonic)
	Louis W. Lujano, Sr.	Member
	Marcia Weeks	Member
	John A. McCarthy, Jr.	Member
	Laura McGrory	Director
	Andrew Wade	Acting Chief Legal Counsel
	Noreen Thorsen	Claims Manager
	Renee Pastor	Self Insurance Manager
	Nancy Johnson	Legal Counsel
	Darin Perkins	Director, ADOSH
	Gary Norem	Chief Accountant
	Glenn Hurd	Accountant
	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 in attendance was Jenypher Jones of Snell & Wilmer.

Approval of Minutes of December 18, 2008 Meeting

The Commission approved the Minutes of the December 18, 2008 meeting on motion of Mr. Lujano, second of Mr. McCarthy. Mr. Gosiger abstained.

Discussion & Action of Requests for Lump Sum Commutation

Erick Villa Martinez #20080-780556 - Noreen Thorsen presented this lump sum petition. She advised that Mr. Martinez requested a lump sum commutation of his scheduled award of \$1,184.75 per month (present value \$6,480.58) in order to pay the balance owed for his vehicle, pay back a personal loan and use the remaining balance to purchase items for his children and return to Mexico. After the additional payment made by the carrier is subtracted from the present value, Mr. Martinez would receive \$5,295.83. Mr. Martinez is unemployed.

Ms. Thorsen advised that the Claims Department is recommending approval of the lump sum commutation since it will allow Mr. Martinez to return to his family in Mexico. Following discussion, the Commission unanimously approved the lump sum commutation on motion of Mrs. Weeks, second of Mr. Lujano.

Discussion & Action of Request for Renewal of Self Insurance Authority

Pilot Travel Centers, LLC - Renee Pastor presented staff's renewal report along with a Dunn and Bradstreet credit report rating. Administration is recommending renewal of workers' compensation self-insurance authority based on the company's consistent record of profitability and assets of \$1.95 billion, a clean audit report and an acceptable credit rating.

Mrs. Weeks expressed concern regarding the ability of self-insured employers' in general to continue their bond riders and letters of credit for security deposits given the financial environment. Ms. Pastor and Ms. McGrory described how the security requirements, including surety bonds and letters of credit, work and also how the Commission has now subscribed to Dunn and Bradstreet and has access to the Dunn and Bradstreet ratings, which also includes UCC filing information. Following further discussion, the Commission unanimously approved continuance of self-insurance authority and signed a Resolution to that effect on motion of Mr. Lujano, second of Mr. McCarthy.

Discussion & Action of Proposed Civil Penalties Against Uninsured Employers

2C07/08-2568	AMERICAN FINE ART EDITIONS, INC.
2C07/08-1793	CURT D. FRINKLE & CATHERINE E. JONES- FRINKLE HUSBAND & WIFE DBA JONES FAMILY HEALTH CARE AKA C AND C RESIDENTIAL
2C08/09-0695	FRATERNAL ORDER OF EAGLES AERIE 2843
2C08/09-0080	LUNA SOLEIL LLC DBA OCTAGON CAFÉ AKA O.C. MANAGEMENT, LLC
2C08/09-0026	MERIDIAN 55, L.L.C. AKA GATEWAY PORTABLE CRUSHING & RECYCLING
2C07/08-2447	MOVADO, L.L.C. DBA CERAMICA
2C08/09-0798	RESTAURANT EIGHTY-FIVE CORPORATION DBA CARNICERIA LA HISPANA

Andrew Wade advised that a compliance investigation confirmed that the above listed employers 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), Mr. Wade recommended civil penalties of \$1,000.00 be assessed against each of the above listed employers. Following discussion, the Commission unanimously approved assessing civil penalties of \$1,000.00 against employers #2568, 1793, 0695, 0080, 0026, 2447 and 0798 on motion of Mr. McCarthy, second of Mr. Lujano.

Discussion & Action of Notice of Final Rulemaking, Title 20, Chapter 5, Article 1, R20-5-106 (A)(11) Forms Proscribed by the Commission, and R20-5-164, Human Immunodeficiency Virus and Hepatitis C Significant Exposure; Employee Notification; Reporting; Documentation; Forms

Nancy Johnson advised that in October of 2008 the Commission approved the proposed rulemaking to amend the title of the form and information in the form that reports disease exposures by adding Methicillin-resistant Staphylococcus aureus; spinal meningitis and tuberculosis. A hearing was held on December 5, 2008 in which no comments were received, and there have been no changes between the proposed rulemaking and the final rulemaking.

In response to questions from the Commissioners, Ms. Johnson and Ms. McGrory

described some differences between a presumption versus having to prove a workplace exposure caused a disease. Following discussion, the Commission unanimously approved the final rulemaking and directed staff to file the Notice of Final Rulemaking for A.A.C. R20-5-101 with the Governor's Regulatory Review Council on motion of Mr. Lujano, second of Mr. McCarthy.

#### Discussion & Action of ADOSH Discrimination Complaints

#08-70 John Ford v. Canyon State Bus Sales, Inc. - Darin Perkins presented a summary of the Division's investigation of a discrimination complaint filed by Mr. Ford. In his complaint, Mr. Ford alleged that he was terminated because he complained about the excessive heat in his work environment, a 50' by 50' outdoor area under a canopy, during the hot summer months and that he had requested the employer supply him with an evaporative cooler. The employer's response was that Mr. Ford missed 29 days out of a total of 193 work days and was terminated because it appeared that Mr. Ford would not be able to return to work after an illness.

Mr. Perkins further advised that Mr. Ford had been employed for ten months as a bus/diesel mechanic. Mr. Ford stated he made a request once each week for a cooler or fan and was told it was not in the budget. He did bring in a cooler from home and stated that some mechanics had coolers and others did not. On August 14, 2007 it was a particularly hot and humid day, and the following morning Mr. Ford went to the emergency room. He called the employer and told them he had become overheated the prior day. On November 25, 2007, Mr. Ford still had not been released to return to work and was terminated due to the need to replace him since it was the employer's busy time of year. The employer stated that Mr. Ford did good work and they would hire him back.

Mr. Perkins stated that there was no indication that Mr. Ford was terminated as a result of his complaints about the heat. Mr. Ford had stated that he was not interested in returning to work for this employer. In response to a question from Mr. Lujano, Mr. Perkins stated that it was indicated Mr. Ford would not be able to return to a job in the heat. The employer did purchase four more coolers after the incident. Mr. Gosiger asked if there was an OSHA standard in regard to termination due to injury and Mr. Perkins stated that there was not. Ms. McGrory explained that under workers' compensation law, an employer can terminate an injured employee if the employer does not have a position available for the employee when he or she is released to return to work. It was not known whether Mr. Ford filed a workers' compensation claim. The Commission unanimously voted not to pursue the complaint on motion of Mr. McCarthy, second of Mr. Lujano.

#09-04 James Taylor v. Microsmith, Inc. - Darin Perkins presented a summary of the Division's investigation of a discrimination complaint filed by Mr. Taylor. In his complaint, Mr. Taylor alleged that he was terminated because he expressed fear over returning to work after being on medical disability due to what Mr. Taylor believes was a chemical exposure at work. The employer stated that Mr. Taylor was terminated because he repeatedly refused to supply the requested medical documentation related to his medical leave of absence. The employer disputes Mr. Taylor's belief that there was any harmful chemical exposure at the workplace.

Mr. Perkins further advised that Mr. Taylor worked in hardware and software development and also worked on circuit boards. He had been on medical leave since November of 2007 and was receiving short term disability. Mr. Perkins advised that the employer had not received any medical documentation that Mr. Taylor's illness was work related. Mr. Delfs noted that it appeared the employer had gone out of their way by requesting medical documentation from Mr. Taylor multiple times. The Commission discussed the company's attempts to obtain the documentation. Mr. Perkins stated that it did not appear Mr. Taylor had been terminated due to expressing concerns about coming back to work, but rather due to not providing the requested



Darin Perkins summarized the citations and proposed penalty as listed. Following discussion and inspection of photos of these violations, the Commission unanimously approved issuing the citations and assessed the recommended penalty of \$3,500.00 on motion of Mrs. Weeks, second of Mr. Lujano.

Steel Engineers, Inc.  
716 W. Mesquite  
Las Vegas, NV 89106

Planned  
Yrs/Business – 19  
Empl. Cov. by Insp. – 7

Site Location: GIS Map (T030NR023W) Section 3, Dolan Springs, AZ 86441  
Inspection #: Q7984/312781255  
Insp. Date: 09/15/08

SERIOUS – Citation 1, item 1 – The employer did not ensure that employees working approximately 26' above a lower level were provided with a fall protection system. There was another instance of this violation.

(One inspection with two nonserious violations in the past three years).

Div. Proposal - \$1,000.00

Formula Amt. - \$1,000.00

SERIOUS – Citation 1, item 2 – The employer did not ensure that stairways having four or more risers were equipped with one stairrail along each unprotected side.

Div. Proposal - \$1,000.00

Formula Amt. - \$1,000.00

TOTAL DIV. PROP. - \$2,000.00

TOTAL FORMULA AMT - \$2,000.00

Darin Perkins summarized the citations and proposed penalty as listed. Following discussion and inspection of photos of these violations, the Commission unanimously approved issuing the citations and assessed the recommended penalty of \$2,000.00 on motion of Mr. McCarthy, second of Mrs. Weeks.

Mr. Lujano noted that the previous employer had paid a larger penalty. It was discussed that one of the adjustment factors is based on the size of the employer, and the second employer has fewer employees. Mr. Lujano stated that he wanted to go on record that he did not think the employer should receive a discount because an injury would be just as severe for an employee of either employer.

Walters & Wolf Construction Specialties, Inc.  
889 N. Colorado St.  
Gilbert, AZ 85233

Planned  
Yrs/Business – 30  
Empl. Cov. by Insp. – 14

Site Location: 50 E. Van Buren Street, Phoenix, AZ 85004  
Inspection #: R0738/312581432  
Insp. Date: 09/10/08

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 – A horizontal lifeline used by employees on the unprotected leading edge of the building above an 18' fall to the street below and attached to the falling object protective structure of a forklift was not designed, installed and used under the supervision of a competent person.

Citation 1, item 1b - The employer did not ensure that the anchorage points used for a personal fall protection system were capable of supporting 5000 pounds for each employee. (Five inspections with 1 nonserious violation in the past three years).

Div. Proposal - \$1,750.00

Formula Amt. - \$1,750.00

SERIOUS - Citation 1, item 2 - Three employees working at heights greater than 6' and exposed to falls were not adequately trained to recognize the hazards of falling or in the procedures to be followed in order to minimize these hazards.

Div. Proposal - \$1,750.00

Formula Amt. - \$1,750.00

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 3a - The employer did not ensure that the rated load capacity of a Beta Max hoist was conspicuously posted on the equipment prior to and during operations.

Citation 1, item 3b - The employer did not ensure that a competent person conducted inspections of a Beta Max hoist prior to and during each use to make sure it was in safe operating condition.

Div. Proposal - \$1,750.00

Formula Amt. - \$1,750.00

TOTAL DIV. PROP. - \$5,250.00

TOTAL FORMULA AMT - \$5,250.00

Darin Perkins summarized the citations and proposed penalty as listed. Following discussion and inspection of photos of these violations, the Commission unanimously approved issuing the citations and assessed the recommended penalty of \$5,250.00 on motion of Mrs. Weeks, second of Mr. Lujano.

Rotorway International  
7150 W. Erie Street  
Chandler, AZ 85226

Planned  
Yrs/Business - 41  
Empl. Cov. by Insp. - 37

Site Location: 7150 W. Erie Street, Chandler, AZ 85226

Inspection #: L3419/312836034

Insp. Date: 12/01/08

SERIOUS - Citation 1, item 1 - A vertical mill was not provided with a barrier guard to protect the operator from contacting the end mill. There were two other instances 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 unused portion of a metal cutting bandsaw was not effectively guarded to prevent the operator from having any part of his body in the danger zone during the operating cycle. There was another instance of this violation.

Div. Proposal - \$1,250.00

Formula Amt. - \$1,250.00

SERIOUS - Citation 1, item 3 - The spindle end, nut and flange projection for a homemade abrasive bench grinder was not provided with a safety guard.

Div. Proposal - \$1,000.00

Formula Amt. - \$1,000.00

TOTAL DIV. PROP. - \$3,500.00

TOTAL FORMULA AMT - \$3,500.00

Darin Perkins summarized the citations and proposed penalty as listed. Following discussion and inspection of photos of these violations, the Commission unanimously approved

issuing the citations and assessed the recommended penalty of \$3,500.00 on motion of Mr. McCarthy, second of Mr. Lujano.

Discussion & Action regarding Industrial Commission's Membership in International Association of Industrial Accident Boards & Commissions (IAIABC)

Ms. McGrory advised that the agency has received an invoice for membership renewal and that given the current budget cuts and constraints, she would recommend suspension of the membership until the Commission is in a better financial situation. The Commission discussed the benefits of belonging to the organization compared with the cost of \$4,000.00 per year. Ms. McGrory stated that while the information obtained from the organization can be valuable, that it would be prudent to cut the expense this year. Mr. Delfs stated that the Commission's membership in the IAIABC can be revisited next year.

Discussion &/or Action regarding the Interview and Selection Process for Administrative Law Judge Appointments. The Commission may move into Executive Session under A.R.S. §§38-431.03(A)(1) and (A)(3) to Discuss Changes to the Interview Questions Asked of Candidates for the Position

Mr. Wade left the meeting. Chairman Delfs asked whether the Commission needed to move into Executive Session to discuss this matter. Ms. McGrory stated that if they wish to discuss the interview questions, it should be done in Executive Session. Otherwise, the discussion should be held in general session. Ms. McGrory stated that this agenda item is to address the selection process for Administrative Law Judges (ALJ's). She gave a history of the process. The question before the Commission is whether they want to continue the current selection process, or delegate the decision to the Chief ALJ. She also stated that Chief Judge Turney has revised the interview questions for the Commissioner's consideration if they decide to retain the current process.

Ms. Turney stated that the Commission has the statutory authority to appoint ALJ's and that she would be happy to take over the function since timeliness is a problem. She described the timing issues associated with the current process. She stated that she currently has 14 judges doing the work of 17 and is in need of filling this position as soon as possible. Ms. Turney stated that while she values and benefits from the Commissioner's input, the process needs to be done more timely.

Mrs. Weeks stated that she agreed the current system takes too long and that she had faith in Ms. Turney to make good selections. She suggested that the final decision could still be up to the Commission or the Director. Chairman Delfs agreed that if Ms. Turney conducted the interviews and made a selection, the applicant could come before the Commission so that they could confirm the appointment. Mr. Gosiger agreed that the Commission could delegate the function to Ms. Turney and could review and approve the appointment.

Chairman Delfs suggested that the Commission direct Judge Turney to define the process and go ahead and conduct the interviews for the current ALJ vacancy. Ms. McGrory stated that this will require a Resolution delegating authority to the Chief ALJ. Mr. Lujano stated that since timeliness is an issue, he agreed that Ms. Turney be allowed to interview for the current position, but was concerned that the Commission not be circumvented. The Commissioners discussed that the delegation of authority could be rescinded at any time if the Commission so chooses.

Following further discussion, the Commission unanimously voted to delegate the

authority for hiring ALJ's to the Chief ALJ on motion of Mrs. Weeks, second of Mr. Gosiger. Chairman Delfs also asked that Ms. McGrory and Ms. Turney provide a written policy of how the selection process will be handled and that the selection and hiring will be contingent upon Commission approval. Ms. Turney thanked the Commissioners for the delegation of authority.

#### Discussion &/or Action regarding Operations of the Industrial Commission

Ms. McGrory provided a summary of the agency's current staffing, explaining that the agency currently has 70 vacancies out of 321 FTEs. She explained that the budget suspension requires that the agency cut spending by 7.5%, which represents approximately \$1.4 million. This is being met largely through vacancy savings. She stated she is looking at the administrative and special funds and has instituted some operational changes designed to streamline operations and improve efficiency. She described the changes involving the first floor receptionist desk and the Ombudsmans Office. She also described some upcoming changes in the Claims Division involving the use of electronic notification of claims. She and staff are looking a ways to better utilize resources on both the administrative and special fund sides.

Mr. McCarthy suggested that a suggestion box could be provided for employees to offer cost cutting ideas. Ms. McGrory agreed and stated that she has considered a "lunch with the Director" program to get input from employees. Mr. Lujano asked other questions about the impact of the budget on staffing levels. Ms. McGrory explained that the level of vacancies at the present time enable the Commission to meet, in large part, the imposed budget suspension. She explained the criteria for "mission critical" positions. Chairman Delfs asked whether the Commissioners would prefer one on one sessions with the Director and staff regarding budget issues or whether this should be an agenda item in Commission meeting. The Commissioners discussed their options in this regard concluding that discussing it as an agenda item could be more informative.

#### Discussion &/or Action regarding Legislation

Ms. McGrory advised that she and Scot Butler have been continuing to meet with legislators and their staffs. She also met with Don Smith and got SCF of Arizona's legislative agenda for the year, which she will provide to the Commission.

#### Announcements

Ms. Hilton reminded the Commissioners that the next meeting will be held on Thursday, January 15<sup>th</sup> at 1:00 p.m.

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 *Bruce C. Delfs*  
Chairman

By *John O. Gray*  
Vice Chairman

By *Thomas W. Lyons, Sr.*  
Member

ATTEST:

By *Kevin Wells*  
Member

*Teresa Hilton*  
Commission Secretary

By *John McAty Jr*  
Member