

MINUTES OF MEETING  
OF THE INDUSTRIAL COMMISSION OF ARIZONA

Held at 800 W. Washington  
Conference Room 308  
Phoenix, Arizona 85007  
Thursday, July 8, 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
	Darin Perkins	Director, ADOSH
	Renee Pastor	Self Insurance Manager
	Dean Palmer	Management Information Systems
	Teresa Hilton	Commission Secretary

Chairman Delfs convened the Commission meeting at 1:00 p.m. noting a quorum present. Also present were Teresa Yi of Snell & Wilmer and Chic Older, Vice President, Arizona Medical Association "ArMA".

Approval of Minutes of June 30, 2010 Meeting

The Commission approved the Minutes of June 30, 2010 on motion of Mr. Parker, second of Ms. Strickler. Mr. McCarthy abstained.

Discussion & Action regarding ADOSH Complainant Appeal from Marc Mathews against Employer, TUV Rheinland, LLC

Darin Perkins advised that Mr. Mathews filed a complaint with ADOSH alleging that he had been exposed to toxic mold or another similar inhalant poisoning during the course of his work.

In response to his complaint, ADOSH sent a letter to the employer requesting that the employer respond to the allegations. The employer submitted a detailed response including the results of tests conducted by an independent industrial hygiene testing firm that established indoor mold levels were lower than those found outdoors. Mr. Mathews did not agree with the employer's response and, as a result, ADOSH conducted an inspection of the workplace. After completing the inspection, ADOSH informed Mr. Mathews of the results of the inspection findings which found no violations of any safety standards. Mr. Mathews responded and stated that he was not satisfied with the inspection and requested that ADOSH review the inspection findings. ADOSH responded to Mr. Mathews and explained in detail that there are no OSHA standards that address air quality levels of mold; no standards that require an employer to conduct pre-entry workplace inspections; and no standards that require employers to maintain records of workplace renovations or to provide employees with such records if they exist. ADOSH also explained the environmental monitoring results that established the mold levels indoors were lower than those outdoors. ADOSH's response concluded that the investigation

into his complaint had been thorough and that there was no evidence of any violation of OSHA standards by TUV. Mr. Mathews requested further review of ADOSH's conclusion.

To ensure that all had been done that could be done, ADOSH interviewed a co-worker of Mr. Mathews' whom Mr. Mathews' alleged experienced health problems similar to his. The co-worker did not attribute her respiratory illness to workplace conditions. ADOSH also reviewed documentation from Mr. Mathews regarding his current medical conditions. This information did not attribute Mr. Mathews' illness to the workplace.

Mr. Perkins explained that this matter has been adequately investigated and there is no justifiable reason to issue a citation to TUV. Mr. Perkins added that the Legal Department also reviewed the case and determined that there was insufficient documentation or justification to issue a general duty citation. Mr. Perkins explained the process under A.A.C. R20-5-619.

Following discussion, the Commission unanimously agreed that no further action be taken with respect to Mr. Matthews' complaint and affirmed the actions taken by ADOSH on motion of Mr. Parker, second of Ms. Strickler.

#### Discussion & Action of Proposed OSHA Citations and Penalties

Spire Engineering, L.L.C. (FN)  
1811 S. Alma School Road, Suite 260  
Mesa, AZ 85210

Complaint  
Yrs/Business – 10  
Empl. Cov. by Insp. – 5

Site Location: Jesse Hayes Road & Salas Lane, Globe, AZ 85501  
Inspection #: I7163/314341082  
Insp. Date: 03/16/10

SERIOUS – Citation 1, item 1 – Two employees were working in an excavation 6' deep, 4' wide and 20' long which was lacking a protective system installed to preclude a cave-in or collapse (1926.652(a)(1).

(No inspection history in the past three years).

Div. Proposal - \$5,000.00

Formula Amt. - \$5,000.00

Darin Perkins summarized the citation and proposed penalty as listed and responded to questions from the Commissioners. The Division recommendation was for the gravity-based penalty with no adjustment factors since the violation directly related to the serious injury. Following discussion and inspection of photographs of this violation, the Commission unanimously approved issuing the citation and assessed the recommended penalty of \$5,000.00 on motion of Mr. McCarthy, second of Ms. Oster.

Economy Drywall, LLC  
500 N. Estrella Pkwy, Suite B2-407  
Goodyear, AZ 85338

Complaint  
Yrs/Business – 3  
Empl. Cov. by Insp. – 4

Site Location: 3130 E. Thomas Road, Phoenix, AZ 85016  
Inspection #: N4762/314458597  
Insp. Date: 05/06/10

SERIOUS – Citation 1, item 1 – An employee climbed up the guardrail of a scissor lift while elevated approximately 27' above the ground to gain access to the roof of the building without being protected by the use of a personal fall arrest system or guardrail system at the time of the

transition (1926.451(g)(1)(vii).  
(No inspection history in the past three years).

Div. Proposal - \$1,000.00

Formula Amt. - \$1,000.00

SERIOUS – Citation 1, item 2 – Three employees were working from an aerial lift at a height of up to 23' above the ground without wearing a safety harness and lanyard (1926.453(b)(2)9v).

Div. Proposal - \$1,000.00

Formula Amt. - \$1,000.00

GROUPED SERIOUS – Citation 1, item 3a – An employee's personal fall arrest system, in an aerial lift, was rigged in such a way that the employee could contact the ground in the event of a fall (1926.502(d)(16)(iii).

Citation 1, item 3b - One employee was using a personal fall arrest system that was attached to the platform guardrail of an aerial lift and not the lanyard attachment anchor device (1926.502(d)(23).

Div. Proposal - \$1,000.00

Formula Amt. - \$1,000.00

NONSERIOUS – Citation 2, item 1 – The OSHA 300 Log and 300A Summary for 2007, 2008 and 2009 was not provided upon request and was not being maintained (1904.40(a).

Div. Proposal - \$ 400.00

Formula Amt. - \$ 400.00

TOTAL PENALTY - \$3,400.00

TOTAL FORMULA AMT. - \$3,400.00

Darin Perkins 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 \$3,400.00 on motion of Mr. Parker, second of Mr. McCarthy.

Flowers Foods dba Holsum Bakery, Inc.  
2322 W. Lincoln Street  
Phoenix, AZ 85009

Complaint  
Yrs/Business – 130  
Empl. Cov. by Insp. – 125

Site Location: 2322 W. Lincoln Street, Phoenix, AZ 85009

Inspection #: I7163/314424649

Insp. Date: 04/29/10

SERIOUS – Citation 1, item 1 – Employees work from the catwalk approximately 15' high, 3' wide and 20' long which is lacking standard guardrails or other equivalent means of fall protection (1910.23( c)(1).

(No inspection history in the past three years).

Div. Proposal - \$2,250.00

Formula Amt. - \$2,250.00

SERIOUS – Citation 1, item 2 – Procedures were not developed, documented and utilized for the control of potentially hazardous energy when employees were engaged in repair and maintenance of machines throughout the facility (mixers, cutters, proof boxes, conveyors, packers, robot machines, etc.)(1910.147( c)(4)(i).

Div. Proposal - \$5,000.00

Formula Amt. - \$5,000.00

SERIOUS – Citation 1, item 3 – Employees were not adequately trained on the written lockout/tagout procedures (1910.147( c)(7)(i).

Div. Proposal - \$2,250.00

Formula Amt. - \$2,250.00

SERIOUS – Citation 1, item 4 – Gears were not completely enclosed on a hoist (1910.263(c)(2)).

Div. Proposal - \$2,250.00

Formula Amt. - \$2,250.00

SERIOUS – Citation 1, item 5 – Sprockets and V-belt drives located within reach from platforms or passageways or located within 8' 6" from the floor were not completely enclosed on a hoist (1910.263(c)(3)).

Div. Proposal - \$ 2,250.00

Formula Amt. - \$ 2,250.00

TOTAL PENALTY - \$15,000.00

TOTAL FORMULA AMT. - \$15,000.00

Darin Perkins summarized the citations and proposed penalty as listed and responded to questions from the Commissioners. The Division recommendation for Citation 1, item 2 was for the gravity-based penalty with no adjustment factors since it directly related to the serious injury. Following discussion and inspection of photographs of these violations, the Commission unanimously approved issuing the citations and assessed the recommended penalty of \$15,000.00 on motion of Mr. McCarthy, second of Mr. Parker.

Acme Metal Works, Inc.  
1292 W. Harwell Road  
Gilbert, AZ 85233

Complaint  
Yrs/Business – 22  
Empl. Cov. by Insp. – 25

Site Location: 1292 W. Harwell Road, Gilbert, AZ 85233

Inspection #: I7163/314424599

Insp. Date: 04/27/10

SERIOUS – Citation 1, item 1 – A router had the interlock bypassed (1910.212(a)(1)).  
(No inspection history in the past three years).

Div. Proposal - \$750.00

Formula Amt. - \$750.00

SERIOUS – Citation 1, item 2 – Three mill machines were lacking a guard at the point of operation (1910.212(a)(3)(ii)). There were two instances of press brakes lacking a guard at the point of operation.

Div. Proposal - \$ 750.00

Formula Amt. - \$ 750.00

TOTAL PENALTY - \$1,500.00

TOTAL FORMULA AMT. - \$1,500.00

Darin Perkins 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 Ms. Oster, second of Mr. McCarthy.

Hip Valley Construction  
P.O. Box 1055  
Camp Verde, AZ 86322

Planned  
Yrs/Business – 15  
Empl. Cov. by Insp. – 25

Site Location: 997 E. Pine Knoll Drive, Flagstaff, AZ 86001

Inspection #: A7717/314384538

Insp. Date: 03/30/10

SERIOUS – Citation 1, item 1 – Three pump jack scaffolds were erected without mending plates, pole anchors and triangular braces (23.403(A)).  
(No inspection history in the past three years).

Div. Proposal - \$1,250.00

Formula Amt. - \$1,250.00

SERIOUS – Citation 1, item 2 – Two employees were working from three pump jack scaffolds which were not erected under the direction of a qualified competent person (1926.451(f)(7).

Div. Proposal - \$1,250.00

Formula Amt. - \$1,250.00

SERIOUS – Citation 1, item 3 – Two employees were working from three pump jack scaffolds without receiving training by a qualified person, associated with working on the scaffolding (1926.454(a).

Div. Proposal - \$1,250.00

Formula Amt. - \$1,250.00

SERIOUS – Citation 1, item 4 – One employee was using a balcony access 2' wide, 2' long and 12' high which was lacking a guardrail system (1926.502(b)(13). There was another instance of this violation.

Div. Proposal - \$1,250.00

Formula Amt. - \$1,250.00

SERIOUS – Citation 1, item 5 – Anchorage points used by employees working approximately 24' high were not capable of supporting 5000 pounds per employee (1926.502(d)(15).

Div. Proposal - \$1,250.00

Formula Amt. - \$1,250.00

SERIOUS – Citation 2, item 1 – An OSHA 300 Log was not maintained by the employer (1904.1(a)(2).

Div. Proposal - \$ 500.00

Formula Amt. - \$ 500.00

TOTAL PENALTY - \$6,750.00

TOTAL FORMULA AMT. - \$6,750.00

Darin Perkins 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 \$6,750.00 on motion of Mr. McCarthy, second of Ms. Strickler.

Investment Painting Services, Inc.  
2033 W. North Lane, Suite 16  
Phoenix, AZ 85021

Complaint  
Yrs/Business – 27  
Empl. Cov. by Insp. – 3

Site Location: 2011 S. 7<sup>th</sup> Avenue, Suite 100, Phoenix, AZ 85007

Inspection #: R0738/314424532

Insp. Date: 04/20/10

SERIOUS – Citation 1, item 1 – Employees were not adequately trained in the recognition and avoidance of hazards associated with the use of aerial lifts (1926.454(a).

(No inspection history in the past three years).

Div. Proposal - \$750.00

Formula Amt. - \$750.00

SERIOUS – Citation 1, item 2 – Employees were painting at heights greater than 15' above the asphalt without utilizing a fall protection system or other equivalent means to prevent a fall (1926.501(b)(1).

Div. Proposal - \$750.00

Formula Amt. - \$750.00

SERIOUS – Citation 1, item 3 – Employees painting at various heights of 15' to 40' in an aerial lift or atop of steel awnings and exposed to falls, were not provided adequate training to recognize the hazards or in the procedures to be followed to minimize those hazards (1926.503(a)(1).

Div. Proposal - \$ 750.00  
TOTAL PENALTY - \$2,250.00

Formula Amt. - \$ 750.00  
TOTAL FORMULA AMT. - \$2,250.00

Darin Perkins 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 \$2,250.00 on motion of Ms. Oster, second of Ms. Strickler.

Stone Source Int'l LLC  
3640 S. Campbell Avenue  
Tucson, AZ 85713

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

Site Location: 3640 S. Campbell Avenue, Tucson, AZ 85713

Inspection #: N5645/314538398

Insp. Date: 06/01/10

SERIOUS - Citation 1, item 1 - A 4" right angle grinder did not have a safety guard (1910.243(c)(3).

(No inspection history in the past three years).

Div. Proposal - \$750.00

Formula Amt. - \$750.00

SERIOUS - Citation 1, item 2 - Electrical conductors to the exhaust fan were inserted into a 220 volt outlet (1910.303(b)(1).

Div. Proposal - \$ 750.00

Formula Amt. - \$ 750.00

TOTAL PENALTY - \$1,500.00

TOTAL FORMULA AMT. - \$1,500.00

Darin Perkins summarized the citations and proposed penalty as listed and responded to questions from the Commissioners. The Commission unanimously approved issuing the citations and increased the penalty for Citation 1, item 2 to \$1,500.00 by changing the probability factor to HG for a gravity-based penalty of \$5,000.00 before adjustment factors due to the open and accessible location of the hazard for a total penalty of \$2,250 on motion of Mr. Parker, second of Mr. McCarthy.

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

The Commissioners were previously provided copies of all comments received along with a copy of the fee hearing transcript. They were also provided a summary of the comments, along with staff's response to the comments. Ms. McGrory stated that several issues needed to be considered by the Commission. The first issue is the methodology to be used to select Arizona values. She summarized the issue and the comments received from the Arizona Medical Association "ArMA." She recommended that the Commission adopt a methodology that selects the values of its Fee Schedule based on the 75<sup>th</sup> percentile of the surveyed values. She also recommended that this methodology be considered a general rule, with the Commission having the discretion to create exceptions as it deems appropriate. As an exception to this general rule, she described that if the survey sample size is less than 4, then the code would be identified as RNE (Relative Value Not Established), except it if involves the professional component "PC" of a value in which case the PC value would be based on the current ICA PC to Total Value ratio. Chairman Delfs asked if Mr. Older, who was present at the meeting, would like to speak. Mr. Older stated that he supported the Director's recommendation regarding the methodology and expressed his appreciation to the Commission for their efforts on the fee

schedule. Following discussion, the Commission unanimously agreed to select values of the Fee Schedule based on the 75th percentile of the surveyed values, subject to exceptions as recommended by staff, on motion of Mr. Parker, second of Ms. Oster.

Ms. McGrory stated that the Commission needs to select the formula to calculate the 75<sup>th</sup> percentile. She directed the Commissioners to Exhibit 1 of their packet, which is a summary of percentile formulas prepared by Dean Palmer. Ms. McGrory described the three formulas, and the slightly differing results from each. She stated that ArMA recommends that the Commission adopt the NIST method, which method produces the higher result. Ms. McGrory recommended that the Commission adopt the formula used in Microsoft Excel and explained why. The Commissioners asked questions of Mr. Palmer, Mr. Older and Ms. McGrory. Chairman Delfs stated that he would like to see the Commission utilize the Excel formula so that the community could more easily use the methodology adopted by the Commission. He noted, however, that the issue of the formula could be revisited in future years if needed. Following additional discussion, the Commission unanimously agreed to use the percentile formula in Excel for purposes of selecting the 75<sup>th</sup> percentile on motion of Mr. McCarthy, which was seconded by Ms. Strickler.

Ms. McGrory stated that the next item for consideration is the issue of the use of networks and other fee discount agreements. She recommended that language be added to the fee schedule stating that if a payer cannot provide verification of a contract signed by the healthcare provider that clearly authorizes the payer's access to network discounts, then the payer is required to make payment as provided in the Arizona fee schedule. Ms. Strickler and Ms. Oster explained that while they understood the problem faced by providers, the recommended solution would create a problem for the payer because the contracts are between the provider and the network. Ms. McGrory explained that the recommended proposal would necessitate a change in business practice, but that the entity that seeks to take advantage of a network should be responsible to prove that it is legally entitled to take the discount. Ms. Strickler suggested that the Department of Insurance, the regulator of network providers, be involved and that the issue may be better addressed through that entity rather than the fee schedule mechanism. Ms. Strickler suggested that a stakeholder group be formed to discuss the issue and propose solutions. Chairman Delfs stated that there has been ample time for comment, but no comments were received opposing staff's recommendation. While he did not object to the forming of a stakeholder group, if he were to decide the issue now, he would support staff's recommendation. Following further discussion, the Commission agreed that this was a very complex issue. Chairman Delfs stated that a stakeholders' committee would be formed to further address the issue.

Ms. McGrory advised that to address the other network issue as described in the initial staff study, she is recommending additional language be added to the fee schedule providing more guidance and direction to the Community regarding Arizona workers' compensation law as it pertains to patient choice and directed care. Responding to a question from Ms. Strickler, Ms. McGrory stated that inclusion of language in the Fee Schedule providing guidance and direction regarding the law is not rulemaking. Following discussion, the Commission unanimously approved adding language to the fee schedule, consistent with current law and Commission policy, that provides more guidance and direction regarding patient choice and directed care on motion of Mr. Parker, second of Mr. McCarthy.

Ms. McGrory then addressed the recommendation by ArMA that the Commission adopt Category III codes to the fee schedule. Only two of the states currently surveyed have adopted

the Category III codes, with one using a By Report "BR" value and the other assigning no value. Ms. McGrory recommended that this matter be addressed in next year's fee schedule update after other parties have had the opportunity to comment on the proposal. The Commissioners unanimously agreed and no action was taken to adopt the Category III codes.

Ms. McGrory then addressed the recommendation by ArMA that the conversion factor for Anesthesia be increased and that the Anesthesia section values be added to the four year cycle of review. Ms. McGrory agreed and recommended that this conversion factor be increased based on the methodology adopted by the Commission. Following discussion, the Commission unanimously approved increasing the Anesthesia conversion factor and adding the Anesthesia section codes to the four year cycle for review on motion of Mr. Parker, second of Ms. Oster.

ArMA has also suggested that the radiology codes containing six digits be removed from the fee schedule since provider operating systems are unable to recognize the numbers. Ms. McGrory explained the history of the codes and recommended that they be deleted since other codes have since been adopted that adequately describe the associated procedure. Following discussion, the Commission unanimously deleted unique Arizona codes 76499.1, 76499.2, 76499.3 and 76499.4 on motion of Mr. Parker, second of Ms. Strickler.

Ms. McGrory advised that the next issue for consideration concerns ArMA's request that the value of code 99099, physician testimony at hearing, be increased. ArMA has stated that the current value of \$110 for the first hour and \$55 for each additional hour is substantially undervalued. Ms. McGrory described the history and budget impact of the code. In light of current budget constraints, she recommend against an increase of the \$110 for the first hour, but suggested that the \$55 for each additional hour be eliminated in recognition of the value of a physician's time if the physician is required to testify in excess of 60 minutes. This would result in a flat \$110 fee per hour of testimony. She also recommended that in next year's fee schedule update, a bifurcated system be considered that takes into consideration that the fee paid to a physician performing an IME takes into consideration that the physician will likely be required to testify at an ICA hearing. If testimony fees to IME doctors are reduced, it may be possible to consider an increase in the testimony fees of other doctors appearing before the Commission. Following discussion, the Commission unanimously eliminated the \$55 for each additional hour for a flat \$110 per hour of testimony with this issue to be addressed in next year's update on motion of Mr. Parker, second of Mr. McCarthy.

Ms. McGrory advised that the final item for consideration today concerns documentation guidelines. Ms. McGrory summarized the comments received and stated that it would be prudent to proceed slowly and cautiously to avoid inadvertent conflicts. She recommended that the Commission adopt the 1995 and 1997 AMA Guidelines, consistent with how they are used and interpreted by CMS, and requiring that payers disclose within the Explanation of Review which specific guideline was used in determining the reimbursement. Following discussion, the Commission unanimously agreed that documentation guidelines from the 1995 and 1997 AMA be utilized and that payers be required to disclose the guidelines utilized on motion of Mr. Parker, second of Ms. Oster.

Ms. McGrory thanked the Commissioners for their work on these issues and stated that the remaining issues will be agenda items for future meetings.

Chairman Delfs suspended the remaining agenda items until the next meeting due to time constraints.



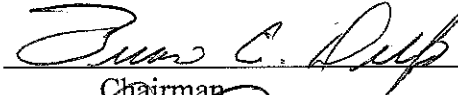
Announcements and Scheduling of Future Meetings

Ms. Hilton reminded the Commissioners that the next meeting is scheduled for Wednesday, July 14<sup>th</sup>.

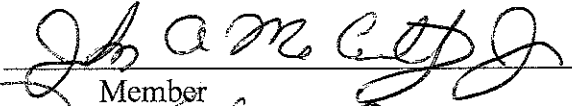
There being no further business to come before the Commission and no public comment, Chairman Delfs adjourned the meeting at 2:55 p.m.

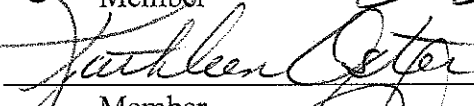
APPROVED:


THE INDUSTRIAL COMMISSION OF ARIZONA

By   
Chairman


By   
Vice Chairman

By   
Member

By   
Member

By   
Member

ATTEST:

  
Commission Secretary