

MINUTES OF MEETING
OF THE INDUSTRIAL COMMISSION OF ARIZONA
Held at 800 W. Washington
Conference Room 308
Phoenix, Arizona 85007
Wednesday, July 14, 2010 – 1:00 p.m.

Present:	Brian Delfs	Chairman
	David Parker	Vice Chairman
	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
	Michael Hawthorne	Chief Financial Officer
	Kara Dimas	Legal Division
	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, Russ Korcuska and David Koval of KCI and Alexis Burns.

Approval of Minutes of July 8, 2010 Meeting

The Commission unanimously approved the Minutes of July 8, 2010 on motion of Mr. McCarthy, second of Mr. Parker.

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

Ms. McGrory stated additional issues need to be addressed. The first is selection of a publication for determination of average wholesale price "AWP" for pharmaceuticals. Ms. McGrory summarized the comments received and stated that she is still working with interested parties regarding this issue. She stated that based on the comments received she will be recommending that the Commission select the publication for determination of AWP. This issue will come back to the Commission with additional recommendation at a later date.

The second issue is reimbursement for generic medications, which has been an area of confusion and complexity. She summarized the comments received and the requirements of A.R.S. §§23-908 and 32-1963.01. She then recommended that specific language be added to the fee schedule that incorporates by reference the applicable sections of A.R.S. §32-1963.01. Following discussion, the Commission unanimously agreed to include and adopt by reference specific language from 32-1963.01 in the fee schedule on motion of Mr. Parker, second of Ms. Oster. Following further discussion, Mr. Parker made an additional motion to amend the fee schedule to include specific language stating that a pharmacy or its agent is entitled to be reimbursed based on the medication dispensed, including a brand name drug that is dispensed as

provided in 23-1963.01. The motion was seconded by Mr. McCarthy and unanimously approved.

The next issue was raised by Stone River who asked that the Commission add a provision in the fee schedule that states that if a pharmacy dispenses a drug without knowledge of the network, that reimbursement be based on the fee schedule as opposed to the network discount. Ms. McGrory described the issue and recommended that the Commission decline to adopt the proposal. If a pharmacy has entered into a network agreement and agreed to certain network discounts, then those network discounts should apply to the pharmacy's agents or entities that have purchased the accounts of the pharmacy. She explained that the converse applies as well. If a pharmacy has not entered into a network agreement, then neither the pharmacy, its agents, or entities that have purchased the pharmacy accounts are subject to the network discounts. Following discussion, the Commission unanimously agreed to add language to the fee schedule stating that reimbursement for pharmaceuticals shall be based on the fee schedule if no contractual agreement exists between the pharmacy and the payer on motion of Mr. Parker, second of Ms. Strickler.

Ms. McGrory described the final issue with respect to generic substitution stating that it is a difficult issue that deals not with the dispensing side of the table, but with the prescribing patterns of physicians. Ms. McGrory described the comments received and the scope of the issue. Ms. McGrory recommended that the Commission continue to work on this issue with the goal of implementing a program that requires documentation from the doctors regarding the need for a brand name drug as opposed to a generic drug. She described the importance of ensuring that the injured worker is not caught in the middle of the generic substitution debate. She described the program that is under consideration. Ms. McGrory stated that she has no recommendation at this time, but will continue to work on the issue.

Ms. McGrory stated that occupational therapists are asking that the Commission reevaluate two codes, 97003 and 97004 since the corresponding physical therapy codes, 97001 and 97002 were valued higher last year. Ms. McGrory described the options available to the Commission with respect to this issue. Following discussion, the Commission agreed to evaluate the codes in their four year cycle and not to address the values at this time.

Ms. McGrory stated that the final issue to be addressed today is the proposal by Healthsystems that imposes pharmaceutical network discounts on parties that have not agreed to the discounts. Ms. McGrory described the issue and recommended that the Commission decline to adopt the language since entities that are not a party to a network should not be subject to the network discounts. Following discussion, the Commission agreed that the proposal should not be adopted.

Discussion & Action of Proposed OSHA Citations and Penalties

Kitchell Contractors, Inc. of Arizona
1797 E. Highland Ave., Suite 100
Phoenix, AZ 85016

Fatality
Yrs/Business – 25
Empl. Cov. by Insp. – 120

Site Location: 1810 E. Windsor Avenue, Phoenix, AZ 85006

Inspection #: Z5834/314168535

Insp. Date: 01/29/10

WILLFUL SERIOUS – Citation 1, item 1 – One employee, struck and killed by a forklift, was not protected from heavy mobile equipment by barricades, traffic cones, warning/danger tape or

a flagger/spotter while he worked in the jobsite roadway (23.403(A).
(Nine inspections with no violations in the past three years).

Div. Proposal - \$70,000.00

Formula Amt. - \$70,000.00

WILLFUL SERIOUS – Citation 1, item 2 – One employee was working in a construction site roadway without donning a reflective vest (1926.95(a).

Div. Proposal - \$63,000.00

Formula Amt. - \$63,000.00

SERIOUS – Citation 2, item 1 – Traffic signs were not used to protect one employee working in a jobsite roadway from mobile equipment travelling the roadway (1926.200(g)(1).

Div. Proposal - \$ 7,000.00

Formula Amt. - \$ 7,000.00

TOTAL PENALTY - \$140,000.00

TOTAL FORMULA AMT. - \$140,000.00

Darin Perkins summarized the citations and proposed penalty as listed and responded to questions from the Commissioners. The Division recommendation for Citation 1, item 1 and Citation 2, item 1 was for the gravity-based penalty with no adjustment factors since the violations directly related to the fatality. Following discussion and inspection of photographs of these violations, the Commission unanimously approved issuing the citations and assessed the recommended penalty of \$140,000.00 on motion of Mr. Parker, second of Mr. McCarthy.

Sun Valley Masonry, Inc.
10828 N. Cave Creek Road
Phoenix, AZ 85020

Unprogram Related
Yrs/Business – 30
Empl. Cov. by Insp. – 45

Site Location: 1810 E. Windsor Avenue, Phoenix, AZ 85006

Inspection #: Z5834/314168543

Insp. Date: 01/29/10

SERIOUS – Citation 1, item 1 – Three employees were not instructed in the safe operating procedures of forklift operations which may include safe handling, travelling, load retrieval, load distribution, care and inspection of forklifts, etc. (1910.178(l)(1)(i).

(23 inspections with two serious and seven nonserious violations issued).

Div. Proposal - \$7,000.00

Formula Amt. - \$7,000.00

SERIOUS – Citation 1, item 2 – The employer did not ensure adherence to ANSI B56-1-1969 Safety Standards for Powered Industrial Trucks for their forklifts in that drivers were not physically qualified, pedestrians were not safeguarded, drivers did not adhere to travelling requirements and all required items on the forklifts were not inspected (1926.602(c)(1)(vi).

Div. Proposal - \$7,000.00

Formula Amt. - \$7,000.00

SERIOUS – Citation 1, item 3 – Employees who were operating forklifts did not have their performance evaluated at least every three years (1910.178(l)(4)(iii).

Div. Proposal - \$ 2,500.00

Formula Amt. - \$ 2,500.00

TOTAL PENALTY - \$16,500.00

TOTAL FORMULA AMT. - \$16,500.00

Darin Perkins summarized the citations and proposed penalty as listed and responded to questions from the Commissioners. The Division proposal for Citation 1, item 1 and item 2 was for the gravity-based penalty with no adjustment factors since the violations attributed to the fatality. Following discussion and inspection of photographs of these violations, the Commission unanimously approved issuing the citations and assessed the recommended penalty of \$16,500.00 on motion of Mr. McCarthy, second of Ms. Oster.

AK&J Sealants L.L.C.
20615 N. 29th Place
Phoenix, AZ 85050

Complaint
Yrs/Business – 10
Empl. Cov. by Insp. – 16

Site Location: 201 N. Central, Phoenix, AZ 85004
Inspection #: A7717/314458936
Insp. Date: 05/10/10

SERIOUS – Citation 1, item 1 – Two opposing tiebacks were not installed on outriggers (23.403.A). There were four other instances of this violation.

(One inspection with one serious and one nonserious violation in the past three years).

Div. Proposal - \$1,250.00

Formula Amt. - \$1,250.00

SERIOUS – Citation 1, item 2 – One employee was working from an electric powered suspended platform without the tie-downs secured to a verified anchorage on the building (1910.66(f)(3)(ii)(c)). There was another instance of this violation.

Div. Proposal - \$1,250.00

Formula Amt. - \$1,250.00

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 – Working platforms and components were not adequately inspected for visible defects before use (1910.66(g)(2)(iv)).

Citation 1, item 3b - A competent person did not adequately inspect cable suspension wire ropes for visible defects (i.e. kinks, bird caging, broken wires) (1910.66(g)(5)(ii)).

Div. Proposal - \$1,250.00

Formula Amt. - \$1,250.00

TOTAL PENALTY - \$3,750.00

TOTAL FORMULA AMT. - \$3,750.00

Darin Perkins summarized the citations and proposed penalty as listed and responded to questions from the Commissioners. He advised that the Division recommendation for each citation should be \$1,500.00 since the 10% reduction for history is not appropriate, for a total proposed penalty of \$4,500.00. Following discussion and inspection of photographs of these violations, the Commission unanimously approved issuing the citations and assessed the recommended penalty of \$4,500.00 on motion of Mr. McCarthy, second of Ms. Strickler.

Reliable Materials Stockers, LLC
20280 N. 59th Avenue, Suite 115
Glendale, AZ 85308

Planned
Yrs/Business – 13
Empl. Cov. by Insp. – 3

Site Location: 4137 S. Harlan, Mesa, AZ 85212
Inspection #: N4762/314458738
Insp. Date: 05/13/10

SERIOUS – Citation 1, item 1 – One employee was standing on a pallet of roofing tiles that were being moved horizontally and was not securely attached to the forklift, while elevated by the forklift, approximately 27' above ground (1926.451(c)(2)(v)).

(No inspection history in the past three years).

Div. Proposal - \$750.00

Formula Amt. - \$750.00

SERIOUS – Citation 1, item 2 – The operator of the forklift dismounted the forklift and left the

forklift unattended while the load engaging means were not fully lowered, while another employee was standing on the pallet of roofing tiles elevated 27' above the ground (1926.602 (c)(1)(vi)).

Div. Proposal - \$ 750.00
TOTAL PENALTY - \$1,500.00

Formula Amt. - \$ 750.00
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.

Farmers Investment Co.
1525 E. Sahuarita Road
Sahuarita, AZ 85629

Complaint
Yrs/Business - 44
Empl. Cov. by Insp. - 87

Site Location: 1525 E. Sahuarita Road, Sahuarita, AZ 85629
Inspection #: P0775/314384454
Insp. Date: 03/29/10

SERIOUS - Citation 1, item 1 - An employee was operating a forklift without the use of the seatbelt (1910.132(a)). There was another instance of this violation.
(No inspection history in the past three years).

Div. Proposal - \$2,250.00

Formula Amt. - \$2,250.00

SERIOUS - Citation 1, item 2 - Employees were required to do maintenance on machinery and the employer had not established lockout/tagout procedures and trained employees to ensure that the equipment would be rendered inoperative prior to any work where the unexpected start-up could cause injury (1910.147(c)(1)).

Div. Proposal - \$2,250.00

Formula Amt. - \$2,250.00

SERIOUS - Citation 1, item 3 - An employee was allowed to operate a forklift without being trained and evaluated in the safe operation of the truck (1910.178(l)(1)(i)).

Div. Proposal - \$2,250.00

Formula Amt. - \$2,250.00

SERIOUS - Citation 1, item 4 - The emergency brakes on two forklifts were not functioning (1910.178(p)(1)).

Div. Proposal - \$2,250.00

Formula Amt. - \$2,250.00

SERIOUS - Citation 1, item 5 - The pecan shell bin loading auger did not have the top guard installed to prevent employees from accidentally coming in contact with the rotating parts (1910.212(a)(1)). There were two other instances of this violation.

Div. Proposal - \$2,250.00

Formula Amt. - \$2,250.00

SERIOUS - Citation 1, item 6 - The drive belts on two of the pecan dryers which were 6'6" above the ground were not fully enclosed and the pulleys were not guarded (1910.219(d)(1)). There were four other instances of this violation.

Div. Proposal - \$2,250.00

Formula Amt. - \$2,250.00

SERIOUS - Citation 1, item 7 - The south end of the roaster had a chain drive and sprockets which were 6'6" above the floor that did not have a guard installed (1910.219(f)(3)). There were three other instances of this violation.

Div. Proposal - \$2,250.00

Formula Amt. - \$2,250.00

SERIOUS – Citation 1, item 8 – A right angle grinder with a 4" diameter abrasive wheel did not have a safety guard installed (1910.243(c)(3)).

Div. Proposal - \$2,250.00

Formula Amt. - \$2,250.00

SERIOUS – Citation 1, item 9 – A 120V electrical outlet located along the wall was not enclosed in the box, allowing for contact with the wires on the back side of the receptacle when attempting to plug into the unit (1910.303(g)(2)(i)).

Div. Proposal - \$2,250.00

Formula Amt. - \$2,250.00

SERIOUS – Citation 1, item 10 – The circuit breaker box on the west side of the wall was missing the panel board cover (dead front), exposing live electrical parts (1910.305(d)). There was another instance of this violation.

Div. Proposal - \$ 2,250.00

Formula Amt. - \$ 2,250.00

TOTAL PENALTY - \$22,500.00

TOTAL FORMULA AMT. - \$22,500.00

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 \$22,500.00 on motion of Mr. McCarthy, second of Ms. Strickler.

Discussion & Action regarding Requests for Renewal of Self Insurance Authority. The Committee 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.

Medtronic, Inc. - Renee Pastor presented staff's renewal report along with current Moody's and Dunn and Bradstreet credit ratings. She responded to questions from the Commissioners. Ms. Pastor advised that Administration is recommending renewal of workers' compensation self-insurance authority based on the solid financial condition of the company with worldwide assets of just over \$23.6 billion, record of profitability, a clean audit report and acceptable credit ratings. Following discussion, the Commission unanimously approved continuance of self insurance authority on motion of Mr. McCarthy, second of Mr. Parker.

Prudential Overall Supply Company – The Commissioners agreed that an Executive Session was not necessary since they had reviewed the confidential financial information. Ms. Pastor presented staff's renewal report along with current Dunn and Bradstreet credit ratings. She responded to questions from the Commissioners. Ms. Pastor advised that Administration is recommending renewal of workers' compensation self-insurance authority based on the company's financial stability, acceptable credit rating scores and a clean audit report. Following discussion, the Commission unanimously approved continuance of self insurance authority on motion of Mr. Parker, second of Ms. Strickler. The Commission unanimously agreed to increase the security deposit to not less than 150% of outstanding liability on amended motion of Mr. Parker, second of Ms. Strickler.

Van Tuyl Group – The Commissioners agreed that an Executive Session was not necessary since they had reviewed the confidential financial information. Ms. Pastor presented staff's renewal report along with current Dunn and Bradstreet credit ratings. She responded to questions from the Commissioners. Ms. Pastor advised that Administration is recommending

renewal of workers' compensation self-insurance authority based on the group's financial stability, a clean audit report and acceptable credit ratings. Following discussion, the Commission unanimously approved continuance of self insurance authority on motion of Ms. Oster, second of McCarthy. Mr. Parker requested that reserves on claims be confirmed over the next year when this comes back for renewal.

Discussion & Action of Petition for Attorneys' Fees

Brian A. Weekley, Taylor and Associates, P.L.L.C., v Steve A. Hutchison – Mr. Wade advised that Brian Weekley of the firm Taylor and Associates has petitioned the Industrial Commission to set attorney' fees with respect to work that he performed for Mr. Hutchison in connection with his February 2, 2009 industrial injury claim. Mr. Wade gave a history of the claim and the work performed by Mr. Weekley on behalf of Mr. Hutchison. Mr. Hutchison terminated the attorney/client relationship and hired a new attorney. No attorney fees have been paid to date and it is estimated that Mr. Weekley spent 7.75 hours on the case.

Mr. Wade presented several options to the Commission. After reviewing those options, Mr. Wade stated that his recommendation is to issue an award granting attorneys' fees in the amount of \$625.00 if, and only if, Mr. Hutchison's claim is found compensable. This is the amount that Mr. Weekley would have received if a proposed settlement had been completed. If the claim is found non-compensable, then no fees should be awarded. This recommendation is based on the fact that while Mr. Weekley did assist in preparing the case for hearing, by accepting the case on contingency, he took the risk that the claim would be denied and he would receive no fee. Following discussion, the Commission unanimously awarded attorneys' fees in the amount of \$625.00 if the claim is found compensable on motion of Ms. Oster, second of Mr. McCarthy.

Discussion & Action of Proposed Civil Penalties Against Uninsured Employers

2C09/10-1572	Creative Travel Management, L.L.C. dba Open Road Tours Inc.
2C09/10-2435	Latitude 33 Beauty Supply LLC dba The Spa At Carefree Resort & Villas
2C09/10-2152	Physician Diagnostics Sleep Technology Specialists, LLC
2C09/10-2773	Rocky's Pro Electrical Contracting, L.L.C.
2C09/10-2148	Mariscos Nuevas Islitas Sinaloense, LLC dba Nuevo Islitas aka Mariscos N. Islitas
2C09/10-1654	Rosati's of Gold Canyon, Inc.
2C09/10-1142	Turn West Design, L.L.C.

Mr. Wade advised that with regard to the above listed employers, a compliance investigation confirmed that they were operating (or had operated) a business with employees, but without workers' compensation insurance. Giving consideration to the factors of A.R.S. §23-907(K), civil penalties of \$1,000.00 are recommended against each of these employers with the exception of employer #2773. With regard to employer #2773, since they have recently obtained coverage, Mr. Wade recommended a penalty of \$500.00. He provided additional information regarding these employers and responded to questions from the Commission.

The Commission unanimously assessed civil penalties of \$1,000.00 against employers

#1572, 2435, 2152, 2148, 1654 and 1142 and assessed a civil penalty of \$500.00 against employer #2773 on motion of Mr. Parker, second of Ms. Oster.

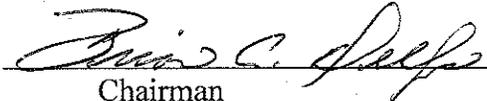
Announcements and Scheduling of Future Meetings

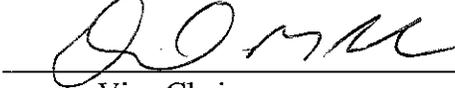
Ms. Hilton reminded the Commissioners that the next meeting is scheduled for Thursday, July 22nd. The Commission also scheduled meetings for Wednesday, August 18th and Thursday, August 26th.

There being no further business to come before the Commission and no public comment, Chairman Delfs adjourned the meeting at 2:40 p.m.

APPROVED:

THE INDUSTRIAL COMMISSION OF ARIZONA

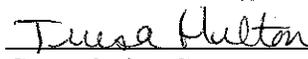
By 
Chairman

By 
Vice Chairman

By _____
Member

ATTEST:

By 
Member


Commission Secretary

By 
Member