MINUTES OF MEETING
OF THE INDUSTRIAL COMMISSION OF ARIZONA
Held at 800 W. Washington
Conference Room 308
Phoenix, Arizona 85007
Thursday, August 5, 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  
Bill Wright  
Asst. Director, ADOSH  
Bruce Hanna  
Industrial Hygienist  
Jesus Maeda  
Industrial Hygienist  
Renee Pastor  
Self Insurance Manager  
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 present was Teresa Yi of Snell & Wilmer, Leah Hubbard of Jeff Gray R & R Partners, and Christine Latou of Road Runner.

Approval of Minutes of July 22, 2010 Meeting

The Commission approved the Minutes of July 22, 2010 on motion of Ms. Strickler, second of Mr. Parker. Mr. McCarthy abstained.

Discussion & Action of Proposed OSHA Citations and Penalties

Ames Construction, Inc.  
8333 E. Hartford Drive  
Scottsdale, AZ  85255  

Site Location: Hwy 74 & Lake Pleasant Road, Phoenix, AZ  85382

Inspection #: 17163/314310137

Inspection Date: 03/04/10

Fatality  
Yrs/Business – 24  
Empl. Cov. by Insp. – 15

SERIOUS – Citation 1, item 1 – One employee was driving a Mack truck without utilizing the seat belt of the vehicle (1926.0095(a)).
(No inspection history in the past three years).

Div. Proposal - $7,000.00  
Formula Amt. - $7,000.00

SERIOUS – Citation 1, item 2 – Traffic signs were not posted to warn employees of road hazards (1926.200(g)(1)).

Div. Proposal - $7,000.00  
Formula Amt. - $7,000.00
SERIOUS – Citation 1, item 3 – The service brake system and the emergency brake system on a side dump trailer were not maintained in operable condition (1926.601(b)(1)).
Div. Proposal - $2,250.00  Formula Amt. - $2,250.00

SERIOUS – Citation 1, item 4 – All defects were not documented and corrected on a side dump trailer when placed in service (1926.601(b)(14)).
Div. Proposal - $ 2,250.00  Formula Amt. - $ 2,250.00
TOTAL PENALTY - $19,000.00  TOTAL FORMULA AMT. - $19,000.00

Bill Wright summarized the citations and proposed penalty as listed and responded to questions from the Commissioners. The Division recommendation for Citation 1 item 1 and item 2 was for the gravity-based penalties with no adjustment factors since the violations resulted in, caused, or contributed to the death of a worker. In response to questions from Mr. Parker regarding the standard for traffic warning signs, further consideration of this matter was tabled in order to allow ADOSH the opportunity to explore the issues raised.

Midwestern Noble Development, LLC
P.O. Box 988
Peoria, AZ 85380

Site Location: 2915 W. Northern Avenue, Phoenix, AZ 85051
Inspection #: R0738/314617846
Inspt. Date: 06/08/10

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 – One employee was working from an aerial lift at a height of 24' without wearing a body harness or body belt to prevent a fall (1926.453(b)(2)(v)).

Citation 1, item 1b - Three employees operated an aerial lift at various heights above 24' thereby exceeding load limits specified by the manufacturer (1926.453(b)(2)(vi). (No inspection history in the past three years).
Div. Proposal - $ 750.00  Formula Amt. - $ 750.00

SERIOUS – Citation 1, item 2 – Two employees’ personal fall arrest systems were rigged in such a way that the employees could contact the ground in the event of a fall (1926.502(d)(16)(iii).
Div. Proposal - $ 750.00  Formula Amt. - $ 750.00
TOTAL PENALTY - $1,500.00  TOTAL FORMULA AMT. - $1,500.00

Bill Wright 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 Mr. Parker, second of Mr. McCarthy.

Pinal County Fleet Service
85 N. Florence Street, #8
Florence, AZ 85132

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

Complaint
Yrs/Business – 100
Empl. Cov. by Insp. – 11
Site Location: 900 S. Pinal Parkway, Florence, AZ 85132
Inspection #: N5645/314667767
Insp. Date: 06/30/10

SERIOUS – Citation 1, item 1 – A 4" vertical portable grinder was not equipped with a guard (1910.243(c)(3). 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 – A circuit breaker panel had openings in the dead front that were not effectively closed, allowing potential contact with the energized bus bar (1910.305(b)(1)(ii).
Div. Proposal - $2,250.00
Formula Amt. - $2,250.00
TOTAL PENALTY - $4,500.00
TOTAL FORMULA AMT. - $4,500.00

Bill Wright 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 approved issuing the citations and assessed the recommended penalty of $4,500.00 on motion of Mr. McCarthy, second of Ms. Oster. Ms. Strickler recused herself.

Precision Auto Diagnostic Incorporated dba
Precision Auto Parts
1024 E. Broadway Road
Phoenix, AZ 85040

Site Location: 1024 E Broadway Road, Phoenix, AZ 85040
Inspection #: Z5838/314617705
Insp. Date: 06/09/10

SERIOUS – Citation 1, item 1 – The industrial steel storage racks were not anchored nor did they have load capacity plaques in place to state the storage capacity of the system (23.403(A). There were two other instance 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 second floor, 8'3" above the concrete floor below, was lacking standard guardrails or other equivalent means to prevent a fall on all open sides (1910.23(c)(1)). There were two other instance of this violation.
Div. Proposal - $1,000.00
Formula Amt. - $1,000.00

SERIOUS – Citation 1, item 3 – One employee was not wearing the manufacturer installed seatbelt on a forklift (1910.132(a).
Div. Proposal - $1,250.00
Formula Amt. - $1,250.00

SERIOUS – Citation 1, item 4 – One untrained employee was operating a forklift (1910.178(l)(1)(i)).
Div. Proposal - $1,250.00
Formula Amt. - $1,250.00

GROUPED SERIOUS – The alleged violations below have been grouped because they
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 5a – One forklift operator did not receive safety refresher training after being involved in an accident (1910.178(l)(4)(ii)(B)).

Citation 1, item 5b - The forklift had defects and had not been removed from service (1910.178(p)(1)). There was another instance of this violation.

Div. Proposal - $1,250.00
Formula Amt. - $1,250.00

NONSERIOUS – Citation 2, item 1 – The employer did not maintain and retain the OSHA 300 Log of Occupational Injuries and Illnesses for five years, in that the employer did not have available upon request the OSHA 300 logs for calendar years 2005 through 2009 (1904.0001(a)(2))

Div. Proposal - $500.00
Formula Amt. - $500.00

TOTAL PENALTY - $6,500.00
TOTAL FORMULA AMT. - $6,500.00

Bill Wright 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 $6,500.00 on motion of Mr. McCarthy, second of Ms. Strickler.

Roadrunner Pharmacy, Inc. Complaint
711 E. Carefree Highway, #140 Yrs/Business – 10
Phoenix, AZ 85085 Empl. Cov. by Insp. – 13
Site Location: 711 E. Carefree Highway, #140, Phoenix, AZ 85085
Inspection #: L3419/314617895
Insp. Date: 06/16/10

SERIOUS – Citation 1, item 1 – Employees exposed to bulk pharmaceutical grade ingredients including but not limited to antineoplastic agents, androgens, steroids and estrogens were not protected by effective engineering controls (i.e. biological safety cabinets)(23.403.A).
(No inspection history in the past three years).

Div. Proposal - $2,500.00
Formula Amt. - $2,500.00

SERIOUS – Citation 1, item 2 – Employees performing compounding operations from hazardous bulk pharmaceutical grade ingredients including but not limited to antineoplastic agents, androgens, steroids and estrogens did not utilize appropriate eye and respiratory protection (1910.132(d)(1)(i)).

Div. Proposal - $2,500.00
Formula Amt. - $2,500.00

SERIOUS – Citation 1, item 3 – A written hazard communication program had not been developed, implemented and maintained for employees who were exposed to hazardous bulk pharmaceutical ingredients (i.e. antineoplastic agents, androgens, steroids and estrogen)(1910.1200(e)(1)).

Div. Proposal - $2,500.00
Formula Amt. - $2,500.00

SERIOUS – Citation 1, item 4 – Employees exposed to hazardous bulk pharmaceutical ingredients (i.e. antineoplastic agents, androgens, steroids and estrogen) were not adequately
trained as to the hazards of these materials (1910.1200(h)).

Div. Proposal - $2,500.00                      Formula Amt. - $2,500.00
TOTAL PENALTY - $10,000.00                   TOTAL FORMULA AMT. - $10,000.00

Bill Wright summarized the citations and proposed penalty as listed and responded to questions from the Commission. In response to a question from Ms. Oster, Bruce Hanna stated that the employer is under the jurisdiction of the Arizona State Board of Pharmacy since they fall under the “retail pharmacy” classification and that he did report the violations to the Board. Mr. Parker recommended that a citation be added related to the lack of a respiratory protection program.

Following further discussion and inspection of photographs of these violations, the Commission unanimously approved adding a citation for lack of a respiratory protection program, approved issuing the citations and assessed a total penalty of $12,500.00 on motion of Mr. Parker, second of Ms. Oster.

Citation 1, item 3 is renumbered to item 4 and Citation 1, item 4 is renumbered to item 5. The additional citation is as follows: Citation 1, item 3 – A written respirator program had not been developed or implemented for employees who were required to use respirators when working with highly hazardous materials such as antineoplastic agents (1910.134(c)(1)). The new citation has a gravity based penalty of $5,000.00, and after applying the adjustment factors results in a $2,500.00 penalty for this citation. Adding this penalty to the other penalties results in the total penalty of $12,500.00.

Thoroughbred Cars, Inc. dba
Thoroughbred Nissan
5163 E. 22nd Street
Tucson, AZ 85711

Site Location: 5152 E. 22nd Street, Tucson, AZ 85711
Inspection #: T3633/314667478
Insp. Date: 06/18/10

GROUPED SERIOUS – The alleged violations below have been grouped because they involve similar or related hazards that may increase the potential for illness.

Citation 1, item 1a – A blower fan and an electric garage door opener were used in the spraying area and were not approved for locations containing both deposits of readily ignitable residues and explosive vapors (1910.107(c)(5)).

Citation 1, item 1b - Employees painted sections of cars using flammable paints and paint spraying equipment and mechanical ventilation was not provided to remove flammable vapors and/or mists (1910.107(d)(2)).

Citation 1, item 1c - Employees painted sections of cars using flammable paints and paint spraying equipment, and a "NO SMOKING" sign was not posted at the spraying area (1910.107(g)(7)).
(No inspection history in the past three years).

Div. Proposal - $1,250.00                      Formula Amt. - $1,250.00
NONSERIOUS – Citation 2, item 1 – The company did not maintain a log and summary of recordable injuries and illness (OSHA 300 Form)(1904.0001(a)(2)).

Div. Proposal - $ 500.00  
Formula Amt. - $ 500.00  
TOTAL PENALTY - $1,750.00  
TOTAL FORMULA AMT. - $1,750.00

Bill Wright 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 $1,750.00 on motion of Mr. McCarthy, second of Ms. Oster.

Discussion & Action of Request for Renewal of Self Insurance Authority

Wal-Mart Associates, Inc. - Renee Pastor presented staff’s renewal report along with current Moody’s, Fitch, 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 financial stability and profitability, with total assets of just over $170.7 billion, a clean audit report and acceptable credit ratings. Mr. Parker asked whether it would be appropriate to recommend the ADOSH consultation program. It was discussed that ADOSH could work with the employer to put together a safety program to help reduce injuries. Following discussion, the Commission approved continuance of self insurance authority conditional upon the company contacting ADOSH for consultation and review of safety management programs on motion of Mr. Parker, second of Ms. Strickler. Mr. McCarthy recused himself.

Discussion & Action of Attorney Fee Petitions

Andrew Wade summarized the status of the 14 attorney fee petitions filed in fiscal year 2010 and compared the total to the prior five years. He stated that there was one more petition ready to submit to the Commission and two more in process.

Ryan Skiver, Warnock, MacKinlay & Carman, P.L.L.C. v Alejandro Amaro-Munoz – Andrew Wade advised that Ryan Skiver of the firm Warnock, MacKinlay & Carman, PLLC has petitioned the Industrial Commission to set attorney’ fees with respect to work that he performed on behalf of Mr. Amaro-Munoz in connection with his December 18, 2009 industrial injury claim. Mr. Wade presented a history of the case and summarized the work performed by Mr. Skiver on behalf of Mr. Amaro-Munoz. Shortly before the first scheduled hearing, Mr. Amaro-Munoz terminated the attorney/client relationship and hired a new attorney. No attorney fees have been paid to date, and staff estimates that Mr. Skiver spent 24 to 26 hours working on the case.

Mr. Wade presented several options to the Commission. After reviewing those options, staff recommends an award granting attorneys’ fees based on a contingency basis. This would respect not only the agreement between the parties, but also the risk that Mr. Skiver was taking of receiving no fee and would recognize that the claimant would not have had to pay anything if they were not successful in obtaining benefits. Mr. Skiver has also requested reimbursement of costs, and Mr. Wade explained that the applicable statute does not provide the Commission with any authority to award costs.
Ms. Oster stated she was more inclined to award fees based on an hourly basis. Ms. Strickler asked how the Commission had handled attorney fee petitions historically. It was discussed that generally, awards have been based on an hourly basis but that the Commission has the authority to award a reasonable fee which can be based on a percentage, contingency basis for a certain length of time. Mr. Wade summarized how the Commission had determined the reasonable hourly rates for certified specialists and non-certified attorneys’ in workers compensation cases. Ms. McGrory described the “appeal” process. Mr. Wade added the case may still settle and any award should provide for such a possibility. Following further discussion, the Commission unanimously awarded attorneys’ fees based on 25 hours being spent on the case at $110 per hour to be paid at a rate not to exceed 10% of all benefits check or settlement but not to exceed the total amount of $2,750.00 on motion of Mr. McCarthy, second of Ms. Oster.

Harlan Crossman v. Francisco Pacheco – Mr. Wade summarized Harlan Crossman’s petition to set attorney’ fees with respect to work that he performed on behalf of Mr. Pacheco in connection with his January 10, 1996, October 21, 2003, and November 1, 2004 industrial injury claims. Mr. Wade presented a history of the claims and the work performed by Mr. Crossman on behalf of Mr. Pacheco. Mr. Pacheco terminated the attorney/client relationship, apparently due to his dissatisfaction with settlement negotiations. Attorney fees in the amount of $24,552.40 have been paid to date.

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 based on 25% of benefits or any settlement related to or that involves permanent disability benefits for a period up to five years from the date of the award of attorneys’ fees, but in no event more than $37,500.00. This would respect the contingent fee agreement between the parties. In response to a question from Ms. Oster regarding settlement negotiations that took place before the attorney / client relationship ended, Mr. Wade stated that he could obtain clarification on that topic and report his findings to the Commission. Chairman Delfs stated that the matter would be tabled until more information is obtained.

Trace Bartlett v. Maria Palomo – Mr. Wade advised that Trace Bartlett has petitioned the Industrial Commission to set attorney’ fees with respect to work that he performed on behalf of Ms. Palomo in connection with her July 28, 2006 industrial injury claim. Mr. Wade presented a history of the claim and the work performed by Mr. Bartlett on behalf of Ms. Palomo. Ms. Palomo has terminated the attorney/client relationship. Staff estimates that Mr. Bartlett could have invested as much as 100 hours working on the case.

Mr. Wade presented several options to the Commission. After reviewing those options, Mr. Wade stated that staff recommends an award granting attorneys’ fees based on 25% of benefits or any settlement related to or that involves permanent disability benefits for a period up to five years from the date of the award of attorneys’ fees, for a maximum fee of $6,850.00. This would respect the contingent fee agreement between the parties and compensate the attorney for the work he performed. Following discussion, the Commission unanimously awarded attorneys’ fees based on 25% of benefits or any settlement related to or that involves permanent disability benefits for a period up to five years, but not more than $6,850.00, on motion of Ms. Oster, second of Mr. McCarthy.
Discussion & Action of Proposed Civil Penalties Against Uninsured Employers

2C09/10-3483    American’s Club, Inc. dba Devil’s Martini
2C10/11-0169    First Class Auto Glass LLC
2C09/10-2918    Fountain Outdoor Recreation Company, LLC
dba Elk Ridge Ski & Outdoor Recreation
2C10/11-0217    Nobilka, L.L.C. dba Trade Embossing & Finishing
2C09/10-2162    Townsend Enterprises, L.L.C. dba Steve’s Sports
                Bar and Grill dba The Lounge

Mr. Wade summarized staff’s attempts to notify employers #0169 and 0217 that they would be under consideration for a $5,000 civil penalty and his recommendation with respect to proceeding with these two employers. Mr. Parker asked about the injunction process and Mr. Wade explained the process and the impact of the present limited resources on that process. Ms. Strickler asked if the civil penalty amounts could be increased to be more effective as a deterrent. Ms. McGrory explained the civil penalty process.

With regard to all of the listed employers, Mr. Wade advised that 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 employers #3483, 2918 and 2162. Following further discussion, Mr. Delfs made a motion to assess $5,000.00 penalties against employers #0169 and 0217 since they do not have the required insurance coverage, and to assess civil penalties of $1,000.00 against employers #3483, 2918, and 2162 which was seconded by Mr. Oster and unanimously approved.

Discussion &/or Action regarding Legislation

Ms. McGrory advised that there is a possibility of a Special Session to address the ballot proposition. Mr. Butler will give a legislative update at the August 18th meeting.

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

Ms. McGrory advised that a summary of actions has been provided to the Commissioners. At the last several Commission meetings, individual issues have been discussed and addressed. To ensure that everything in the recommendations has been covered, she is requesting that the Commission adopt sections B and C of the staff document. Following discussion, the Commission unanimously approved staff’s summary and adopted sections B and C on motion of Mr. Parker, second of Ms. Oster. Ms. McGrory stated that the document would be available on the Commission’s website tomorrow and that the actual updated fee schedule to be effective October 1, 2010 would be on the web site on September 1st.

Announcements and Scheduling of Future Meetings

Ms. Hilton reminded the Commissioners that the next meeting is scheduled for Wednesday, August 18th and there is also a meeting scheduled for Thursday, August 26th. Chairman Delfs stated that an item for discussion is whether meetings should be held twice monthly, perhaps the first and third or the second and fourth weeks. Ms. McGrory stated that,
from a staff standpoint, it would be helpful knowing in advance when meetings would be held and that it could pose a challenge for OSHA citation lapse time since Arizona is already 14 days behind the national average. She stated that the current Commission policy is that any fine over $1,000.00 be brought before the Commission and wondered if we could look at adjusting that amount. It was discussed that Arizona is the only state that brings the citations before the Commissioners. Following further discussion, Ms. McGrory stated that she would ask Mr. Perkins to put together a proposal regarding the threshold policy and that the Commission could delegate the authority to ADOSH. This will be an issue for further discussion.

Ms. McGrory stated that consideration of setting assessment rates will also be a future agenda item. It was agreed it will be an agenda item for August 26th.

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

Chairman

By

Vice Chairman

By

Member

ATTEST:

Jessa Hulston
Commission Secretary

By

Member

By

Member