

MINUTES OF MEETING
OF THE INDUSTRIAL COMMISSION OF ARIZONA

Held at 800 West Washington Street

Conference Room 308

Phoenix, Arizona 85007

Wednesday, January 9, 2013 – 1:00 p.m.

Present:	David Parker	Chairman (video conference)
	Kathleen Oster	Vice Chair
	John A. McCarthy, Jr.	Member
	Susan Strickler	Member
	Michael G. Sanders	Member (telephonic)
	Laura McGrory	Director
	Andrew Wade	Chief Counsel
	Darin Perkins	Director, ADOSH
	Renee Pastor	Self-Insurance Manager
	Michael Hawthorne	Chief Financial Officer
	Kamen Kovatchev	Self-Insurance
	Teresa Hilton	Commission Secretary

Chairman Parker convened the Commission meeting at 1:02 p.m. noting a quorum present. Mr. Sanders had not yet connected telephonically. Also in attendance was Eda Barolli of Snell & Wilmer.

Approval of Minutes of December 19, 2012 Meeting

The Commission unanimously approved the Minutes of December 19, 2012 on motion of Mr. McCarthy, second of Ms. Strickler.

Consent Agenda:

a. Approval of Proposed Civil Penalties Against Uninsured Employers.

1. 2C12/13-0315 Arizona Sandwich Company, L.L.C.
2. 2C12/13-0311 Chandler Tire, L.L.C.
3. 2C11/12-0805 La Casa Verde, Q.C., L.L.C. dba Verde Power Sports

Chairman Parker asked whether any items needed to be removed from the consent agenda. Secretary Hilton stated that item #(a)(1), 2C12/13-0315 Arizona Sandwich Company, L.L.C. was being removed from the consent agenda. The Commission unanimously approved the remaining items on the consent agenda on motion of Mr. McCarthy, second of Ms. Oster.

Discussion & Action of Arizona Sandwich Company, L.L.C. – Andrew Wade advised that this employer has obtained workers' compensation coverage and he is now recommending a reduced penalty of \$500.00. The Commission unanimously approved a penalty of \$500.00 on motion of Ms. Strickler, second of Ms. Oster.

Discussion &/or Action regarding Legislation

Laura McGrory stated there was nothing new to report at this time and that Scot Butler will have specific recommendations at the next meeting regarding legislative proposals.

Discussion & Action of Proposed OSHA Citations & Penalties

Canyon Custom, L.L.C.
6205 N. 55th Avenue
Glendale, AZ 85301

Unprogrammed Related
Yrs/Business – 21
Empl. Cov. by Insp. – 4

Site Location: 2545 W. Holly Street, Phoenix, AZ 85009
Inspection #: A7746/316691179
Insp. Date: 09/11/12

SERIOUS – Citation 1 - Item 1 – Employees were exposed to potential hazards involving the ignition of combustible dusts, or including ignition of energized electrical equipment, ignition by propane powered industrial trucks, and ignition by improperly equipped portable vacuum cleaners. (A.R.S. § 23-403(A)).

Div. Proposal - \$5,000.00

Formula Amt. - \$5,000.00

SERIOUS – Citation 1 - Item 2 – Employees working on top of open ceiling joists above the office ceiling were not protected from falling through the floor holes by secured floor hole covers of standard strength and construction. (1910.0022(a)(8)(ii)).

Div. Proposal - \$750.00

Formula Amt. - \$750.00

SERIOUS – Citation 1 - Item 3 – Employees working on top of an open-sided office ceiling area approximately 9' feet above ground level were not protected by a guardrail system or any type of fall protection. (1910.0023(c)(1)).

Div. Proposal - \$ 750.00

Formula Amt. - \$ 750.00

TOTAL PENALTY - \$6,500.00

TOTAL FORMULA AMT. - \$6,500.00

Darin Perkins summarized the citations and proposed penalty as listed and responded to questions from the Commissioners. The Division proposal for Item 1 was for the gravity-based penalty with no adjustment factors because the violation resulted in, caused, or contributed to serious injury or death of a worker.

Michael Sanders joined the meeting telephonically at this point and Mr. Perkins summarized the facts and staff's recommendation.

The Commission unanimously approved issuing the citations and assessed the recommended penalty of \$6,500.00 on motion of Mr. McCarthy, second of Ms. Oster.

Sheyenne Homes, L.L.C.
3029 E. Des Moines
Mesa, AZ 85213

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

Site Location: 675 W. Irvington Road, Tucson, AZ 85213
Inspection #: F3875/316829597
Insp. Date: 10/25/12

GROUPED SERIOUS – Citation 1 – Item 1a – Two employees were working on a steel welded-frame scaffold that measured 13 feet 4 inches high, 5 feet wide and 7 feet long, that was not fully planked. (1926.0451(b)(1)).

Citation 1 – Item 1b – Two employees were working on a steel welded-frame scaffold that measured 13 feet 4 inches high, 5 feet wide and 7 feet long, and were not provided with a means of access such as a ladder. (1926.0451(e)(1)).

Div. Proposal - \$750.00

Formula Amt. - \$750.00

SERIOUS – Citation 1 - Item 2 – Two employees were working on a steel welded-frame scaffold that measured 13 feet 4 inches high, 5 feet wide and 7 feet long that was not erected by a competent person. (1926.0451(f)(7)).

Div. Proposal - \$750.00

Formula Amt. - \$750.00

SERIOUS – Citation 1 - Item 3 – Two employees were working on a scaffold that measured 13 feet 4 inches high, 5 feet wide and 7 feet long that did not have any guardrails installed. (1926.0451(g)(4)(i)).

Div. Proposal - \$750.00

Formula Amt. - \$750.00

SERIOUS – Citation 1 - Item 4 – Two employees were working on a steel welded-frame scaffold that measured 13 feet 4 inches high, 5 feet wide and 7 feet long, and were not trained by a person qualified in the subject matter to recognize those hazards associated with the type of scaffold being used and to understand the procedures to control or minimize those hazards. (1926.0454(a)).

Div. Proposal - \$ 750.00

Formula Amt. - \$ 750.00

TOTAL PENALTY - \$3,000.00

TOTAL FORMULA AMT. - \$3,000.00

Mr. Perkins summarized the citations and proposed penalty as listed. The Commission unanimously approved issuing the citations and assessed the recommended penalty of \$3,000.00 on motion of Mr. Sanders, second of Ms. Strickler. Mr. Sanders stated that the photos speak for themselves.

Imperial Ironworks, LLC

P.O. Box 2823

Peoria, AZ 85380

Complaint

Yrs/Business – 20

Empl. Cov. by Insp. – 15

Site Location: 7910 West Market Street, Peoria, AZ 85380

Inspection #: R1538/316801927

Insp. Date: 10/22/12

GROUPED SERIOUS – Citation 1 – Item 1(a) – The employer did not establish and implement a written respiratory protection program where employees were required to use respirators. (1910.134(c)(1)).

Citation 1 – Item 1(b) – An employee required to wear a 3M half-mask respirator had not been medically evaluated prior to using the respirator. (1910.134(e)(1)).

Citation 1 – Item 1(c) – The employer did not ensure that employees required to wear 3M half-mask respirators were fit tested. (1910.134(f)(1)).

Citation 1 – Item 1(d) – The employer did not ensure that an employee utilizing a 3M respirator could demonstrate knowledge of why the respirator was necessary and how improper fit, usage, or maintenance could compromise the protective effect of the respirator. (1910.134(k)(1)(i)).

Div. Proposal - \$750.00

Formula Amt. - \$750.00

SERIOUS – Citation 1 - Item 2 – Employees operating a forklift were not trained in the safe operation of powered industrial trucks. (1910.178(I)(1)(i))

Div. Proposal - \$750.00

Formula Amt. - \$750.00

SERIOUS – Citation 1 - Item 3 – The cut-off saw was inadequately guarded. (1910.215(b)(5)).

Div. Proposal - \$750.00

Formula Amt. - \$750.00

GROUPED SERIOUS – Citation 1 – Item 4(a) – A 220 volt homemade black flexible extension power cord with a pendant box (labeled for wall use) on the end which was supplying power to the welder was not used in accordance with instructions included in the listing or labeling. (1910.303(b)(2)).

Citation 1 – Item 4(b) – One 20’ orange extension cord that is used daily to power handheld grinder and other hand tools had two cuts in the cord approximately one half inch long. The damage on the cord was three feet from the end of the cord. (1910.303(b)(7)(iv)). There were two other instances of this violation.

Citation 1 – Item 4(c) – One 220 volt junction or pendant box was lacking a cover. The subject box was being used to supply power to a mig welder. (1910.305(b)(2)(i)).

Citation 1 – Item 4(d) – A black flexible power cord supplying power to the welder did not have strain relief. (1910.305(g)(2)(iii)). There were four other instances of this violation.

Div. Proposal - \$ 750.00

Formula Amt. - \$ 750.00

TOTAL PENALTY - \$3,000.00

TOTAL FORMULA AMT. - \$3,000.00

Mr. Perkins stated this file had been presented at the Commission meeting on December 5, 2012 at which time the Commission tabled consideration because of questions regarding the history for this employer and whether a willful designation was appropriate. He summarized the history and explained his recommendation. Mr. Parker questioned how to address an employer’s failure to comply with the standards after a violation is cited, the employer states that it will correct the issue, but the employer experiences turnover and the problem is not corrected. Mr. Perkins responded to the question. Ms. McGrory described a different perspective, and explained how a willful citation can be based on plain indifference to employee safety and health. Following further discussion, the Commissioners directed Legal counsel to review the matter to determine whether a willful classification would be appropriate. Chairman Parker stated that the matter would be tabled to allow for that review.

Parties Plus Tucson LLC dba Parties Plus
3510 S. Campbell Avenue
Tucson, AZ 85713

Complaint
Yrs/Business – 6
Empl. Cov. by Insp. – 10

Site Location: 3510 S. Campbell Avenue, Tucson, AZ 85713

Inspection #: A9339/316853233

Insp. Date: 11/02/12

SERIOUS – Citation 1 - Item 1 – Employees in the warehouse do not wear seatbelts while operating the forklifts. (1910.0132).

Div. Proposal - \$1,250.00

Formula Amt. - \$1,250.00

GROUPED SERIOUS – Citation 1 - Item 2a – Employees were allowed to operate a forklift without being trained in the safe operation of the truck. (1910.0178(I)(1)(i)).

Citation 1 - Item 2b – One employee was allowed to operate a forklift and had not received refresher forklift training since September 6, 2005. (1910.0178(I)(1)(i)).

Div. Proposal - \$1,250.00

Formula Amt. - \$1,250.00

SERIOUS – Citation 1 - Item 3 – One employee was allowed to ride on a pallet that was loaded onto the tines of a forklift while the truck was traveling. (1910.0178(m)(3)).

Div. Proposal - \$1,250.00

Formula Amt. - \$1,250.00

TOTAL PENALTY - \$3,750.00

TOTAL FORMULA AMT. - \$3,750.00

Mr. Perkins summarized the citations and proposed penalty as listed. The Commission unanimously approved issuing the citations and assessed the recommended penalty of \$3,750.00 on motion of Mr. McCarthy, second of Ms. Strickler.

H B Medtech dba Trusted AeroSpace and Engineering Pvt. Ltd

Mr. Wade stated that the employer name may be incorrect on the agenda and staff recommends this matter be removed from consideration at this time.

Discussion & Action of ADOSH Discrimination Complaints

#12-30 Randy Blevins v Total Facility Solutions, Inc. - Darin Perkins presented a summary of the Division's investigation of a discrimination complaint filed by Mr. Blevins. In his complaint, Mr. Blevins alleges that he was terminated for engaging in protected activity. In response to the complaint, the employer presented its position with respect to Mr. Blevins' separation from employment.

Mr. Perkins presented a history of Mr. Blevins' employment and chronology of events and responded to questions from the Commission. The Division recommendation was to pursue the matter because there was sufficient evidence to support a causal link between protected activity and adverse action. Following discussion, the Commission unanimously voted to pursue the complaint on motion of Mr. Sanders, second of Mr. McCarthy. Chairman Parker stated this was one of the best investigations and reports he has read and would be a good model for the future.

#13-3633-04 Pam Slonaker v Veterans of Foreign Wars Post 8242 – Mr. Perkins presented a summary of the Division's investigation of a discrimination complaint filed by Ms. Slonaker. In her complaint, Ms. Slonaker stated that her assigned work hours were decreased in retaliation for having engaged in protected activity. In response to the complaint, the employer presented its position with respect to the decrease in work hours.

Mr. Perkins presented a history of Ms. Slonaker's employment and chronology of events and responded to questions from the Commission. The Division recommendation was not to

pursue the matter because there was insufficient evidence to support a causal link between protected activity and adverse action. Following discussion, the Commission unanimously voted not to pursue the complaint on motion of Ms. Oster, second of Ms. Strickler.

Chairman Parker thanked Darin Perkins for his service to the Commission and stated he is a true leader and he enjoyed working with him. Mr. Perkins stated it has been a pleasure working for the Commission.

Discussion & Action regarding Request for Renewal of Self-Insurance Authority

Renee Pastor reviewed the ratio analysis sheet for the three following employers since they have the same parent company. She then presented the individual reports.

FedEx Express - Ms. Pastor presented staff's renewal report along with current Moody's and Dunn and Bradstreet bond and credit ratings and responded to questions from the Commissioners. Administration is recommending renewal of workers' compensation self-insurance authority based on the large size of the parent company with worldwide assets of just under \$29.9 billion at May 31, 2012; a clean audit report and acceptable bond and credit ratings. The Commission unanimously approved renewal of self-insurance authority on motion of Ms. Strickler, second of Mr. McCarthy.

FedEx Freight, Inc. - Ms. Pastor presented staff's renewal report along with current Moody's and Dunn and Bradstreet bond and credit ratings. Administration is recommending renewal of workers' compensation self-insurance authority based on the large size of the parent company with worldwide assets of just under \$29.9 billion at May 31, 2012; a clean audit report and acceptable bond and credit ratings. The Commission unanimously approved renewal of self-insurance authority on motion of Ms. Oster, second of Mr. Sanders.

FedEx Ground Package System, Inc. - Ms. Pastor presented staff's renewal report along with current Moody's and Dunn and Bradstreet bond and credit ratings and responded to questions from the Commissioners. Administration is recommending renewal of workers' compensation self-insurance authority based on the large size of the parent company with worldwide assets of just under \$29.9 billion at May 31, 2012; a clean audit report and acceptable bond and credit ratings. The Commission unanimously approved renewal of self-insurance authority on motion of Mr. Sanders, second of Ms. Strickler. Mr. Parker described a concern with some of the information supplied by the employer, in particular the data that states the employer does not have any claims that are over a year and a half old, all other claims are closed and there is no supportive care for any of the claims. He stated that the third party administrator has a good reputation but this was highly unusual. Ms. Pastor responded with some additional background information. Mr. Parker described what he wanted staff to watch. Ms. Oster noted that FedEx Ground has a different TPA (third party administrator) than the other two and asked if the parent company oversees the self-insurance programs for the subsidiaries. Ms. Pastor stated that each subsidiary has requested independent self-insurance authority and they each manage their own expenses and losses, and choose their own TPA.

Discussion &/or Action of Proposed Rulemaking regarding Selection of Index for Setting of Maximum Average Monthly Wage under A.R.S. §23-1041(E)

Mr. Wade stated that the Legislature amended A.R.S. §23-1041(E) earlier this year and

changed the index from the Arizona mean wage for all occupations to the employment cost index. He explained that the employment cost index, published by the Bureau of Labor Statistics, is a series of indexes and he described some of the different series. Because the employment cost index consists of many different indexes, it is necessary for the Commission to select one index to use in adopting the maximum average monthly wage. The Staff Analysis provided to each of the Commissioners has also been provided to key stakeholders within the workers' compensation community. Mr. Wade stated that staff's recommendation is for the employment cost index for wages and salaries, for civilian workers, by occupational group and industry, all workers, and explained why this index was selected. He stated that to update the data supplied for this particular index, through September 2012, wages and salary increased 1.7%. In 2011 the overall increase was 1.4%, which is lower than the statistical increase in the Arizona mean wage for the last several years. Based on the data, this particular index has been more stable over the last decade compared to the Arizona mean wage. Mr. Wade stated that the Commission has received no objection to the proposal from any stakeholder. Jeff Gray who represents the Arizona Self Insurers' Association has notified staff that the proposal looks reasonable. Pete Dunn who represents the Arizona Association of Lawyers for Injured Workers notified staff that the AALIW has no objection to the proposal, but would like to see a mechanism for review. Mr. Wade stated that his recommendation is to proceed with rulemaking to identify the specific index the Commission will use in adopting the maximum average monthly wage. Ms. Oster questioned whether the employment cost index includes corporate officers which might skew the average and corporate officers are often not included under workers' compensation. Mr. Wade stated he did not know if all officers were included but the data relates to wages of employees. Mr. Parker stated that he agreed with staff's report and that his concern was that we would end up with something that is weighted more nationally than it is what is happening in Arizona, but if the index selected is for the Phoenix and Maricopa County area, changes to wages in other areas of the state may be excluded. He stated what he would like is for staff to report in three years and include in the evaluation the comparison of what the Phoenix regional data is compared to the national data. If it turns out that there is an anomaly in the data, the Commission can always propose additional rulemaking. Mr. Sanders agreed. Ms. McGrory stated that the nice thing about rulemaking is that the Commission can amend rules and will work with stakeholders should an amendment be needed. She described information that can be presented in the report to the Commissioners. Mr. Parker stated he would just like to watch this index to make sure that it is the most appropriate index. Ms. Oster made a motion on staff's recommendation which is to use the "Bureau of Labor Statistics, Employment Cost Index for Wages and Salaries, for Civilian Workers, by Occupational Group and Industry, All Workers' in adopting the maximum average monthly wage under A.R.S. § 23-1041(E) and to direct staff to move forward with the rulemaking. Mr. Wade stated that staff will proceed with the rulemaking process. Ms. Oster commented on the rule and Mr. Wade explained that once the rule becomes final, the Commission will be required to use this index unless the Commission amends the rule. If, after the three-year review, the Commission desires a different index, the Commission can proceed with rulemaking at the time to amend the rule. Following further discussion, Ms. Oster restated the motion to move on staff's recommendation which was seconded by Ms. Strickler and unanimously approved.

Discussion &/or Action regarding Residential Fall Protection and Response to Federal OSHA regarding Complaint about State Program Administration

Darin Perkins stated that a Complaint about State Program Administration (CASPA) has been filed with Federal OSHA and Federal OSHA has issued its findings. He has provided the

Commissioners with a draft response which explains the criteria that are used to measure whether a state OSHA program is at least as effective as the federal program. Based on these criteria, or outcome measures, the Arizona OSHA program is better than the federal program. Mr. Perkins reviewed other information that can be considered to determine effectiveness, including data that establishes that Arizona has had one of the lowest, if not the lowest, fall construction fatality rates of all reporting states for the last several years. He also described the statistics that demonstrate ADOSH performs more inspections in those areas where Arizona has jurisdiction each year than federal OSHA performs in the areas where federal OSHA has jurisdiction. He also highlighted the practical reality that Arizona has an increased presence in the construction industry, which results in greater compliance within that industry and which is another factor for the lower construction related fall fatality rate. He explained the information presented in the appendix to the draft response. Mr. Perkins welcomed suggestions regarding the draft response. Mr. Sanders stated the draft well done and complete. He added that he did not see how federal OSHA could have a response that would be significantly contradictory. Mr. Perkins explained that OSHA has not provided support for their position except to assert that Arizona's standard does not mirror the federal standard. Federal OSHA has not offered any evidence or data that would suggest that Arizona's program is not at least as effective as the federal program in enforcing the residential fall protection standards. Mr. Parker commented on the use of an objective measure to determine whether a state plan is at least as effective from the perspective of what a standard requires, as opposed to the administration of the program which is the focus of the current criteria.

The telephonic connection with Michael Sanders was dropped at this point.

Mr. Parker suggested that the response emphasize how Arizona's program excels in this area. Arizona can evaluate its effectiveness in this area through objective criteria that focus on outcomes. He commented on the language that explains how employers must do something, and suggested that this point be emphasized more in ADOSH's response. Mr. Parker noted that Arizona's standard may not mirror exactly the federal standard, but Arizona's standard is not required to have the exact same language as the federal standard. He explained that the requirement is the state plan is "at least as effective," not that Arizona's plan must be "identical to" the federal program. Mr. Perkins agreed that was a good point. Ms. McGrory explained how the Commission can support its current position, notwithstanding the earlier position taken by the Commission with respect to enactment of SB 1441. In this regard, objective outcome measures identified by the Commission support the effectiveness of SB1441. Following further discussion, Mr. Perkins stated that federal OSHA has extended the deadline for our response to February 8, 2013. Ms. McGrory stated that the draft response will be an agenda item for the next meeting.

Discussion &/or Action regarding the Selection and Hiring Process for ADOSH Director. The Commission may move into Executive Session under A.R.S. §§38-431.03(A)(1) and (A)(3) to Discuss Selection of Candidates

Ms. McGrory explained the selection and hiring process, the Commissioners' role in that process, and the different options available to the Commissioners with respect to the appointment of the ADOSH Director. Ms. McGrory also provided her recommendations regarding this process and responded to questions from the Commissioners. Following discussion, the Commission unanimously agreed to advertise the position externally on motion of Ms. Strickler, second of Mr. McCarthy. A decision on the Commission's role in the interview

process will be made at a later date. In response to a question from Chairman Parker, Ms. McGrory stated that the agency's HR manager has recommended that, if asked, the Commissioners should decline requests to meet separately with potential candidates. Ms. McGrory also stated that Larry Gast and Jessie Atencio have been appointed as Acting Directors and she explained the responsibilities that each will have in their respective acting capacities.

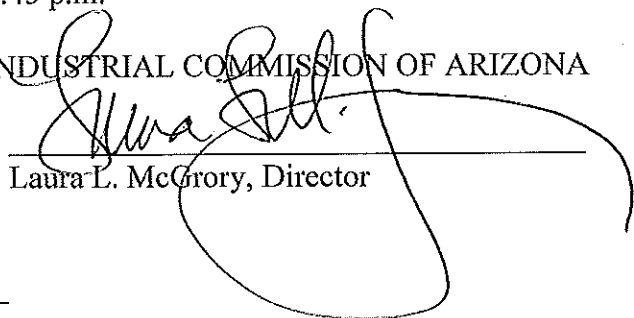
Announcements and Scheduling of Future Meetings

The next Commission meeting will be held on Wednesday, January 23, 2013. The Commission changed the meeting scheduled for Wednesday, January 30, 2013 to Thursday, January 31, 2013.

There being no further business to come before the Commission and no public comment, Chairman Parker adjourned the meeting at 2:45 p.m.

THE INDUSTRIAL COMMISSION OF ARIZONA

By



Laura L. McGrory, Director

ATTEST:



Teresa Hilton, Commission Secretary