

MINUTES OF MEETING
OF THE INDUSTRIAL COMMISSION OF ARIZONA

Held at 800 West Washington Street
Conference Room 308
Phoenix, Arizona 85007

Thursday, February 19, 2015 – 1:00 p.m.

Present:	David M. Parker	Chairman
	Susan Strickler	Vice Chair
	Michael G. Sanders	Member
	Joseph M. Hennelly, Jr.	Member
	Laura McGrory	Director
	Andrew Wade	Chief Counsel
	William Warren	ADOSH Director
	Sylvia Simpson	Chief Financial Officer
	Renee Pastor	Accounting
	Pat Ireland	Compliance Officer
	Steve Ripple	Compliance Officer
	Jacqueline Kurth	Claims Department
	Melinda Poppe	Chief Administrative Law Judge
	Stephen Ball	Legal Division
	Kara Dimas	Commission Secretary

Chairman Parker convened the Commission meeting at 1:00 p.m. noting a quorum present. Also in attendance was Scot Butler, Commission lobbyist, Kim Lough representing Camp Industries, Darin Perkins with the Central Arizona Project, Assistant Attorney General Kirstin Story representing the Arizona Secretary of State, and Jason Weber of Snell & Wilmer.

Approval of Minutes of February 5, 2015 Regular Meeting and Executive Session.

Chairman Parker stated that there is a desire to amend the Executive Session Minutes and explained when the Executive Session Minutes will be addressed. The Commission unanimously approved the Minutes of the January 22, 2015 Regular Session on motion of Vice Chair Strickler, second of Mr. Sanders.

Consent Agenda:

a. Approval of Proposed Civil Penalties Against Uninsured Employers.

1. 2C14/15-1250 Alpha Logistics, L.L.C.
2. 2C14/15-1266 Bola's Trucking, L.L.C.
3. 2C14/15-1854 Cowboy Way Adventures, L.L.C.
4. 2C14/15-1415 Global Shield Risk Solutions, LLC dba GSRS
5. 2C14/15-1416 Gyro 5, L.L.C. dba Segway of Scottsdale
6. 2C14/15-1279 JNC Drywall, L.L.C.
7. 2C14/15-1549 Jose & Maria Garcia, husband & Wife, dba Garcia Movers
8. 2C14/15-1556 Road Service, LLC

b. Approval of Requests for Renewal of Self-Insurance Authority.

1. The Arizona School Alliance For Workers' Compensation, Inc.
2. Washington Elementary School District No. 6

Chairman Parker stated that agenda item a.5. and b.1. would be removed from the consent agenda and heard separately. The Commission unanimously approved the remaining items on the consent agenda on motion of Mr. Sanders, second of Vice Chair Strickler.

Andrew Wade advised that Gyro 5, L.L.C. dba Segway of Scottsdale has obtained workers' compensation insurance and staff is recommending a \$2,500.00 civil penalty instead of staff's previous recommendation of a \$5,000.00 civil penalty. The Commission unanimously assessed the recommended penalty of \$2,500.00 against Gyro 5, L.L.C. dba Segway of Scottsdale on motion of Mr. Hennelly, second of Mr. Sanders.

Vice Chair Strickler recused herself from consideration of The Arizona School Alliance For Workers' Compensation, Inc.'s request for renewal of its self-insurance authority. The Commission approved renewal of self-insurance authority on motion of Mr. Sanders, second of Mr. Hennelly with a vote of three in favor. There was no discussion and Vice Chair Strickler did not participate in the vote.

Discussion and/or Action regarding Legislation.

Scot Butler summarized the deadlines for introducing new bills at the Legislature. He commented on bills of interest to the Commission including House Bills 2213, 2297, 2331, 2335, 2346 and Senate Bills 1061, 1290 and 1443. He recommended that the Commission take a neutral position on HB 2331. Mr. Butler noted that HB 2334, the "bad faith bill," has not moved out of committee, and Ms. McGrory commented on the House Insurance Committee hearing for HB 2334 and the concern expressed by some who testified regarding the problems experienced with third party administrators or "TPA's." She explained that the issues described by people testifying at the Committee hearing are not simply a "TPA" problem. The Commissioners also discussed SB 1443 and potential consequences on the cost and availability of workers' compensation insurance.

Discussion and/or Action regarding Residential Fall Protection and Federal OSHA's Decision to Reject State Initiated Plan Change No. 133, and Defer Reconsideration of Arizona's State Plan Authority under Section 18(e) of the Occupational Safety and Health Act. The Commission may move into Executive Session under A.R.S. §§ 38-431.03(A)(3) and (A)(4) to consult with its attorneys to obtain legal advice and to consider its position and instruct its attorneys regarding pending or contemplated litigation.

Ms. McGrory noted that ADOSH is conducting inspections that involve residential fall protection and is enforcing Subpart M. She explained how ADOSH is tracking these types of inspections. Ms. McGrory asked whether the Commission would need this agenda item as a continuing item. Chairman Parker asked if any of the Commissioners wanted this item to remain as a continuing agenda item and, hearing no comment, stated that this item will be removed as a continuing item. Chairman Parker acknowledged Darin Perkins and thanked him for all the work he performed while he was Director of ADOSH.

Chairman Parker stated that agenda item 7 would be addressed next.

Discussion and Action of Arizona Division of Occupational Safety and Health Proposed Citations and Penalties.

Camp Industries, Inc.
7300 N Dreamy Draw Dr Unit 228
Phoenix, AZ 85020

Fatality/Accident
Years in Business: 12
Emp. Covered by inspection: 3

Site Location: 16495 N Scottsdale Rd
Scottsdale, AZ 85254
Inspection No: U5916-317858611
Inspection Date: 09/16/2014

Mr. Warren summarized ADOSH's investigation into a fatal accident that resulted in the death of two workers in a sewer lift station. He noted that Mr. Ireland performed the investigation and described the violations and the resulting citations.

SERIOUS – Citation 1 - Item 1 –

- a) Scottsdale Promenade Shopping Center, Sewer lift station: Camp Industries, Inc. did not evaluate the sewer lift station vault to determine if it was a permit-required confined space prior to employees entering the space. (29 CFR 1910.146(c)(1)).
- b) Scottsdale Promenade Shopping Center, Sewer lift station: Camp Industries, Inc. did not inform employees by any means that the sewer lift station vault was a permit-required confined space and what the dangers of the space were. (29 CFR 1910.146(c)(2)).
- c) Scottsdale Promenade Shopping Center, Sewer lift station: Camp Industries, Inc. did not develop and implement a written permit space entry program prior to employees entering the space. (29 CFR 1910.146(c)(4)).
- d) Scottsdale Promenade Shopping Center, Sewer lift station: Camp Industries, Inc. did not complete an entry permit which authorized entry into the permit-required confined space. (29 CFR 1910.146(e)(1)).
- e) Scottsdale Promenade Shopping Center, Sewer lift station: Camp Industries, Inc. did not provide training to three employees that entered a permit-required confined space prior to their entry into the permit-required confined space. (29 CFR 1910.146(g)(1)).
- f) Scottsdale Promenade Shopping Center, Sewer lift station: Camp Industries, Inc. did not certify that permit-required confined space entry training had been accomplished. (29 CFR 1910.146(g)(4)).

Div. Proposal - \$7,000.00
TOTAL PENALTY - \$7,000.00

Formula Amt. - \$7,000.00
TOTAL FORMULA AMT. - \$7,000.00

Chairman Parker provided some background information on why sewer lift stations are used and how they operate. He explained that sewer systems generate hydrogen sulfide and other toxic gases, summarized what is a confined space, and explained the distinction with a permit required confined space. Chairman Parker asked if the matter was evaluated for willful and Mr. Warren explained that it had. Mr. Warren added that one of the owners of the company was one of the employees that died and the compliance officer interviewed the other owner, the spouse. He

stated that it appeared that she managed the office and did not participate in the technical aspects of the business. Mr. Sanders commented that there were four employees, including the two owners, and that the employer was probably out of business because two employees have passed away. Vice Chair Strickler asked Mr. Warren to describe the sequence of the employees entering the confined space. Mr. Warren responded that the 18 year old employee entered first and Mr. Warren noted that he was the son of one of the employees that passed away. Mr. Warren explained that the owner of the business and the father of the 18 year old entered the confined space to rescue the 18 year old. They were able to push the 18 year old out of the space while a bystander helped pull the 18 year old out. The owner and father of the 18 year old were then overcome by gases and died. Chairman Parker commented on the frequency of these types of accidents and that the hazards are well-known in the industry. Chairman Parker noted that he had received a request to speak from Mr. Kim Lough with Camp Industries and asked Mr. Lough if he wanted to address the Commission. Mr. Lough made the following statement:

“Thank you Chairman Parker, my name is Kim Lough and I am with the law firm of Jennings Haug and Cunningham. I am here to speak on behalf of the survivors of the company that used to be known as Camp Industries. First, let me put your mind at ease. I am not here to argue in defense of the proposed citation and penalty and from the comments that I have already heard that would be an uphill battle at best or at least. What I am here to ask you to do is to consider exercising your discretion not to issue a citation and penalty because it will not effectuate the purposes of the occupation safety and health act in this circumstance. Please allow me to explain that comment. On August 25, Camp Industries, which was Jared Camp and his life-long friend Jeremy Johnson and Jeremy’s 18 year old son Cody, were called to an emergency episode at the Pavilions where a pump in a lift station, as you have heard, had quit operating. When they got there Cody, who had as evidenced by the information provided to you by the Division of Occupation Safety and Health, who had training in confined spaces, went into the vault in order to get the serial number or model number off of the pump so they knew what it was they were dealing with. When Cody began to be overcome by the fumes, his father did go into the vault to save him as did Jared. Jared and Jeremy were successful in getting Cody out but tragically succumbed to the fumes while they were in there. On August 25 Camp Industries died in that vault. A citation and penalty are intended to modify behavior. There is no behavior to modify here. There is no benefit to be achieved by issuing a citation and imposing a penalty because there is no one to respond. The effect of the issuance of a citation and penalty in this instance will be to provide culpable third parties with the defense to actions sought for recovery of wrongful death damages by the survivors. If what we are seeking to achieve by the enforcement of the occupational safety and health act is safe conduct, we simply can’t unfortunately achieve it in this situation. We can’t turn the clock back and get these people to do what they should have done, to get the training that they should have gotten in order to ensure that this didn’t happen, but it has, these are the cards which we are dealt. The question is whether anything that the Industrial Commission can do is going to make that better, going to effectuate the purposes of the act by altering behavior to ensure compliance. In these circumstances it will not. It will only damage the survivors, the innocent survivors and their ability to try to collect from culpable third parties. Now just to let you know that I am not here speaking about this for strictly financial reasons, Jared Camp was my law partner’s son-in-law. And I ask you to exercise your discretion and not issue a citation and a penalty because it would be a useless act. It would be tantamount to citing me for reckless driving when I drive my car off a cliff and kill myself. Thank you.”

Chairman Parker told Mr. Lough that he appreciated his comments. Chairman Parker asked Mr. Warren if there were any other citations issued related to this event. Mr. Warren responded that there were citations issued to the property owner and he described those citations.

Chairman Parker asked if there were additional questions.

Vice Chair Strickler asked Mr. Warren why the citations against the other employer were not included in this presentation. Mr. Warren explained why the citations issued to the other employer did not meet the criteria for bringing the case file to the Commissioners prior to issuance of the citations. Chairman Parker added that the dollar amount of the citations against the other employer were within the authority that the Commission had delegated to ADOSH to issue directly. Vice Chair Strickler noted that she recognized the delegation of authority and added that since this matter involved a fatality she would have expected to receive information on both employers that were involved. Chairman Parker suggested that in those cases that involve a fatality, that ADOSH consider including all employers on the Commission agenda together. Mr. Warren stated they would do so.

Chairman Parker asked if the penalty policy addressed the situation where an employer is essentially out of business but the legal entity still exists. Mr. Wade advised that if the Commission sought to obtain legal advice, that the Commission has the ability to move into executive session for that purpose.

Chairman Parker stated that he fully understood where Mr. Lough was coming from and the analogy was a very good one, but it is his understanding that the legal entity still exists and he commented that confined space issues are one of the most serious issues to come before the Commission. He noted that he does not know of any situation more serious than employees entering into any sewer vault underground without testing and he explained why. He asked if any of the Commissioners had other thoughts.

Mr. Sanders commented on the corporation's likely structure, and noted that one may assume that one owner was the president and the wife was probably the treasurer or corporate secretary. Mr. Warren explained that the file had a copy of the Corporation Commission records and stated that Jared Camp was shown as the president and Cara Camp was shown as the vice president. Mr. Sanders asked who was going to pay the fine, if the expectation is that the victim's wife, who is also a victim and an innocent party, would be liable. Mr. Wade noted that the citation is proposed against the corporation. Mr. Sanders commented that the corporation is basically now just the wife and asked if the corporation would be liable. Mr. Wade explained how ADOSH is proposing citations against the employer as it existed on the date of the accident and the impact that subsequent events may have on collection of the proposed penalty. Mr. Sanders noted that this woman has just lost her entire livelihood and the Commission is going to hit her for more. Mr. Wade reminded the Commission of the availability of executive session and commented that without knowing more facts, it is difficult to conclude that she would necessarily be individually liable for the debts of the corporation. Mr. Sanders added she owns the corporation now and owns the assets of the corporation, so she is liable.

Chairman Parker asked if there were other thoughts or discussion and noted he fully understands Mr. Sanders' view, but believes still it is appropriate to issue the citation. He asked if there was a motion. There was no response to Chairman Parker's request for a motion. Chairman Parker made a motion to approve staff's recommendation. Mr. Hennelly seconded the motion.

Chairman Parker as if there was any other discussion. There was no response and Chairman Parker called for a vote. Chairman Parker and Mr. Hennelly voted in favor of the motion. Vice Chair Strickler commented on the availability for an executive session and stated that she was still contemplating the matter. Chairman Parker asked Vice Chair Strickler if she would like an executive session. Mr. Sanders stated that the motion had failed. Chairman Parker noted that if the vote ended up at two in favor, the motion would fail as it would need three votes to pass. Mr. Sanders stated the motion failed. Ms. McGrory asked if she could mention something for the Commission to consider and explained ADOSH's penalty negotiation authority at the informal conference stage. Chairman Parker stated that he would amend his motion to provide ADOSH with more latitude at the informal conference. Mr. Sanders asked how many times will there be a vote on the motion and stated that we have declined to fine these people. Chairman Parker stated that voting on the motion has not been completed and it appeared that Vice Chair Strickler was still contemplating the motion. Chairman Parker asked if there were any votes opposed to the motion. Mr. Sanders and Vice Chair Strickler voted against the motion. Chairman Parker noted that there were two votes in favor of the motion and two votes opposed to the motion and, as a result, the motion failed. He asked if there was an alternative motion.

Mr. Sanders asked why an alternative motion was needed. Chairman Parker responded that an alternative motion was not necessarily needed, but he would allow an opportunity for an alternative motion. Mr. Sanders stated that the motion had failed so no citation will be issued. Chairman Parker explained he was offering the opportunity for an alternative motion, and noted that the motion to issue the citation had failed, and there was no alternative motion. He thanked ADOSH staff for their work on this investigation.

Phoenix Trim-A-Tree, LLC
3722 E Superior Ave
Phoenix, AZ 85040

Fatality/Accident
Years in Business: 10
Empl. Covered by inspection: 4

Site Location: 1150 N 54th St
Chandler, AZ 85226
Inspection No: H1793-317858785
Inspection Date: 09/18/2014

Mr. Warren summarized ADOSH's investigation into a fatal accident and explained that the investigation did not identify any violations and ADOSH was not recommending any citations.

Site Utility Systems LLC
4302 E Superior
Phoenix, AZ 85040

Fatality/Accident
Years in Business: 8
Empl. Covered by inspection: 8

Site Location: 7171 S 51st Ave
Laveen, AZ 85339
Inspection No: H1793-1004833
Inspection Date: 10/27/2014

Mr. Warren summarized ADOSH's investigation into a fatal accident and explained that the investigation did not identify any violations and ADOSH was not recommending any citations.

Chairman Parker announced that the Commission would address Agenda Item 6.

Discussion and Action of Arizona Division of Occupational Safety and Health (ADOSH)
Discrimination Complaints

Chairman Parker explained that there would be an open session presentation from ADOSH and he anticipated there would also be an executive session. He noted that there was one request to speak and he would provide an opportunity for speakers during the open session. He described the process for an executive session.

14-2865-02 - Steven Faer vs. State of Arizona, Secretary of State, William Warren presented a summary of Mr. Faer's complaint, the employer's response, and the results of the ADOSH investigation. Mr. Warren recommended that the Commission pursue the matter.

Chairman Parker stated that he expects an executive session to discuss the merits of pursuing the matter and to obtain legal advice. He asked if there were any factual questions for staff at this point. Mr. Sanders asked about Ms. Clark having stated that she created Mr. Faer's job and Mr. Warren responded that is what Mr. Faer said and that Ms. Clark denied making that statement. In response to a question from Mr. Sanders, Mr. Ripple stated that he did ask Ms. Clark that question. Mr. Sanders stated he had an issue with a key factor in the case and Mr. Wade noted that the Commission should discuss the strengths and weaknesses of the facts in executive session. Mr. Sanders asked who was present for the March 5 meeting. Mr. Ripple responded to the question. Mr. Ripple added that he asked Ms. Snider if there was any way that Mr. Faer could have anticipated that his duties were going to change and she responded no. Mr. Sanders referred to Exhibit 3 and stated that it is clear that they were notations that indicate that they were talking about these specific changes well in advance of any protected activity. He described the notations as referring to these specific reorganizational problems and issues. He added there were other notes from a July meeting. He explained that he wanted to bring the issues up because they caused some concern and some doubt for him. Chairman Parker asked if the rest of that thought could be kept for executive session and to stick to any clarifying factual issues in public session. Mr. Hennelly asked if there was any other documentation regarding the reorganization other than the notes, such as a plan outline or anything else, and why the reorganization with respect to Mr. Faer occurred so long after these meetings in the summer of 2013. Mr. Ripple stated that the employer did not provide any other documentation.

Chairman Parker asked Ms. Kirstin Story if she wanted to address the Commission and he explained that this is not a time to argue issues but she has an opportunity to present information to the Commission that may assist the Commission in deciding whether or not to pursue this matter. Ms. Story identified herself and stated she is with the office of the Arizona Attorney General, Employment Law Section, and was appearing on behalf of the Arizona Secretary of State's Office. She stated that Mr. Faer's complaint under section § 23-425 alleges that his loss prevention and risk management duties were removed from him in retaliation for his engaging in protected activity. She referred to a comment made by Mr. Sanders and described the evidence that supports that view. She explained that the process at the Secretary of State's Office involved multiple individuals responding to risk management and occupation safety and health issues, and how having many individuals involved was creating confusion. The decision was made to centralize these responsibilities into one position, and that position was held by Mr. Blum. She explained that Mr. Blum would assume those duties and be that one point of contact and coordinator. Ms. Story described the time frames when the Secretary of State's Office began making the changes. She referred to documents from July 2013 where management again discussed Mr. Blum's role and indicated that he already had assumed some responsibilities for risk management and loss prevention. She referred to the July 30th email in exhibit 3 that Mr. Faer was copied on, which makes reference to a meeting that Mr. Blum was coordinating and conducting with the risk management division. She noted that it further supports the conclusion

that Mr. Blum had already assumed the responsibilities. She described the evidence that supported the employer's position that Mr. Faer know about the changes. Ms. Story also explained why the elements in § 23-425 were not satisfied and she offered to entertain questions.

Mr. Sanders questioned the duplication of exhibits and the addendum that was sent by the Secretary of State's Office that had the exhibits highlighted. He also noted the information contained in the August 2, 2013 email from Ed Hail.

Chairman Parker thanked Ms. Story and Ms. Story thanked the Commission for the opportunity to speak.

Chairman Parker as if there was any other questions for staff or for Ms. Story before moving to executive session.

The Commission unanimously voted to move into Executive Session to obtain legal advice and to discuss contemplated or pending litigation, on motion of Chairman Parker, second of Vice Chair Strickler. Chairman Parker also asked if there was a motion to move into executive session to discuss the February 5, 2015 executive session minutes. The Commission unanimously voted to go into Executive Session to discuss the executive session minutes, on motion of Mr. Sanders, second of Mr. Hennelly. Executive Session Minutes are kept separately.

The Commission returned to General Session at 2:52 p.m.

Chairman Parker referred to Agenda item number 6, Steven Faer vs. State of Arizona, Secretary of State, and asked if there was any public discussion or if there was a motion. Mr. Sanders stated that without restating his points, he moved to decline to pursue. Vice Chair Strickler seconded the motion and the Commission unanimously voted in favor of the motion.

Chairman Parker announced the Commission would return to Agenda item number 2, Executive Session Minutes, and the Commission unanimously approved the Minutes of the February 5, 2015 Executive Session, as amended, on motion of Vice Chair Strickler, second of Mr. Sanders.

Discussion and Action of Request for Lump Sum Commutation. The Commission may move into Executive Session under A.R.S. §§ 38-431.03(A)(2) and (A)(3) to discuss or consider records exempt by law from public inspection or to consult with its attorneys of legal advice.

Sharon C. O'Meara – Jacqueline Kurth presented this lump sum petition with a recommendation for approval. She offered to answer questions concerning the information contained in the confidential memorandum in executive session. The Commission unanimously approved the lump sum commutation on motion of Vice Chair Stickler, second of Mr. Sanders.

Discussion and Action regarding the Selection of Candidates for Interviews for Administrative Law Judge Positions. 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 stated the Commission is being asked to consider candidates for a second interview with the Commissioners. She provided a copy of the questions used in the last recruitment and described the process if revisions to the questions were needed. Chairman Parker asked if there was a motion to move into executive session to discuss the candidates. The

Commission unanimously voted to go into Executive Session to discuss the candidates for the administrative law judge positions on motion of Mr. Sanders, second of Mr. Hennelly. Executive Session Minutes are kept separately.

Upon return to General Session, Chairman Parker stated that candidates will be referred to by number and asked if there was a motion to interview any candidates. Mr. Sanders moved to interview candidates numbers one, two, three, four, six, and seven. Mr. Hennelly seconded the motion. The Commission unanimously agreed to interview Candidates one, two, three, four, six, and seven. Chairman Parker asked Ms. McGrory if she had any recommendation regarding scheduling interviews. Ms. McGrory stated that if the preference is to allow an hour and a half for each candidate, the Commission could schedule interviews at 10:00 a.m., 12:30 p.m., 2:00 p.m. and 3:30 p.m. on Tuesday, March 3rd and 8:30 a.m. and 10:00 a.m. on March 4th. She added that the Commission may want to schedule a regular Commission Meeting beginning at 11:30 a.m. on March 4th. Chairman Parker noted that a meeting has not been scheduled for the following week, and he suggested that a regular Commission meeting was needed for March 4th. Chairman Parker suggested a 9:45 a.m. start time on March 3rd to allow time to start the meeting and begin the first interview at 10:00 a.m. He suggested the March 4th meeting could begin at 8:30 a.m. with a regular session at 11:30. Ms. McGrory explained how the agenda could be drafted for that day. Chairman Parker noted the availability of candidates appearing by telephone or video. Ms. McGrory described how staff plans to handle the process for notifying the candidates and obtaining required information. In response to a question from Chairman Parker, Ms. McGrory explained the impact of the hiring freeze and the review by ADOA of appointments Grade 25 or higher.

Announcements, Scheduling of Future Meetings and Retirement Resolutions.

Ms. McGrory presented a retirement resolution for signature for JoAnn Gaffaney for 23 years of state service.

Chairman Parker confirmed the Commission meeting dates scheduled for meetings for March 3 and 4, 2015 for interviews. He also confirmed March 19 and 26, as well as April 9, 23, and 30. Ms. McGrory asked if there was a date in April when the Commissioner would be attending in person for the Fee Schedule Hearing. Mr. Sanders stated that he will not be able to attend in person during most of April but planned on being in person for the April 30 meeting. Chairman Parker stated that the Fee Schedule will be scheduled for the April 30, 2015 meeting.

There being no further business to come before the Commission and no public comment, the meeting was adjourned at 3:35 p.m.

THE INDUSTRIAL COMMISSION OF ARIZONA

By


Laura L. McGrory, Director

ATTEST:


Kara Dimas, Commission Secretary