

MINUTES OF MEETING
OF THE INDUSTRIAL COMMISSION OF ARIZONA
Held at 800 West Washington Street
Conference Room 308
Phoenix, Arizona 85007
Wednesday, July 1, 2015 – 1:00 p.m.

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| Present: | Dale L. Schultz | Chairman |
| | David M. Parker | Commissioner |
| | Michael G. Sanders | Commissioner |
| | Joseph M. Hennelly, Jr. | Commissioner (audio) |
| | Clint Bolick | Commissioner |
| | Andrew Wade | Acting Director |
| | William Warren | ADOSH Director |
| | Steve Ripple | Compliance Officer |
| | Erik Anderson | Compliance Officer |
| | Billie Gingrass | Compliance Officer |
| | Molly Jones | Claims |
| | Kathryn Harris | Staff Attorney |
| | Yvonne Borunda | Legal |
| | Kara Dimas | Commission Secretary |

Chairman Schultz convened the Commission meeting at 1:00 p.m. noting a quorum present. Also in attendance were Dennis Carpenter and Michelle Kunzman with the Arizona Attorney General's Office, and Jason Weber and Christina Jutzi of Snell & Wilmer.

Approval of Minutes of June 25, 2015 Regular Session Minutes.

Commissioner Parker requested an addition to the draft June 25, 2015 Minutes under the Truck Works, Inc. topic to add "when other recent violations were non-serious" to the sentence that read: "He asked why the respiratory protection citation is classified as a serious violation." Commissioner Parker noted that he tends to view these violations as serious. The Commission approved the Minutes of the June 25, 2015 Regular Session meeting on motion of Commissioner Parker, second of Commissioner Sanders, with a vote of four in favor. Commissioner Bolick was not able to attend the June 25, 2015 meeting and did not vote on this motion.

Consent Agenda:

All items following under this agenda item are consent matters and will be considered by a single motion with no discussion unless a Commissioner asks to remove an item on the consent agenda to be discussed and voted on separately. The Commission 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.

a. Approval of Proposed Civil Penalties Against Uninsured Employers.

1. 2C14/15-2523 Bits & Pizza's Incorporated

2. 2C14/15-1396 Chef Greco Enterprises, L.L.C., dba Burger Factory & Eggery
3. 2C14/15-0400 Happy Foster Family Adult Care Home, LLC
4. 2C14/15-0077 Teal Design Build, Inc.

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

1. Viad Corp
2. Weyerhaeuser Company

Chairman Schultz asked if any agenda items needed to be removed from the Consent Agenda. Commissioner Sanders suggested that it might be helpful to Commissioner Bolick if the self-insurance renewal is heard separately. Administration staff was not in attendance to make the presentation and Commissioner Sanders withdrew his request. The Commission unanimously approved the items on the Consent Agenda on motion of Commissioner Sanders, second of Commissioner Bolick.

Discussion and Action Regarding Requests to the Governor's Office for Approval Under Executive Order 2015-01 to Proceed with Rulemaking.

Andrew Wade stated that the two remaining requests have been approved by the Office of the Arizona Governor and the Industrial Commission may now proceed with the rulemakings. He identified the rulemakings as the three-year extension of crane operator's certification and adopting national consensus standards for industrial helmets. Commissioner Parker asked if the rulemaking process would be completed within the six months and Mr. Wade responded to the question.

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

14-2865-20 - Jennifer Iversen vs. SUS, LLC dba Stand-Up Scottsdale

William Warren presented a summary of Ms. Iversen's complaint, the employer's response, and the results of the ADOSH investigation. Mr. Warren recommended that the Commission not pursue the matter because the investigation did not identify sufficient evidence to support pursuit. Mr. Warren responded to questions from the Commissioners. Commissioner Parker commented on the witness interviews and Chairman Schultz agreed with the comments and added that the allegations were not in character for the supervisor. The Commission unanimously voted not to pursue the complaint on motion of Commissioner Sanders, second of Commissioner Bolick.

14-2919-05 - Mark A. Lopez vs. City of Winslow, Winslow Fire Department

Mr. Warren presented a summary of Mr. Lopez's complaint, the employer's response, and the results of the ADOSH investigation. Mr. Warren presented staff's recommendation. Commissioner Parker commented on the circumstances and noted the complainant was a career Lieutenant, worked part time yet devoted a lot of time to the City, if there is a call while he is driving the ambulance he responds as an employee of the ambulance, if he responds without the ambulance then he is there as a Lieutenant for the City. Commissioner Parker noted that the Fire Chief may not have appreciated the complainant's approach to some things but the City cannot fire

him for taking a safety issue to the City Manager, and it appears that is what happened in this case. He added that the complainant acted as a whistleblower, addressed safety concerns to the person who could make a difference, and he was then fired. Commission Parker explained that he sees this as a clear violation.

Chairman Schultz asked if there were other questions. Commission Bolick commented on the timing of the decision to terminate compared to the timing of raising safety concerns. Commissioner Parker commented on the knowledge possessed by the City Manager and the Fire Chief and when the Fire Chief had decided to terminate. He referred to the City's response concerning whether safety recommendations from any of the firefighters, the Captain or anyone else has ever been implemented, and the allegations concerning the cost of workers' compensation coverage compared to the advantage of experience versus a new hire.

Commissioner Sanders commented on the \$800 a year cost. He asked Mr. Wade for his legal opinion and Mr. Wade responded that the Commission has the option of an Executive Session. Commissioner Sanders moved the Commission enter into Executive Session to obtain legal advice and to discuss contemplated or pending litigation. Commissioner Parker seconded the motion and the Commission unanimously voted to move into Executive Session. Executive Session Minutes are kept separately.

The Commission returned to General Session at 2:05 p.m.

Commissioner Schultz asked if there was a motion. Commissioner Sanders moved to not pursue. There was no second. Chairman Schultz asked if there was another motion. Commissioner Parker moved to pursue and Commissioner Bolick seconded the motion. Commissioner Parker, Commission Bolick, and Commissioner Hennelly voted to pursue. Chairman Schultz and Commissioner Sanders voted against the motion.

14-2865-02 - Complainant Request for Reconsideration
Steven Faer vs. State of Arizona, Secretary of State

Chairman Schultz noted that Dennis Carpenter submitted a request to speak on this item and asked Mr. Wade about the order. Mr. Wade suggested that Mr. Warren present the matter first. Chairman Schultz agreed with that order and noted that, in addition, Commissioner Bolick was recently appointed to the Commission. Mr. Warren explained that this matter was previously presented to the Commission and the Commission decided not to pursue. Mr. Faer requested the Commission reconsider that decision. Mr. Warren summarized Mr. Faer's request, the original investigation, and the further investigation performed as a result of Mr. Faer's request for reconsideration. Mr. Warren explained that there is nothing new that would warrant the Commission reconsidering the decision not to pursue the matter.

Commissioner Bolick noted that he did not see a recommendation not to pursue nor the grounds for a recommendation not to proceed in the materials. Mr. Warren responded noting that the Commission had previously decided not to pursue and a copy of the Minutes from that Commission meeting should be in the secondary materials provided. Mr. Wade commented on the procedural posture. Commissioner Bolick asked if the Minutes described the basis for the Commission's decision not to pursue. Mr. Wade responded that the Minutes present a summary of the discussion and the ultimate legal action. Commissioner Sanders added that he copied the Minutes to remind the Commissioners of the previous discussion and action and noted there was also an Executive Session in that particular case. He explained that this agenda item is not to

rehash the case and asked if he was correct. Chairman Schultz acknowledged the request is for the Commission to reconsider the decision. Commissioner Bolick asked about the scope of the request for reconsideration. Mr. Wade responded to the question.

Commissioner Parker commented on the development of the reconsideration process, the federal model, and the Commission's desire to provide an opportunity for a party to ask the Commission to reconsider without requiring the typical procedural practice of requiring a member of the public body who voted for the original motion to first move for reconsideration. He explained that the process allows the complainant to ask the Commission to re-examine its decision because the complainant believes the Commission misinterpreted evidence or missed something and not that he just does not like the decision and is asking the Commission to reconsider.

Commissioner Sanders commented on exhibit 3, and stated that it is clear from the notes that they had already transferred control to another party well in advance of anything that would be considered protected activity. He provided additional details why the original decision was appropriate. Commissioner Parker added that management decided to consolidate the functions to a higher level, and the complainant believed he was singled out and interpreted that as discrimination.

Commissioner Bolick asked staff if the recommendation today would be the same as had been made initially in light of the examination of exhibit 3 and Mr. Warren responded to the question. Commissioner Bolick asked if this agenda item could be postponed to a later date to allow more time to review the materials.

Chairman Parker asked Mr. Wade if there were any time constraints and Mr. Wade responded to the question. Commissioner Bolick asked if the Commissioners would indulge him he would be grateful for additional time to review the materials.

Chairman Schultz asked Mr. Wade if this was an appropriate time to take public comment. Mr. Wade responded to the question. Chairman Schultz asked Mr. Bolick if he would like to have the input from the Attorney General's Office. Commissioner Bolick replied that if the attorney is ready to say something today, that they may all profit from it.

Chairman Schultz asked Mr. Carpenter if he would like to address the Commission. Mr. Carpenter identified himself as the Chief Counsel of the Employment Law Section at the Arizona Attorney General's Office. He thanked the Commission for the opportunity to speak and urged the Commission not to reconsider the decision not to pursue on the grounds that there is no new information and it is not wise to set precedent to reconsider something simply because the complainant disagrees with the Commission's unanimous decision not to pursue.

Chairman Schultz asked if there were any questions for Mr. Carpenter and, hearing none, thanked Mr. Carpenter. Chairman Schultz returned to Commissioner Bolick's motion to table this matter and return this agenda item to a future agenda. Commissioner Parker seconded the motion and commented that the basis for the request to reconsider seems to be that the Commission erred in not following ADOSH's recommendation and that this does not rise to the threshold required for reconsideration. He added that he does not object to allowing more time to consider the matter. Chairman Schultz clarified that the motion is to table the matter and return to a future agenda to allow time for additional review. Chairman Schultz, Commissioner Parker, and

Commissioner Bolick voted in favor of the motion and Commissioners Sanders and Commission Hennelly voted against the motion.

Mr. Warren clarified when Commissioner Bolick wanted the matter returned to the agenda.

14-2865-09 - Complainant Request for Reconsideration
Francis Himplsl vs. State of Arizona, Arizona Department of Transportation

Mr. Warren explained that this matter was previously presented to the Commission, the Commission decided not to pursue, and Mr. Himplsl has requested the Commission reconsider its decision. Mr. Warren summarized Mr. Himplsl's request, the original investigation, and the further investigation performed as a result of Mr. Himplsl's request for reconsideration. Mr. Warren recommended that the Commission not pursue the matter because there was no new evidence from the review to support reconsideration of the decision not to pursue the complaint.

Commissioner Parker summarized the request for reconsideration and commented on the factual circumstances.

Chairman Schultz asked if there was a motion. Commissioner Parker moved that the Commission not reconsider its decision not to pursue. Commissioner Sanders seconded the motion. Commissioner Bolick asked if it was clear that the person who submits a motion for reconsideration needs to raise new matters or present the evidence in a different light. Mr. Wade explained that ADOSH sends a letter to the complainant and Mr. Warren read the letter that was sent to the Claimant. Commissioner Bolick commented that the letter appropriately explained the expectations.

Chairman Schultz asked if there was further discussion or questions. There was no further discussion or questions. Chairman Schultz called for a vote and the Commission unanimously approved the motion not to reconsider the decision not to pursue.

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

Commissioner Parker noted the first item was a "Dodge" inspection and asked for an explanation of the term. Mr. Warren explained the use of the word "Dodge."

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| Phoenix Commercial Electric, Inc. | Planned |
| 8901 N 79 th Ave Ste 101 | Years in Business: 19 |
| Peoria, AZ 85345 | Empl. Covered by inspection: 9 |
| Site Location: 2201 W Fairview St Ste 5 | |
| Chandler, AZ 85224 | |
| Inspection No: U5916-1057244 | |
| Inspection Date: 4/21/2015 | |

SERIOUS – Citation 1 - Item 1 – Northwest corner of 94th St and Fairview St: One employee was working in an excavation without having first received training in the recognition and avoidance of unsafe conditions and the regulations applicable to excavations to control or eliminate any hazards or other exposure to illness or injury. (29 CFR 1926.21(b)(2)).

Div. Proposal - \$1,250.00

Formula Amt. - \$1,250.00

SERIOUS – Citation 1 - Item 2 – Northwest corner of 94th St and Fairview St: One employee was working in a 7 feet deep, 2 feet 4 inches wide, and approximately 200 feet in length excavation that had not been inspected by a competent person. (29 CFR 1926.651(k)(1)).

Div. Proposal - \$1,250.00

Formula Amt. - \$1,250.00

SERIOUS – Citation 1 - Item 3 – Northwest corner of 94th St and Fairview St: One employee was working in a 7 feet deep, 2 feet 4 inches wide, and approximately 200 feet in length excavation that was not adequately benched to preclude a cave-in or collapse, according to the requirements of 29 CFR 1926.652(b), in that the benching system utilized did not meet the requirements. (29 CFR 1926.652(a)(1)).

Div. Proposal - \$1,250.00

Formula Amt. - \$1,250.00

TOTAL PENALTY - \$3,750.00

TOTAL FORMULA AMT. - \$3,750.00

Mr. Warren summarized the citation and proposed penalty as listed. Commissioner Parker commented on potential confusion with mounted photograph 2 and noted that the superimposed measurements on mounted photograph 1 are helpful. He referred to mounted photograph number 5 and commented on abatement of violations such as failure to train. Mr. Warren responded to the comment and noted he will follow up with the employer regarding abatement. Following discussion, the Commission unanimously approved issuing the citation and assessed the recommended penalty of \$3,750.00 on motion of Commissioner Bolick, second of Commissioner Parker.

PSI Holding Company dba Packaging
Specialists Inc., Southwest
5320 W Buckeye Rd
Phoenix, AZ 85043

Planned

Years in Business: 35

Empl. Covered by inspection: 37

Site Location: 5320 W Buckeye Rd
Phoenix, AZ 85043

Inspection No: Q6169-1041336

Inspection Date: 2/12/2015

SERIOUS – Citation 1 - Item 1 –

a) One Clark forklift, model and serial number unknown, had a faceplate that was not legible. (29 CFR 1910.178(a)(6)).

b) One employee was not trained in the safe operation of any of the powered industrial trucks. There were 3 powered industrial trucks on site. Caterpillar 50, model and serial number unknown, Mitsubishi model number FGC18N, serial number AF81F10329, and a Clark model number CMC20S, serial number unknown. (29 CFR 1910.178(l)(1)(i)).

c) The employer did not perform an evaluation at least once every three years for each powered industrial truck operator that drives a powered industrial truck. (29 CFR 1910.178(l)(4)(iii)).

Div. Proposal - \$1,250.00

Formula Amt. - \$1,250.00

SERIOUS – Citation 1 - Item 2 – Shop floor: One employee was operating a urethane saw (vertical rotating saw), model and serial numbers unknown, that was missing a guard. (29 CFR 1910.212(a)(1)).

Div. Proposal - \$1,000.00

Formula Amt. - \$1,000.00

SERIOUS – Citation 1 - Item 3 – Shop floor: One employee was operating a horizontal slitter saw, model number HT-51-88 VBA and serial number unknown, which had an unguarded shaft end that was projecting more than one half the diameter of the shaft. (29 CFR 1910.219(c)(4)(i)).

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| Div. Proposal - \$750.00 | Formula Amt. - \$750.00 |
| TOTAL PENALTY - \$3,000.00 | TOTAL FORMULA AMT. - \$3,000.00 |

Mr. Warren summarized the citation and proposed penalty as listed. Commissioner Bolick asked for an explanation of the hazards related to not having a legible faceplate. Mr. Warren described some hazards. Commissioner Parker commented on stability or lack of stability in different configurations. Commissioner Sanders referred to Citation 1, Item 3 and asked about the safety hazard and whether the saw had been equipped with a guard that had been removed. Mr. Warren responded to the question. Following discussion, the Commission unanimously approved issuing the citation and assessed the recommended penalty of \$3,000.00 on motion of Commissioner Parker, second of Commissioner Hennelly.

Thunderbird Masonry, Inc.
 22028 N 19th Ave
 Phoenix, AZ 85027

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| Unprogrammed Related | |
| Years in Business: | 37 |
| Empl. Covered by inspection: | 9 |

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| Site Location: | 3300 W Camelback Rd Phoenix, AZ 85013 |
| Inspection No: | T9350-1048152 |
| Inspection Date: | 3/12/2015 |

SERIOUS – Citation 1 - Item 1 – North Building, 4th Floor, East wall scaffold: One employee was working, laying brick and grouting from a tubular welded frame scaffold that was approximately 53 feet high that did not have guardrails installed on all open sides to prevent a fall to the ground below. (29 CFR 1926.451(g)(4)(i)).

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| Div. Proposal - \$1,250.00 | Formula Amt. - \$1,250.00 |
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SERIOUS – Citation 1 - Item 2 – North Building, North wall scaffold: The employer did not ensure that each employee who was involved in disassembling scaffolding was trained by a competent person. (29 CFR 1926.454(b)).

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| Div. Proposal - \$1,250.00 | Formula Amt. - \$1,250.00 |
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SERIOUS – Citation 1 - Item 3 – North Building, 4th floor, North wall: One employee was retrieving tools from a scaffold platform without the use of a guardrail system, safety net system, or personal fall arrest system to prevent a 45 foot fall hazard. (29 CFR 1926.501(b)(1)).

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| Div. Proposal - \$1,250.00 | Formula Amt. - \$1,250.00 |
| TOTAL PENALTY - \$3,750.00 | TOTAL FORMULA AMT. - \$3,750.00 |

Mr. Warren summarized the citation and proposed penalty as listed. Commissioner Parker commented on the conditions shown in mounted photograph number 7 and explained why the gravity of the violation for Citation 1 Item 3 should be considered higher/greater. Erik Anderson explained his gravity analysis. Commissioner Parker stated he would recommend a gravity-based penalty of \$5,000.00 for Citation 1 Item 3. Commissioner Sanders referred to mounted photograph 7 and asked if ADOSH would propose a citation if the employee was not where he was when photographed. Mr. Anderson responded to the question. Commissioner Parker moved to approve staff's recommendation with the exception that Citation 1 Item 3 be changed to a higher/greater, \$5,000.00 gravity-based penalty, with the same reductions for a \$2,500.00 penalty

and a \$5,000.00 total penalty. The Commission unanimously approved issuing the citation with a total penalty of \$5,000.00 on motion of Commissioner Parker, second of Commissioner Bolick.

Trademark Visual, Inc.
3732 E University Dr
Phoenix, AZ 85034

Complaint
Years in Business: 7
Empl. Covered by inspection: 2

Site Location: 388 N Gilbert Rd
Gilbert, AZ 85233
Inspection No: H1793-1050845
Inspection Date: 4/02/2015

SERIOUS – Citation 1 - Item 1 – East Wall: Two employees were working on an awning at a height of approximately 10 feet 6 inches above the lower level installing a vinyl graphic sign and were not protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems. (29 CFR 1926.501(b)(1)).

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

SERIOUS – Citation 1 - Item 2 – East Wall: Employees were not trained to recognize fall hazards, or trained on the company procedures for fall protection to minimize fall hazards while installing a graphic sign at heights of approximately 10 feet 6 inches. (29 CFR 1926.503(a)(1)).

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

SERIOUS – Citation 1 - Item 3 –

a) East Wall: Two employees were observed using a Louisville model number L 3022-24PT extension ladder to access the work area on top of the awning and the ladder was extended only 6 to 8 inches above the top of the awning. (29 CFR 1926.1053(b)(1)).

b) East Wall: Two employees were working on the cap and top step of a Werner four-foot step ladder and a six-foot step ladder, model and serial numbers unknown. (29 CFR 1926.1053(b)(4)).

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

SERIOUS – Citation 1 - Item 4 – East Wall top of Awning: One employee was working from a yellow six-foot stepladder and had not received training in the recognition and avoidance of unsafe conditions associated with the use of portable ladders. (29 CFR 1926.1060(a)).

Div. Proposal - \$750.00 Formula Amt. - \$750.00

TOTAL PENALTY - \$4,500.00 TOTAL FORMULA AMT. - \$4,500.00

Mr. Warren summarized the citation and proposed penalty as listed. Following discussion, the Commission unanimously approved issuing the citation and assessed the recommended penalty of \$4,500.00 on motion of Commissioner Sanders, second of Commissioner Bolick.

Discussion and Action regarding Attorneys' Fees Petition.

Richard Taylor vs. Bryan Reifenrath – Andrew Wade stated that Attorney Richard Taylor has petitioned the Industrial Commission to set attorneys' fees with respect to work performed for Mr. Reifenrath in connection with Mr. Reifenrath's workers' compensation claim. Mr. Wade presented a history of the claim and the work performed by Mr. Taylor. Mr. Wade explained the options available to the Commission and explained why staff recommended an award of attorney

fees based on 15% of the \$974.00 LEC award which is \$146.16 for a total of 5 years less fees already paid from that LEC award for a total amount not to exceed \$7,501.92. Commissioner Bolick asked for an overview of the attorney fee process and Mr. Wade responded to the question. Kathryn Harris responded to questions from the Commission. Commissioner Parker moved the recommendation to include authorizing staff to type in the Commissioners' signatures on the Findings and Award. Commissioner Sanders seconded the motion and the Commission unanimously approved the motion.

Announcements, Scheduling of Future Meetings and Retirement Resolutions.

The Commission reviewed the meeting schedule through August and scheduled meetings for September.

There was no public comment and Chairman Schultz asked if there was a motion to adjourn. Commissioner Sanders moved to adjourn and Commissioner Bolick seconded the motion. The Commission unanimously voted to adjourn and the meeting was adjourned at 3:32 p.m.

THE INDUSTRIAL COMMISSION OF ARIZONA

By



Andrew Wade, Acting Director

ATTEST:



Kara Dimas, Commission Secretary