

MINUTES OF MEETING  
OF THE INDUSTRIAL COMMISSION OF ARIZONA  
Held at 800 West Washington Street  
Conference Room 308  
Phoenix, Arizona 85007  
Wednesday, October 21, 2015 – 1:00 p.m.

Present:	Dale L. Schultz	Chairman
	Joseph M. Hennelly, Jr.	Commissioner
	Clint Bolick	Commissioner
	Andrew Wade	Acting Director
	Valli Goss	Legal Counsel
	William Warren	ADOSH Director
	Larry Gast	Assistant ADOSH Director
	Steven Black	Compliance Officer
	Ruben Rodriguez	Compliance Officer
	Steve Ripple	Discrimination Investigator
	Jesse Perez	Discrimination Investigator
	Erik Anderson	Compliance Officer
	Kara Dimas	Commission Secretary

Chairman Schultz convened the Commission meeting at 1:05 p.m. noting a quorum present. Also in attendance were Curtis Fikes, Ray Castro and Angie Stoll from Staffing Network, Tina Hours from Arizona Office Technologies (AOT), Assistant Attorney General Kirstin Story representing Pinal County Superior Court, Jim Stabler and Cathy Vines of CopperPoint Mutual, and Susan Strickler from the Arizona Self-insureds Association, and Jason Weber of Snell & Wilmer.

Approval of Minutes of October 15, 2015 Regular Meeting.

The Commission unanimously approved the Minutes of the October 15, 2015 Regular meeting on motion of Commissioner Hennelly, second of Commissioner Bolick.

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. 2C14/15-1636 Casey, L.L.C. dba Las Casitas Villas
2. 2C15/16-0259 E-Vapor Zone, L.L.C.
3. 2C15/16-0264 Foothills Mattress and Furniture, L.L.C.
4. 2C14/15-2414 Jose Amador & Maria Amador, h/w, and Fernando Amador & Sandra Amador, h/w, dba Yuma Organic

5. 2C15/16-0803 Laveen Nails and Day Spa JP, L.L.C., dba Laveen Nails & Day Spa
6. 2C15/16-0804 Ronald Williams & Courtney Williams, h/w, dba Classic Colorworks

Chairman Schultz stated that agenda item 3.a.3., would be removed from the consent agenda and heard separately. The Commission unanimously approved the remaining items on the consent agenda on motion of Commissioner Bolick, second of Commissioner Hennelly.

Discussion and/or Action regarding Legislation. This agenda item may include Discussion and/or Action Regarding the Sunset Review of the Industrial Commission of Arizona, and related Boards, Committees or Councils.

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Chairman Schultz explained that this is a continuing agenda item and there was nothing new to report.

Chairman Schultz moved back to the Consent Agenda item that was moved to the regular agenda.

Valli Goss advised that 3.a.3. Foothills Mattress and Furniture, L.L.C., has obtained workers' compensation insurance and staff is recommending a reduced penalty of \$500.00, instead of staff's previous recommendation of a \$1,000.00 civil penalty. The Commission unanimously assessed the recommended penalty of \$500.00 against each employer on motion of Commissioner Hennelly, second of Commissioner Bolick.

Discussion and Action and Potential Resolution regarding Proposed Rulemaking to A.A.C. R20-5-601 to adopt Federal Occupational Safety and Health standards extending the deadline for employers to ensure that crane operators are certified by three years, until November 10, 2017 and adding a new subpart to provide protections to employees working in confined spaces in construction.

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Mr. Warren described the proposed rulemaking to adopt federal safety and health standards in construction to extend the crane operator certification deadline and he explained why the rulemaking is necessary. He also explained why it is necessary to adopt the new federal standards related to confined spaces in construction.

Commissioner Bolick asked for more details regarding the standards related to confined spaces in construction. Mr. Warren explained the requirements in general industry and described the differences with the requirements in the construction standards. The construction standards require training but little else and employees in construction may be working in confined spaces and exposed to potential atmospheric and engulfment hazards as would be present in general industry, and the new construction standards import similar requirements. Commissioner Bolick asked Mr. Warren about his review of the new federal standards and Mr. Warren replied that he had reviewed the standards and they are appropriate.

Chairman Schultz commented on the limited number of certified crane operators and explained why the extension is appropriate. With respect to the standards for confined spaced in construction, Chairman Schultz noted the number of cases before the Commission and the potential for serious injuries from employees working in confined space. He noted that the new construction standards apply to both public and private employers in the state of Arizona.

Chairman Schultz asked if there was a motion to approve the resolution as presented. Commissioner Bolick made that motion and Commissioner Hennelly seconded. Mr. Wade noted that that the motion for today would be to direct staff to file a notice of proposed rulemaking with the Secretary of State and he summarized the process after the notice of proposed rulemaking is published.

Chairman Schultz referred to the motion. Commissioner Bolick moved to direct staff to file the notice of proposed rulemaking with the Secretary of State. Commissioner Hennelly seconded the motion. The Commission unanimously voted in favor of the motion.

Discussion and/or Action of Arizona Division of Occupational Safety and Health Discrimination Complaint.

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14-2865-35 - Sun-Brite Professional Services, Inc. dba Sun-Brite Fire & Water Restorations

William Warren presented a summary of the 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.

Commissioner Bolick asked for clarification whether ADOSH is addressing solely the demotion. Ruben Rodriguez responded to the question. Mr. Warren added some additional details.

Commissioner Hennelly asked for details concerning the timing regarding employer knowledge of protected activity and Mr. Warren provided additional details.

Chairman Schultz asked if there were any other questions, comments, or a motion. Commissioner Hennelly moved the Commission not pursue the complaint further and Commissioner Bolick seconded the motion. The Commission unanimously voted in favor of the motion.

14-2919-23 - Staffing Network and Arizona Office Technologies (AOT)

William Warren presented a summary of the 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.

Chairman Schultz asked if there were any questions or comments. The Complainant addressed the Commission. He commented on the investigation, the employer's discipline process, the presence of mosquitoes in the workplace, and employer knowledge of the mosquitoes. Chairman Schultz asked the Complainant some clarifying questions and the Complainant responded to the questions.

Chairman Schultz asked if there were any other questions, comments, or a motion. Mr. Ray Castro identified himself as the COO of Staffing Network and he commented on the employer's position regarding the complaint and why the work assignment was ended.

Chairman Schultz asked if there was a motion. Commissioner Hennelly moved the Commission not pursue the matter further and Commissioner Bolick seconded the motion. The Commission unanimously voted in favor of the motion.

15-3633-12 - Pinal County dba Pinal County Adult Probation Department

William Warren presented a summary of the 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.

Chairman Schultz asked if there were any other questions or comments. Assistant Attorney General Kirstin Story representing Pinal County Superior Court stated she was present in case the Commission had any questions - otherwise she did not need to make any comments. Chairman Schultz asked if there was a motion. Commissioner Bolick moved the Commission not pursue the matter further and Commissioner Hennelly seconded the motion. The Commission unanimously voted in favor of the motion.

15-3633-16 - RCHP-Sierra Vista, Inc. dba Canyon Vista Medical Center

William Warren presented a summary of the 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.

Chairman Schultz asked if there were any questions, comments, or a motion. Commissioner Hennelly moved the Commission not pursue the matter further and Commissioner Bolick seconded the motion. The Commission unanimously voted in favor of the motion.

15-3633-26 - Mitchell's Merchant Patrol, Inc.

William Warren presented a summary of the 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.

Chairman Schultz asked if there were any questions, comments, or a motion. Commissioner Bolick moved the Commission not pursue the matter further and Commissioner Hennelly seconded the motion. The Commission unanimously voted in favor of the motion.

Executive Session under A.R.S. § 38-431.03(A)(3) and (A)(4) to Discuss Arizona Division of Occupational Safety and Health Discrimination Complaint.

14-2865-35 - Sun-Brite Professional Services, Inc. dba Sun-Brite Fire & Water Restorations

14-2919-23 - Staffing Network and Arizona Office Technologies (AOT)

15-3633-12 - Pinal County dba Pinal County Adult Probation Department

15-3633-16 - RCHP-Sierra Vista, Inc. dba Canyon Vista Medical Center

15-3633-26 - Mitchell's Merchant Patrol, Inc.





SERIOUS – Citation 1 - Item 2 – Lot # 9: Three employees were observed working 22' above the ground level without anchor points. (29 CFR 1926.502(d)(15)).

Div. Proposal - \$4,000.00

Formula Amt. - \$4,000.00

SERIOUS – Citation 1 - Item 3 – Lot # 20: Employees used the top step of an 8' A-frame ladder to access the roof top that was 13' above the floor level. (29 CFR 1926.1053(b)(13)).

Div. Proposal - \$2,000.00

Formula Amt. - \$2,000.00

TOTAL PENALTY - \$10,000.00

TOTAL FORMULA AMT. - \$10,000.00

Mr. Warren summarized the citation and proposed penalty as listed. Commissioner Bolick noted the employer had been cited earlier this year and asked whether staff had considered a willful classification violation. Mr. Warren responded that the other citation was still in litigation. Commissioner Bolick noted that the employer should have been on notice about all of the requirements, commented on the size of the employer, repeated violation, and suggested that the adjustment for size not apply in this matter.

Chairman Schultz commented on the superficial attempt at a restraint that would not protect a worker from falling and he agreed with not having a reduction for size.

Chairman Schultz asked if there were any other questions, comments, or a motion. Commissioner Bolick moved to approve the citation while removing the size adjustment factor so the total penalty would be \$12,500.00. Commissioner Hennelly seconded the motion. The Commission unanimously approved issuing the citation and assessed a total penalty of \$12,500.00.

McKenna Construction Inc.  
2302 E Indian Pink Cir  
Payson, AZ 85541

Planned

Years in Business: 8

Empl. Covered by inspection: 4

Site Location: 20677 E Maya Rd  
Queen Creek, AZ 85142

Inspection No: T9350-1067209

Inspection Date: 05/29/2015

SERIOUS – Citation 1 - Item 1 – Roof, Southwest Corner: One employee was installing sheeting to the outside of the building without the use of a guardrail system, safety net system, or personal fall arrest system to prevent an approximate 9 foot 9 inch fall to the ground below. (29 CFR 1926.501(b)(1)).

Div. Proposal - \$2,000.00

Formula Amt. - \$2,000.00

SERIOUS – Citation 2 - Item 1 – West side of building: The employer did not protect employees from stepping into or have ladders fall into the floor hole that was approximately 24 inches by 24 inches and 12 inches deep. (29 CFR 1926.501(b)(4)(ii)).

Div. Proposal - \$1,000.00

Formula Amt. - \$1,000.00

SERIOUS – Citation 2 - Item 2 – Oregano's Pizzeria 20677 E Maya Rd Queen Creek, AZ 85142: The Company did not assure fall protection training for all employees who were exposed to a fall greater than six feet. (29 CFR 1926.503(a)(1)).

Div. Proposal - \$2,000.00

Formula Amt. - \$2,000.00

SERIOUS – Citation 2 - Item 3 – Northwest side of building: The operator of the JLG Forklift Model number 8042 Serial number 0160054911 did not fully lower the load before leaving the operator's position of the forklift in accordance with ANSI B56.1-1969 Section 603, Paragraph E. (29 CFR 1926.602(c)(1)(vi)).

Div. Proposal - \$1,000.00

Formula Amt. - \$1,000.00

SERIOUS – Citation 2 - Item 4 – Oregano's Pizzeria, 20677 E Maya Rd Queen Creek, AZ 85142: An employee operating a JLG Forklift Model number 8042 Serial number 0160054911 and the employer did not have a written certification that the employee had been trained and evaluated as required by the standard. (29 CFR 1926.602(d)).

Div. Proposal - \$1,000.00

Formula Amt. - \$1,000.00

SERIOUS – Citation 2 - Item 5 – North side of building: Three employees and the Foreman were using an 8 foot A-frame fiberglass ladder make and model unknown, to access the patio roof at a height of 9 feet 3 inches. (29 CFR 1926.1053(b)(13)).

Div. Proposal - \$1,000.00

Formula Amt. - \$1,000.00

TOTAL PENALTY - \$8,000.00

TOTAL FORMULA AMT. - \$8,000.00

Mr. Warren summarized the citation and proposed penalty as listed and commented on a typo in the item numbering. Commissioner Bolick asked Mr. Warren about the gravity based penalty assessment on Citation 2, Item 1. Mr. Warren explained staff's assessment and Eric Anderson provided additional details regarding conditions at the worksite. Commissioner Bolick noted that this employer has been twice cited for related types of workplace issues, and he commented on the adjustment for size. Mr. Anderson and Mr. Warren responded to the comment. Commissioner Bolick suggested the Commission should consider a \$5,000.00 gravity based penalty.

Chairman Schultz stated this is the same issue that they have seen in the last couple of weeks in this type of construction where they are leaving those significant holes and exposing people and it is concerning to him that there seems to be a trend that needs to be addressed. Commissioner Hennelly asked for additional details concerning the number of holes. Mr. Anderson commented on the holes and explained what is depicted in mounted photographs numbers 13 and 14.

Chairman Schultz asked if there were any other questions or a motion. Commissioner Bolick moved to approve the citation with Citation 2, Item 1 having a gravity based penalty of \$5,000.00 based on higher greater for a total penalty of \$9,000.00 and Commissioner Hennelly seconded the motion. The Commission unanimously approved issuing the citation and assessed the recommended penalty of \$9,000.00.

Sargon Masonry Construction, LLC  
301 E Bethany Home Rd, Ste C184  
Phoenix, AZ 85012

Planned  
Years in Business: 2  
Empl. Covered by inspection: 2

Site Location: 26982 N. 80<sup>th</sup> Ln  
Peoria, AZ 85383  
Inspection No: S8089-1078527  
Inspection Date: 07/15/2015

SERIOUS – Citation 1 - Item 1 – North side of house: Two employees working from the roof were not protected from falling approximately 10 feet to a lower level by guardrail system, safety net system, or personal fall arrest systems. (29 CFR 1926.501(b)(13)).

Div. Proposal - \$1,250.00

Formula Amt. - \$1,250.00

SERIOUS – Citation 1 - Item 2 – Roof: Two employees working at heights and exposed to falls approximately 10 foot 10 inches above a lower level were not provided training to recognize the hazards of falling or the procedures to be followed in order to minimize these hazards. (29 CFR 1926.503(a)(1)).

Div. Proposal - \$1,250.00

Formula Amt. - \$1,250.00

SERIOUS – Citation 1 - Item 3 – North side of roof: A stairway or ladder was not provided for two employees where a break in elevation of 10 feet 10 inches existed at the access to the roof of the building. (29 CFR 1926.1051(a)).

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. The Commission unanimously approved issuing the citation and assessed the recommended penalty of \$3,750.00 on motion of Commissioner Hennelly, second of Commissioner Bolick.

Discussion and Action Regarding Rulemaking relating to the Development and Implementation of a Process for the use of Evidence Based Medical Treatment Guidelines to Treat Injured Workers under A.R.S. § 23-1062.03.

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Mr. Wade presented some background regarding the 2012 legislation that requires the Commission to develop and implement a process for the use of treatment guidelines, where appropriate, to treat injured workers. He summarized the work of the Director's advisory committee and the advisory committee's recommendations. He noted that the Commission adopted those recommendations on December 18, 2014. He explained the reasons for the delay in completing a draft notice of proposed rulemaking and added that Commission staff have been working on the other components that will be necessary to implement the use of evidence based medical treatment guidelines.

Jacqueline Kurth summarized her background and described what has happened with the creation of the Medical Resource Office (MRO). She noted that the forms for the electronic process have been developed and she explained how she will be working with the Work Loss Data Institute, the publisher of the *Official Disability Guidelines* (ODG), for training and to develop a training webinar for the MRO's website. She also summarized the work to date with a vendor to create a portal and offered estimates regarding the time-frames to test the system. Ms. Kurth explained how she is also working with the Arizona Medical Association (ArMA) regarding the new review process.

Chairman Schultz asked about the number of states using the evidence based guidelines. Ms. Kurth stated that 32 states use treatment guidelines and there are some other states currently in the process of considering treatment guidelines. Chairman Schultz asked if states that use guidelines do so for all medical treatment as opposed to a narrow application. Ms. Kurth stated that the majority are using it for all, however about 5 – 6 have limited the use of guidelines and she commented on the use of drug formularies.

Chairman Schultz commented on how impressed he was at the presentation during the Annual Claims Seminar held in August regarding how the ODG involves continual input from

medical practitioners and the use of evidence based revisions to the guidelines. He also thanked everyone for working so hard on this project and noted that despite some delay in creating the draft rulemaking, that there has been continual work to prepare for a smooth implementation process.

Commissioner Hennelly commented on the incredible amount of work that the committee put into this project. He explained how the committee members devoted a great deal of time even though they have full time jobs and the outreach to the constituency was amazing. He acknowledged that not all stakeholders will be pleased with every component and there were disagreements along the way but the committee was still able to develop the consensus recommendations. Commissioner Hennelly thanked Ms. Kurth, Melinda Poppe, Cathy Vines, and James Stabler. He strongly urged that the Commission proceed with this rulemaking and thanked everyone involved for their hard work.

Chairman Schultz commented on the draft rules. Mr. Wade summarized the comment process. Chairman Schultz asked about the 10 business day time-frame to communicate to a provider the decision not to preauthorize. Ms. Kurth noted that there was significant discussion regarding that time frame. Ms. Vines explained that the committee discussed different time frames and ultimately concluded that 10 days would be reasonable time period for the process to receive a request, evaluate the request, determine how to respond, and to formulate a response. She added that it was another consensus decision. Ms. Kurth added that when physicians, injured workers, or applicant attorneys bring a request for administrative review to the Commission that they will need to show that they have submitted this request initially to the payor to ensure that this step is not skipped. Chairman Schultz added that it was helpful to him to review the actual forms, the forms achieve a happy medium in keeping the forms simple, able to be completed quickly, and yet still supply the necessary information. He also noted that there was a question whether a provider may bill the payor for time spent participating in a peer review and whether that is addressed in the Physicians' Fee Schedule. He asked how that is going to be addressed. Ms. Kurth replied that staff will explore that question and if not already addressed, the Commission may have to include a CPT code in the next Fee Schedule. Chairman Schultz also noted that he appreciated the way the program was tied into the Fast Track and thinks this is really a step forward in being able to serve stakeholders.

Commissioner Bolick asked about applying the guidelines to other than just the treatment of chronic pain and use of opioids at all stages. Mr. Wade explained that the draft rules provide a mechanism for the Commission to expand the use of the treatment guidelines to other conditions and body parts and he summarized the process.

Commissioner Bolick asked about the statutory mandate. Mr. Wade referred to A.R.S. § 23-1062.03. Commissioner Bolick reviewed the statute, commented on the open-ended nature of the mandate, and noted that it may be prudent to address other components at the appropriate time. Ms. Kurth explained how the development of the electronic process includes the potential to expand the application of the guidelines.

Commissioner Bolick stated he was impressed with all of the work in this project. He added that the proposed rule looks very good, noted that the mandate was from 2012, the number of states that have already adopted treatment guidelines, and explained that he would like to publish the proposed rule and get the process started. Mr. Wade stated that the motion would be to direct staff to file the notice of proposed rulemaking with the Secretary of State. He noted that the notice of proposed rulemaking will be publishing in approximately three weeks. He added that if the

Commission desires, he could distribute the draft to key stakeholders which will provide them with an additional three weeks on top of the 30 day formal comment period. Commissioner Bolick moved this action and Commissioner Hennelly seconded the motion. The Commission unanimously approved the motion to direct staff to file the notice of proposed rulemaking with the Secretary of State and for staff to distribute the draft to key stakeholders.

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.

Chairman Schultz moved the Commission discuss the selection of candidates for the Administrative Law judge position in executive session. Commissioner Hennelly seconded the motion. The Commission unanimously voted in favor of the motion. Chairman Schultz announced the Commission would move into executive session.

The Commission returned to regular session at 3:04 p.m.

Chairman Schultz stated he would entertain a motion to direct staff to interview candidates 1, 2, 3, 7 and 11. Commissioner Bolick moved that motion and Commissioner Hennelly seconded the motion. The Commission unanimously voted in favor of the motion.

Announcements, Scheduling of Future Meetings and Retirement Resolutions.

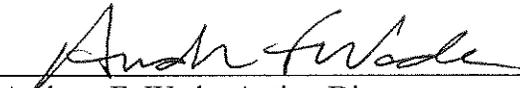
Mr. Warren commented on the Leadership Safety Summit scheduled for November 4 and 5, 2015 to be held at the Thunderbird Global School of Management.

Public Comment.

Chairman Schultz asked if there were any comment from the public. The Complainant in discrimination matter 14-2919-23 thanked the Commission for investigating and considering his complaint. He presented his view of what some witnesses had told the investigator and he commented on problems with mosquitoes.

Chairman Schultz asked if there was a motion to adjourn. Commissioner Hennelly moved to adjourn and Commissioner Bolick seconded the motion. The Commission unanimously voted to adjourn and the meeting was adjourned at 3:11 p.m.

THE INDUSTRIAL COMMISSION OF ARIZONA

By   
Andrew F. Wade, Acting Director

ATTEST:

  
Kara Dimas, Commission Secretary