

MINUTES OF MEETING
OF THE INDUSTRIAL COMMISSION OF ARIZONA
Held at 800 West Washington Street
Conference Room 308
Phoenix, Arizona 85007
Thursday, May 19, 2016 – 1:00 p.m.

Present:	Dale L. Schultz	Chairman
	Joseph M. Hennelly, Jr.	Vice Chair
	Scott P. LeMarr	Commissioner
	Robin S. Orchard	Commissioner
	James Ashley	Director
	Stephen Ball	Acting Chief Legal Counsel
	Bob Charles	Legislative Affairs Chief / Public Information Officer
	Sylvia Simpson	Chief Financial Officer
	Renee Pastor	Accounting
	William Warren	ADOSH Director
	Ruben Rodriguez	Compliance Officer
	Billie Gingrass	Compliance Officer
	Kara Dimas	Commission Secretary

Chairman Schultz convened the Commission meeting at 1:00 p.m. noting a quorum present. Also in attendance were Robert Robichaud and Timothy Hurd with Western Window, Alex Contreras and Amanda Frank with West Point Contractors, and Jason Weber of Snell & Wilmer.

Approval of Minutes of May 12, 2016 Regular Meeting.

Chairman Schultz stated he would like to postpone the approval of the May 12, 2016 Minutes to a later meeting.

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. 2C15/16-0753 Dental Sticks, Inc.(a Maine Corporation)
 2. 2C14/15-1703 Memos Granite & Marble LLC
 3. 2C14/15-2531 McDade Entertainment L.L.C., dba New Norton's Country Corner

- b. Approval of Requests for Renewal of Self-Insurance Authority.
 1. ABF Freight System, Inc.

Chairman Schultz asked if any agenda items needed to be removed from the Consent Agenda, hearing none, the Commission unanimously approved the items on the Consent Agenda on motion of Commissioner LeMarr, second of Vice Chair 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.

Mr. Charles commented about the bills that have been signed and that SB 1500 would be signed by the Governor today.

Presentation from and/or discussion with the Industrial Commission's Public Information Officer. This agenda item may include discussion regarding the operations of the Industrial Commission.

Mr. Charles commented on the outreach to the Legislature and Governor's office to recognize their support of SB 1500. He also attended the OSHCON meeting this week and will be doing more work to promote ADOSH consultation services. He provided an update on the heat awareness and Zika Virus campaigns, noting a lot of interest by the media for coverage. He commented that the new ICA website is much closer to completion and will be going live in July.

Chairman Schultz noted that Mr. Ashley was the speaker at the Arizona Self-Insurers Association (ASIA) luncheon this week and he had received positive phone calls. Mr. Ashley commented on the event and positive feedback.

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

15-3875-7 – Urquidy vs. Diversified Conveyors, Inc.

William Warren presented a summary of Mr. Urquidy'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.

Commissioner Orchard asked Mr. Rodriguez to verify dates. Mr. Rodriguez responded that June 2, was when he arrived at the Tucson ADOSH office, and that he returned the complaint on June 12.

Chairman Schultz asked if there were any other questions or anyone else who would like to discuss the discrimination complaint. Hearing none, he asked if there was a motion to accept the recommendation of staff. Vice Chair Hennelly moved not to pursue, Commissioner LeMarr seconded the motion. Chairman Schultz added that in spite of the confusion about the dates, it is an excellent record, that multiple people were interviewed and that ADOSH was able to get very definitive statements. The Commission unanimously approved the motion not to pursue.

15-3875-8 – Laguna vs. West Point Contractors, Inc.

William Warren presented a summary of Mr. Laguna's complaint, the employer's response, and the results of the ADOSH investigation. Mr. Warren recommended that the Commission pursue the matter because the investigation did identify sufficient evidence and a causal link between the

protected activity and the adverse action such that pursuit is warranted. He noted that the time of the adverse action and the protected activity appears to be suspicious and no other similarly situated employees had been terminated for failure to use safety glasses. He also stated that evidence submitted by the respondent did not support the other undisputed facts uncovered by Mr. Rodriguez. The respondent knew the employee was going to call OSHA and there was no direct evidence to support the respondent's claim that the employee was terminated for failure to wear safety glasses or a hardhat. There were no reprimands for any other employees for not wearing the personal protective equipment and on the day of termination the supervisor who notified him of this termination, his uncle, indicated to him that his raising issues with OSHA was part of the reason for his termination. Mr. Rodriguez asked the supervisor if he said that and his response was that he "said a lot of things that day," so he did not confirm or deny it.

Commissioner Orchard asked about witness statements. Commissioner LeMarr pointed out that they were in the report but not separated out like the other package. Commissioner LeMarr commented that it seemed pretty straight forward and asked if there were mitigating circumstances not provided. It seems as if the complainant was accurate that he complained about it and said he was going to ADOSH, did so, and was terminated because of that. Mr. Warren commented that this investigation was done by a phone/fax. The employer responded and ADOSH chose not to do an onsite inspection. Mr. Rodriguez determined he could not find anything to support an onsite inspection. He added that employees have the right to call OSHA.

Vice Chair Hennelly asked for clarification on page 7 of the report, where Compliance Supervisor Gilbert Bracamonte stated that he spoke with the Regional Manager Mr. Contreras, who said to Mr. Bracamonte that they had terminated an employee because he had threatened to notify OSHA, and asked if it was correct. Mr. Rodriguez responded that it was not correct, Mr. Contreras did not say that they terminated the employee that was an error.

Chairman Schultz asked for an explanation regarding protected activity and whether the reason for termination arising from the protected activity need not be the only reason for termination, or even the most significant reason for the termination. However, if the protected activity is any part of the reason for termination then that creates the potential for this going forward as a complaint. Mr. Warren agreed and added that Mr. Rodriguez looked to see if there were any other similarly situated employees that had been terminated for not wearing their safety gear and could not determine that based on the investigation.

Chairman Schultz asked if there were any other questions and then asked if the representatives from West Point Contractors would like to speak. Alex Contreras stated that the employee was fired for refusing to obey safety policy per the written notice given to him and provided to ADOSH. He noted there is a record at DES confirming his refusal to comply with the West Point safety policy. He also noted his conversation with Mr. Bracamonte and the complaint regarding water, and stated he had no knowledge that the employee had any plan to contact ADOSH when the decision was made to terminate.

Commissioner LeMarr asked if Mr. Contreras has seen the photographs in the report and noted they are not dated and there was not enough specific information to indicate that safety glasses were part of the standard operating procedure for the company. Mr. Contreras responded that it was definitely written in their policy and something that they have to remind their employees about. He stated no one had ever been terminated for not wearing safety glasses or having to be reminded to do so, and this was the first time someone was fired due to safety issues. He stated that the

termination was due to his refusal to wear safety glasses, and this was confirmed in a recording with DES regarding his refusal to follow policy.

Amanda Frank responded to whether it was known that the employee had contacted ADOSH. She was the person who ordered the employee to put on the safety glasses, and did not know that he would contact ADOSH. She stated that the employee commented that if OSHA showed up he would not wear his safety glasses so citations could be issued for not wearing gear. She stated that this comment was in response to her warning to employees that failure to wear safety glasses could result in OSHA citations. She commented about the photograph and that wearing safety glasses affects seeing waves in the pavement and sometimes employees take them off while raking to get a smooth finish. At the time she asked Mr. Laguna to wear his gear he was operating heavy equipment, and that is why she asked him to use them.

Chairman Schultz was not sure of the timing but indicated that the employee was going to complain about the lack of water. Ms. Frank stated he did not tell her that he was going to complain about lack of water, his response was if OSHA showed up he would wear his sun glasses and ball cap and tell them how they never get water and something about travel pay. He was informed that if he purchased water that he would be reimbursed, no one had said anything about running out of water. She said there was no threat to call OSHA, it was this is what I would do if OSHA showed up and that she was never told by the employee that he was going to call. Chairman Schultz asked if Ms. Frank was a full time safety person and she responded yes.

Commissioner LeMarr stated that he found it astounding that they would not be making sure there was water on a paving site all of the time as it is one of the hottest activities you can engage in no matter what time of the year. The notion that you might expect employees to provide their own water is pretty far-fetched. Ms. Frank responded that in addition to the water that they keep on the jobsite, the jobsite trailer has a water cooler at all times, there was not a lack of water. Commissioner LeMarr asked Mr. Warren about ADOSH's policies regarding the summer season, hydration and rest, and whether there is a standard regarding how far away water should be. Mr. Warren stated he would have to double check but part of the standard for providing water for employees in sufficient supply to get them through the day.

Vice Chair Hennelly asked if the supervisor Mr. Laguna, the complainant's uncle, was still an employee with the company. Ms. Frank and Mr. Contreras responded that he was not.

Commissioner Orchard commented that it looks like a "he said/she said" and wondered if someone heard them say to Mr. Laguna that he was being let go because of his complaint to OSHA or the other way around. If the employer did not know he made a report to OSHA, she was challenged with linking the activity. She agreed with Commissioner LeMarr's point that having no water was a concern. Also that the employees interviewed said they bring their own water and the fact that they were not aware was also concerning. She was stuck on the issue regarding the employer's knowledge as to whether they knew that the employee reported to OSHA when he was let go, and the employee saying they did know. Mr. Contreras stated it was his decision to terminate and he was not in the field. He was notified of the employee's refusal to obey an order, he said the employee needs to be terminated. He then notified the employee's supervisor, who also happened to be the employee's uncle that he needed to be terminated. He made an error that they did not send someone to accompany the uncle to carry out the termination. He stated it would have helped to avoid some problems by having a second witness during termination.

Mr. Warren commented that as the cases are reviewed, that they look at the totality of evidence submitted by both sides and ADOSH remains neutral when investigating discrimination cases. However, based on the evidence presented suspicion arose based on the timing of the adverse action, as he was allegedly terminated on the 29th but comes back to work on the 2nd, when his uncle tells him he has been terminated and makes the statement regarding OSHA. He did complain about water on the 29th and that there was a discussion in some form regarding OSHA.

Commissioner LeMarr followed up on Vice Chair Hennesly's comments. He was prepared to suggest it be reopened because it states that they had terminated this employee because he had threatened to notify OSHA. He commented that if it was a typo it should have been fixed, now the statement is completely different. Mr. Warren stated he did not catch the typo.

Chairman Schultz followed up with Ms. Frank about the comment that Mr. Laguna made to her. Ms. Frank stated the employee's reason given for refusing to wear safety glasses was that his sunglasses were prescription. She advised him that she could give him side shields or goggles to go over top and that was his response. Chairman Schultz asked about the decision for Mr. Laguna to be off a day, indicates it was the uncle who said to take a day off while I get this mess sorted out. Mr. Contreras responded that the uncle was instructed to terminate the employee the morning of the 30th, and failed to do so and they found out later. Chairman Schultz clarified that when he came back to work on the 2nd was when he was then formally terminated. Mr. Contreras stated he guessed the uncle was having a hard time terminating his nephew.

Chairman Schultz's confirmed that it was difficult to sort out and with two very diametrically opposed versions of what transpired it was a difficult decision. He noted they have the option of either accepting the recommendation of staff to pursue the complaint or deciding that there is insufficient merit to pursue. Mr. Warren commented that they have the ability for the Commission to go into executive session to discuss the validity of the legal aspects if they desire.

Chairman Schultz asked if there was a motion to approve the recommendation to pursue the complaint or to determine that they do not want to pursue the complaint.

Commissioner Orchard asked the employer to confirm that the employee was hired in August 2014, and through the chronology of events there were no issues between the time he was hired and this specific incident. Ms. Frank responded that she spoke with Mr. Rodriguez during the interview and advised him that she had the exact same safety glasses issue with the same employee on another jobsite, but there is no written documentation. Ms. Frank stated that it had in fact happened and there were other superintendents who witnessed the same thing, but there is no documentation on the issue. Commissioner Orchard wanted to be clear that the time that she was describing was not documented, and asked if he refused after being told to wear safety glasses or was he just not wearing safety glasses, that was the point she was trying to make. Ms. Frank stated he was not wearing safety glasses and would not remedy it by putting on the side shields she was providing, or the goggles. She said it was pretty much a weekly thing. Chairman Schultz clarified that the difference this time was that he refused. Ms. Frank agreed and that the employee did so in a very inappropriate manner, in her opinion.

Commissioner LeMarr asked if Mr. Rodriguez interviewed the complainant at any other time besides the time he requested a complaint form. Mr. Rodriguez stated he had when the employee came into the ADOSH office.

Commissioner LeMarr asked if there was an inspection and Mr. Warren believed it did not warrant an onsite inspection. He explained the two ways to proceed with the investigation process.

Chairman Schultz asked if there was a motion to approve the recommendation of staff to pursue this complaint or in the alternative to not pursue the complaint. Commissioner Orchard asked about an executive session and Chairman Schultz stated they could talk about legal issues relative to the matter. If they moved into executive session it would be for the purpose of discussing the process and legal issues like preponderance of the evidence, the basis for the actions and what actions might be pursued. No decisions could be made while in executive session, but discussion of the legal issues relative to this item on the agenda was proper. The Commission unanimously voted to go into Executive Session on motion of Commissioner Orchard, second of Vice Chair Hennelly.

The Commission moved into Executive Session at 1:44 p.m.

The Commission returned to General Session at 2:06 p.m.

Chairman Schultz thanked everyone for their patience and asked if there was a motion to either approve the recommendation of staff to pursue the complaint or not pursue the complaint. Vice Chair Hennelly stated it is a very difficult case and a quintessential "he said/she said" case. The complainant's behavior is far from stellar, the company handled disbursement of water and record keeping issues badly, notwithstanding that, he made a motion to decline the recommendation. Chairman Schultz stated there was a motion to not accept the recommendation of staff and therefore not to pursue the complaint. Commissioner LeMarr stated he concurred for all of the reasons that Vice Chair Hennelly did and seconded the motion. Vice Chair Hennelly stated he would like to emphasize for the company that they have some work to do with respect to the issues raised; having the uncle involved was a terrible idea and they need to get their house together with respect to keeping their records on discipline and those types of things. Also, they need to look into the water issues because that is a big problem. The Committee unanimously agreed.

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.

15-3875-7 – Urquidy vs. Diversified Conveyors, Inc.

This item was provisional and on the agenda in the event there was a need for executive session to obtain advice from counsel. There was no need for an executive session in this matter.

15-3875-8 – Laguna vs. West Point Contractors, Inc.

This item moved into executive session and executive session minutes are kept separately.

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

Strom Aviation, Inc.
24641 Pinal Air Park Rd
Marana, AZ 85653

Site Location: 24641 Pinal Air Park Rd
Marana, AZ 85653

Fatality/Accident
Years in Business: 25
Empl. Covered by inspection: 5

Chairman Schultz asked if they had a "lockout tagout" policy for changing the belts. Mr. Hurd stated they do and it is a written program too. Mr. Robichaud commented that they have put together a safety charter and are doing the right things. The organization's president has given them more authority to get things done and have more training and safety meetings.

Commissioner LeMarr commented that is one of the cleanest operations he has seen in the industry, and the stacking and banding of the material is safe. He wished every company took safety as seriously as they do and they may be eligible for a quick fix as they obviously abated or were in the process of abating the issues before the citations were issued.

Mr. Warren explained the reason for no "lock-out tag-out" citation because Ms. Frasier thought their program did meet the standards and identified what she saw at the time. She noted that it was a very clean place, and the employer was very cordial with her, but this is what they saw at the time of inspection.

Mr. Robichaud complimented the Commission for how it runs its meetings.

Chairman Schultz praised the organization for safety and stated that they are doing a lot of it right. He asked if they could do something for the Commission within their industry and suppliers and others they work with to encourage them to use the ADOSH consultation services. Mr. Robichaud noted that they will be moving to a larger facility and will encourage it.

Commissioner Orchard stated in light of being proactive and getting training, she recommended that they dismiss Citation 1, Item 1 since they were in the midst of training, not because we made them. For Item 2, she recommended the minimum \$100.00 penalty and Item 3 the minimum \$100.00 penalty for a total of \$200.00. Commissioner LeMarr seconded the motion. The Commission unanimously voted in favor of the motion.

Discussion and/or action regarding Industrial Commission goals, objectives and key initiatives for 2016. This Agenda Item may include discussion regarding the Commission budget and review of Division, Department, and Section specific objectives.

Mr. Ashley commented that he spoke at the ASIA luncheon meeting and that it was a good opportunity to share the transformation taking place at the agency, both internally and through legislative action and that it was a pleasure to have Commissioner Orchard there. After the meeting Eric Gregory, a case management supervisor with UPS, invited the Commission to tour the UPS facility in Phoenix and discuss their safety procedures and protocol in place. He will set something up and send a notice of opportunity for attendance by Commissioners. Chairman Schultz notes he had met with Mr. Gregory before at a safety summit. He added that he had heard that Mr. Ashley had the largest attendance of any meeting this year.

Mr. Ashley stated he has selected a vendor for the creation of on-line forms to make sure that every form will be available on the new website to be submitted on-line. Ms. Poppe had previously provided timelines and will be leaning out the claims system processes, and that the vendor was finalized. Also Mr. Charles mentioned the website revamp, which will coincide with the completion of having all forms available on-line so that they are rolled out in one big package in about two months. Chairman Schultz noted that it would be Commission wide, not just claims forms, but all forms. Mr. Ashley noted there will be over 60 individual forms available, even for the support divisions, and that any form that any customer or stakeholder would need will be included.

Mr. Ashley noted that a couple of months ago the Commission voted to proceed with rulemaking on aggregate and specific excess insurance policies to give more freedom in the market for self-insurance pools. Many industry folks were concerned about the inability to be able to form pools under the current limit and those limits will be expanding to mirror the best practices of the state of Nevada where doing so worked out extremely well. He expects these changes to be finalized by August 2nd.

He provided an update on the Chairman's Working Group on Roofers, that the meeting was productive and will lead to additional meetings. The next meeting is set for June 2nd.

Commissioner Orchard commented that she attended the ASIA luncheon and that Mr. Ashley was well received and did a great job with his presentation. She noted a lot of buzz and positive feedback.

Announcements, Scheduling of Future Meetings and Retirement Resolutions.

Mr. Ashley reminded the Commission that there will be a meeting in Prescott on July 14th and will expect the agenda to be similar to the trips to Tucson and Yuma.

Mr. Ashley provided updates on Division Managers. Ruby Tate is the new Special Fund Manager and will be starting on June 6th. Her background and qualifications were discussed. Jason Porter will be the new Chief Legal Counsel and will be starting on May 23rd. His background and qualifications were discussed.

Ms. Dimas confirmed the meeting schedule through July.

Public Comment.

There was no public comment. Commissioner LeMarr moved to adjourn and Vice Chair Hennelly seconded the motion. The Commission unanimously voted to adjourn and the meeting was adjourned at 2:42 p.m.

THE INDUSTRIAL COMMISSION OF ARIZONA

By James Ashley
James Ashley, Director

ATTEST:

Kara Dimas
Kara Dimas, Commission Secretary