

MINUTES OF MEETING  
OF THE INDUSTRIAL COMMISSION OF ARIZONA

Held at 800 W. Washington  
Auditorium  
Phoenix, Arizona 85007  
Wednesday, May 6, 2009 – 1:00 p.m.

Present:	Brian Delfs	Chairman
	Joe Gosiger	Vice Chairman
	Louis W. Lujano, Sr.	Member (telephonic)
	Marcia Weeks	Member
	John A. McCarthy, Jr.	Member
	Laura McGrory	Director
	Andrew Wade	Chief Legal Counsel
	Gary Norem	Chief Financial Officer
	Darin Perkins	Director, ADOSH
	Steven Black	Compliance Officer, ADOSH
	Noreen Thorsen	Claims Manager
	Randy Maruca	Director, Labor Dept.
	Theresa Acosta	Special Fund
	Teresa Hilton	Commission Secretary

Chairman Delfs convened the Commission meeting at 1:00 p.m. noting a quorum present. Also in attendance were Rebecca Sanchez and Jenypher Jones of Snell & Wilmer. Court reporter was also present and transcript of the public hearing will be available.

Public Hearing to accept comments and other information regarding the one-half percent assessment under A.R.S. §23-1065(F). During this hearing, the Commission may also discuss the assessment and information relevant to the levying of the assessment

Chairman Delfs welcomed interested parties to the public hearing and advised that notice was provided to the public on April 3, 2009 inviting comments. He also advised that the record will remain open for public comments until tomorrow at 5:00 p.m. At a later scheduled meeting, the Commission will discuss and may take action on this assessment. A court reporter was present for this agenda item.

Gary Norem addressed the Commission and summarized his report and exhibits. He noted that under A.R.S. §23-1065(F), the Commission is authorized to assess a one-half percent assessment if the total annual reserved liabilities of the Special Fund for apportionment under §23-1065 exceed six million dollars. The tax was previously assessed in calendar years 2005, 2006 and 2007 and was discontinued for 2008 and 2009. As of June 30, 2008 the Special Fund liabilities under A.R.S. §23-1065(B) and (C) were \$55.9 million. Reported reserves for compensation benefits were \$35.4 million and supplemental reserves were \$20.5 million for a total of \$55.9 million. Based on the actuarial analysis, the apportionment liability on June 30, 2008 greatly exceeds the \$6 million required to reinstitute the additional assessment of one-half percent tax under A.R.S. §23-1065(F). The actuarial liability for fiscal year 2006 was \$61.4 million and for fiscal year 2007 was \$57.8 million. Mr. Norem further stated that based on the three most current years, it would be reasonable to assume that the liability will continue to greatly exceed \$6 million for calendar years 2009 and 2010.

Mr. Norem described the Special Fund's asset deficit from the previous years and stated that the total net asset deficit of the Special Fund on June 30, 2008 is projected to be \$30.6 million dollars. The final audited numbers for June 30, 2008 should be available later in May 2009. He further stated that the projected decrease in the Special Fund's investment portfolio of \$34.3 million during fiscal year 2009 is expected to increase the net asset deficit to \$64.9 million by June 30, 2009.

Mr. Norem stated that, in view of the foregoing apportionment liabilities and the increasing net asset deficit of the Special Fund, there is justification and authority to reinstitute the one-half percent assessment under A.R.S. §23-1065(F) for calendar year 2010 and to consider, as well, a reallocation of the calendar year 2009 assessments so that the A.R.S. §23-1065(F) assessment is reinstated for calendar year 2009. With such a reallocation, the overall assessment rate for calendar year 2009 would remain unchanged at four and one-half percent.

Mr. Norem responded to questions from the Commissioners regarding losses to the Special Fund's investment portfolio, revenue projections for the next three years and projections for actuarial liabilities.

There were no comments from the attendees. Chairman Delfs closed the hearing at 1:20 p.m. after noting that the record will remain open for comments until the next day at 5:00 p.m. The Commission continued with its regularly scheduled meeting.

#### Approval of Minutes of April 30, 2009 Meeting

The Commission approved the Minutes of the April 30, 2009 meeting on motion of Mr. Lujano, second of Mr. McCarthy. Mr. Gosiger abstained.

#### Discussion & Action of Proposed Civil Penalties Against Uninsured Employers

2C08/09-0432	ADVANCED RECRUITING SYSTEMS, LLC
2C08/09-1596	EUGENE TUCKER & SHARON TUCKER HUSBAND & WIFE DBA ET AUTO & TRUCK PARTS
2C08/09-1694	TRADEMARK CONSTRUCTION CO., INC. DBA JMW TRUSS, LLC AKA JMW TRUSS AND COMPONENTS
2C08/09-1150	OMAR DE LA CRUZ & SILDA R. DE LA CRUZ HUSBAND & WIFE DBA MANGO'S CAFÉ AND MEXICAN BAKERY
2C08/09-1695	ROBERT ARAVE & PATRICIA ARAVE HUSBAND & WIFE DBA ROBERT'S COMPLETE AUTOMOTIVE
2C08/09-1548	T & R TRANSPORT, INC.

Andrew Wade advised that a compliance investigation confirmed that the above listed employers were operating (or had operated) a business with employees, but without workers' compensation insurance. Giving consideration to the factors of A.R.S. §23-907(K), Mr. Wade recommended civil penalties of \$1,000.00 be assessed against employers #0432, 1596, and 1150.

He further recommended civil penalties of \$5,000.00 be assessed against employers 1694 and 1695 since this is their second civil penalty. With regard to employer #1548, Mr. Wade recommended that they be assessed a civil penalty of \$500.00 since they have recently obtained workers' compensation insurance coverage. The Commission unanimously assessed the recommended penalties of \$1,000.00 against employers #0432, 1596, and 1150, civil penalties of \$5,000.00 against employers #1694 and 1695, and a civil penalty of \$500.00 against employer #1548 on motion of Mr. McCarthy, second of Mr. Lujano.

#### Discussion & Action of ADOSH Discrimination Complaints

#09-09 John Faux v. Securaplane Technologies, Inc. - Darin Perkins presented a summary of the Division's investigation of a discrimination complaint filed by Mr. Faux. In his complaint, Mr. Faux stated that his employment was terminated because he complained to his employer and to ADOSH about employee exposure to toxic fumes. The employer stated that Mr. Faux was fired for poor work performance and excessive personal use of the company's internet, e-mail and telephone systems.

Mr. Perkins described the allegations and the employer's response in detail. He stated that based on the information gathered during the investigation, a connection could not be established between the protected activity and the adverse action. He recommended that the Commission not pursue the case.

Mr. Lujano questioned why the employer only brought up Mr. Faux's inability to perform his work after they found out he spoke to OSHA and that if he was not performing adequately why did they not speak to him before. Mr. Lujano stated that it seemed to him the catalyst for Mr. Faux's termination was the OSHA complaint and that the employer had not followed a progressive discipline plan. Mr. Perkins agreed that there was a lack of progressive discipline but stated that the employer said they did provide Mr. Faux with feedback regarding his assignment. Mr. Lujano stated that it appeared to him that the employer's new human resources manager was trying to terminate Mr. Faux. The Commissioners discussed the employer's lack of documentation regarding Mr. Faux and handling of personnel issues.

Mr. Perkins addressed the timing issue. He explained that Mr. Faux's complaints to his employer about the fumes started early on and it was over three months after his OSHA complaint when he was terminated. He further noted that Mr. Faux may have been the most vocal employee to complain about fumes in the workplace, but he was not the only employee that complained about the fumes, and the other employees were not terminated.

Mr. Gosiger and Mr. Lujano expressed concern about the "first and final warning" that was issued regarding the fumes issue. Mr. Perkins clarified that the warning had been issued to a co-worker, Mr. Schille, not to Mr. Faux. Mr. Gosiger questioned why the new human resources manager hired in August went back and looked at Mr. Faux's internet and e-mail usage. Mr. Perkins responded that the company had concerns about Mr. Faux's lack of performance on the project he was assigned to and the reasons why he was not performing. Mr. Gosiger stated that the company identified the problem (excessive internet and e-mail usage) but never designed or developed a training program for Mr. Faux to correct the problems.

Mr. Lujano made a motion to investigate further and pursue the complaint. Mr. McCarthy stated that the destruction by the former human resources employee of the file dealing with the fumes issue was a red flag. He seconded the motion to pursue. Mr. Gosiger stated that he would like staff to look at why Mr. Faux was apparently treated differently. Mr. Lujano stated that the way Mr. Faux was treated was not fair and that there should have been progressive

discipline and an opportunity for Mr. Faux to improve.

Mrs. Weeks stated that the "first and final written warning" that had been issued to Mr. Schille was for inappropriate behavior rather than being related to the fumes issue. Also, since it had been five months since Mr. Faux filed his complaint, she believed he was fired due to lack of diligence on the project he was working on rather than the OSHA complaint. She further stated that she could not see where the employer had treated Mr. Faux differently than the other employees who complained about the fumes.

Mr. Perkins stated that the employer took steps to address the fumes issues, including moving employees out of the building and breaking their lease. Mr. McCarthy noted employees had stated that they were told not to discuss the fumes issue and that they were afraid to say anything. He stated that to him this was a "red flag".

Mr. Gosiger noted that the ADOSH investigator identified the facts but concluded that Mr. Faux was terminated due to lack of performance and excessive internet, e-mail and cell phone use, perhaps because of the time line. He expressed concern over the employer's lack of documentation and lack of progressive discipline. The question was called for and the Commission approved the motion to pursue the complaint three to two. Mrs. Weeks and Mr. Delfs voted nay.

See Minutes below where the Commission later returned to this agenda item.

#09-15 Stephen Casarez v. Paragon Corporation dba Carvers Arrowhead - Darin Perkins presented a summary of the Division's investigation of a discrimination complaint filed by Mr. Casarez. In his complaint, Mr. Casarez alleges that he was terminated because he had a refrigerator door fall on his foot and he requested medical attention. The Manager did not want him to seek medical attention but, after insisting, the employer provided Mr. Casarez the addresses of two health care centers. Since that incident, his hours were reduced and he was not given his fair share of tables to serve. After a short time, management decided they did not need him any longer and terminated his employment. The employer stated that Mr. Casarez was let go because of his restricted availability to work, and his admitted unhappiness working for Carvers. Mr. Casarez also had multiple angry confrontations with other servers and was known as not being a team player. He did not help to maintain a positive work environment.

Mr. Perkins described the allegations and the employer's response in detail. He stated that based on the information gathered during the investigation, there was no evidence or indication that Mr. Casarez was terminated because of his protected activity. He recommended that the case be dismissed. The Commission discussed that the company was having financial problems due to the parent company filing bankruptcy and that they had to downsize. Mr. Gosiger stated that he agreed Mr. Casarez was not terminated for the participation in protected activity, and made a motion not to pursue the complaint, which was second of Mrs. Weeks and passed unanimously.

#### Discussion & Action of Proposed OSHA Citations and Penalties

Area Steel Erectors Inc.  
3941 W. Glendale Drive  
Phoenix, AZ 85363

Unprogram Related  
Yrs/Business - 3  
Empl. Cov. by Insp. - 5

Site Location: 141 N. Broad Street, Globe, AZ 85501

Inspection #: Y5457/313088494

Insp. Date: 03/18/09

SERIOUS - Citation 1, item 1 - The employer did not ensure that all reinforcing steel (rebar)

was adequately capped or covered to prevent the possibility of impalement.  
(No inspection history in the past three years).

Div. Proposal - \$750.00

Formula Amt. - \$750.00

**SERIOUS** – Citation 1, item 2 – Four employees were working on an elevated surface 25' above the lower level, and were not protected from falling by the use of a fall protection system.

Div. Proposal - \$ 750.00

Formula Amt. - \$ 750.00

TOTAL DIV. PROP. - \$1,500.00

TOTAL FORMULA AMT - \$1,500.00

Darin Perkins summarized the citations and proposed penalty as listed. Following discussion and inspection of photos of these violations, the Commission unanimously approved issuing the citations and assessed the recommended penalty of \$1,500.00 on motion of Mr. McCarthy, second of Mrs. Weeks.

Executive Door Company  
3939 W. Clarendon Avenue  
Phoenix, AZ 85019

Planned  
Yrs/Business – 16  
Empl. Cov. by Insp. – 21

Site Location: 3939 W. Clarendon Avenue, Phoenix, AZ 85019

Inspection #: L3419/313160335

Insp. Date: 04/15/09

**SERIOUS** – Citation 1, item 1 – A radial arm saw did not have the lower exposed portion of the blade guarded by a device that automatically adjusted itself to the thickness of the stock and remained in contact with the material being cut. There was another instance of this violation.  
(No inspection history in the past three years).

Div. Proposal - \$750.00

Formula Amt. - \$750.00

**SERIOUS** – Citation 1, item 2 – A breaker panel was missing one blankout cover. There were four other instances of this violation.

Div. Proposal - \$ 750.00

Formula Amt. - \$ 750.00

TOTAL DIV. PROP. - \$1,500.00

TOTAL FORMULA AMT - \$1,500.00

Darin Perkins summarized the citations and proposed penalty as listed. Following discussion and inspection of photos of these violations, the Commission unanimously approved issuing the citations and assessed the recommended penalty of \$1,500.00 on motion of Mr. Lujano, second of Mrs. Weeks.

Clinton Campbell, Contractor, Inc.  
dba Phoenix Brick Yard  
1814 S. 7<sup>th</sup> Avenue  
Phoenix, AZ 85007

Complaint  
Yrs/Business – 92  
Empl. Cov. by Insp. – 70

Site Location: 1814 S. 7<sup>th</sup> Avenue, Phoenix, AZ 85007

Inspection #: U9805/313125932

Insp. Date: 03/31/09

**SERIOUS** – Citation 1, item 1 – Three forklifts were modified in a manner which may affect their capacity and safe operation without the manufacturer's prior written approval.  
(No inspection history in the past three years).

Div. Proposal - \$1,250.00

Formula Amt. - \$1,250.00

SERIOUS – Citation 1, item 2 – Four forklifts were missing functioning seatbelts.

Div. Proposal - \$1,250.00

Formula Amt. - \$1,250.00

GROUPED SERIOUS – Citation 1, item 3a – A written hazard communication program had not been developed, implemented and maintained for employees who were potentially exposed in the workplace to hazardous chemicals, materials and/or substances including oils, lubricants, battery acid, paints, solvents and masonry cleaner.

Citation 1, item 3b - The employer did not furnish information and training to an employee who was potentially exposed in the workplace to hazardous chemicals, substances and/or materials such as Diedrich Envirestore 100 masonry cleaner.

Div. Proposal - \$1,250.00

Formula Amt. - \$1,250.00

TOTAL DIV. PROP. - \$3,750.00

TOTAL FORMULA AMT - \$3,750.00

Darin Perkins summarized the citations and proposed penalty as listed. Following discussion and inspection of photos of these violations, the Commission unanimously approved issuing the citations and assessed the recommended penalty of \$3,750.00 on motion of Mr. McCarthy, second of Mrs. Weeks.

Mr. Gosiger made a motion to reconsider the decision in the John Faux ADOSH Discrimination case, which was seconded by Mrs. Weeks. Chairman Delfs stated that he would return to this agenda item for further discussion. Mr. Gosiger stated that although he was troubled by the lack of documentation and lack of progressive discipline, this is not a union environment. One of the reasons he had voted to pursue the complaint was due to the destroyed file on the fumes issue. In reviewing the report, he noted that the new human resources manager did take an active approach to resolving the issue and that he did not believe she had any animosity toward Mr. Faux but was just doing her job.

He stated that he could not find that the nexus for Mr. Faux's termination was the protected activity but rather due to his lack of performance, although he felt it was inappropriate that they had not given him a second chance. Mr. Lujano disagreed with Mr. Gosiger's analysis and stated that there were no problems with Mr. Faux's productivity until after he complained about the fumes. He further stated that the reasons behind the termination were not above board, evidence was destroyed, and that the new human resources manager had acted in an inappropriate and egregious manner towards Mr. Faux and had done him a gross injustice.

After further discussion, Mr. Gosiger made a motion to not pursue the complaint which was seconded by Mrs. Weeks. The motion passed three to two with Mr. McCarthy and Mr. Lujano in opposition.

#### Discussion &/or Action regarding Operations of the Industrial Commission

Ms. McGrory stated that there was nothing new to report.

#### Discussion &/or Action regarding Legislation

Ms. McGrory stated that there was nothing new to report and that the legislature is continuing to work on the budget.

Discussion &/or Action regarding Industrial Commission of Arizona, for Itself and as Trustee for the Special Fund of the Industrial Commission of Arizona; and the Special Fund of the Industrial Commission of Arizona, Petitioners, v. Dean Martin, Arizona State Treasurer, in his official capacity; Janice K. Brewer, Governor of the State of Arizona, in her official capacity, Respondents. The Commission may move into Executive Session under A.R.S. §§38-431.03(A)(3) and (A)(4) for Discussion and Consultation with the Attorneys of the Public Body regarding Pending Litigation or Settlement Discussions in order to resolve Litigation. 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

Ms. McGrory advised that the state filed their response on Friday and that our reply is due May 12, 2009. She provided a short summary of the state's response.

Announcements

Ms. Hilton reminded the Commissioners that the next meeting will be held on Wednesday, May 13, 2009.

There being no further business to come before the Commission and no public comment, Chairman Delfs adjourned the meeting at 2:10 p.m.

APPROVED:

THE INDUSTRIAL COMMISSION OF ARIZONA

By \_\_\_\_\_  
Chairman

By \_\_\_\_\_  
Vice Chairman

By Louis W. Lujano, Sr.  
Member

By [Signature]  
Member

ATTEST:

Teresa Hilton  
Commission Secretary

By [Signature]  
Member