

MINUTES OF MEETING
OF THE INDUSTRIAL COMMISSION OF ARIZONA
Held at 800 W. Washington
Conference Room 308
Phoenix, Arizona 85007
Thursday, October 22, 2009 – 1:00 p.m.

Present:	Brian Delfs	Chairman
	Marcia Weeks	Vice Chairman
	Louis W. Lujano, Sr.	Member (telephonic)
	David Parker	Member (video conference)
	Laura McGrory	Director
	Andrew Wade	Chief Legal Counsel
	Darin Perkins	Director, ADOSH
	Noreen Thorsen	Claims Manager
	Gary Norem	Chief Financial Officer
	Glenn Hurd	Financial Officer
	Teresa Hilton	Commission Secretary

Chairman Delfs convened the Commission meeting at 1:00 p.m. noting a quorum present. Mr. McCarthy was not able to attend. Also in attendance were Scott Butler, the agency's lobbyist, and Jen Jones and Teresa Yi of Snell & Wilmer.

Approval of Minutes of October 7, 2009 Meeting

The Commission unanimously approved the Minutes of the October 7, 2009 General Session on motion of Mr. Lujano, second of Mrs. Weeks. The Commission unanimously approved the Minutes of the October 7, 2009 Executive Session on motion of Mr. Lujano, second of Mr. Parker.

Discussion & Action of ADOSH Discrimination Complaint

#09-55 Christine Buda v. Arizona Department of Fire, Building and Life Safety – Darin Perkins advised that this discrimination case was presented to the Commission on September 17, 2009 and gave a brief recap of what was presented at that time. He advised that the Division recommendation at that time was not to pursue the complaint since there was little evidence to suggest protected activity and there were also issues of gender and age discrimination.

He advised that, in response to questions from the Commissioners, ADOSH has obtained further information. Ms. Buda does have reinstatement rights and all of the furloughed employees received the same letter. The investigator did inspect the store room and found no safety concerns. Ms. Buda did request help to move the boxes but those interviewed did not believe there was a safety concern but rather, it appeared she asked for help to help speed things along. Mr. Lujano asked if Ms. Buda had put her concerns in writing. Mr. Perkins stated she did not. He advised that ADOSH did obtain a copy of the agency's RIF plan which was approved by ADOA.

Following further discussion of whether Ms. Buda was terminated for participating in protected activity, the Commission unanimously voted not to pursue the case on motion of Mr.

Delfs, second of Mr. Parker. Mr. Delfs expressed his appreciation to Mr. Perkins and his staff for providing the additional information the Commissioners had requested and their follow-up investigation.

Discussion & Action of Proposed OSHA Citations and Penalties

Bernie's Brass, Inc.
2326 E. Magnolia Street
Phoenix, AZ 85034

Planned
Yrs/Business - 1
Empl. Cov. by Insp. - 21

Site Location: 2326 E. Magnolia Street, Phoenix, AZ 85034
Inspection #: L3419/313890907
Insp. Date: 09/24/09

SERIOUS - Citation 1, item 1 - The back side of a metal shear was not guarded with an awareness barrier to prevent workers from coming in contact with moving parts such as the shear blade, drive sprockets and drive chains. There was another instance of this violation. (No inspection history in the past three years).

Div. Proposal - \$1,250.00

Formula Amt. - \$1,250.00

SERIOUS - Citation 1, item 2 - The punch station on two Edwards Ironworkers was not guarded to prevent employees from having any part of their body in the danger zone(s) during the operating cycle.

Div. Proposal - \$1,250.00

Formula Amt. - \$1,250.00

TOTAL DIV. PROP. - \$2,500.00

TOTAL FORMULA AMT - \$2,500.00

Darin Perkins summarized the citations and proposed penalty as listed and responded to questions from the Commissioners. Following discussion and inspection of photographs of these violations, the Commission unanimously approved issuing the citations and assessed the recommended penalty of \$2,500.00 on motion of Mrs. Weeks, second of Mr. Lujano.

Bryant Industries, Inc.
788 W. Illini Street
Phoenix, AZ 85041

Planned
Yrs/Business - 24
Empl. Cov. by Insp. - 8

Site Location: 788 W. Illini Street, Phoenix, AZ 85041
Inspection #: L3419/313849119
Insp. Date: 09/03/09

GROUPED SERIOUS - The alleged violations below have been grouped because they involve similar or related hazards that may increase the potential for illness.

Citation 1, item 1a - The employer did not establish and implement a written respiratory protection program for employees wearing tight fitting, air purifying respirators and continuous-flow supplied air respirators.

Citation 1, item 1b - Two employees performing abrasive blasting and spray finishing operations were not medically evaluated to determine the employee's ability to use a respirator before the employee was fit-tested or required to use the respirator in the workplace.

Citation 1, item 1c - Two employees wearing tight fitting, air purifying respirators did not pass an appropriate qualitative or quantitative fit test.

Citation 1, item 1d - Breathing air provided by a compressed air receiver to a supplied air blasting hood was not sampled and analyzed to determine if it met the Grade D breathing air specifications.

Citation 1, item 1e - A compressed air receiver used to provide breathing air to a supplied air blasting hood was not equipped with a carbon monoxide monitor or a high temperature alarm or both.

(No inspection history in the past three years).

Div. Proposal - \$750.00

Formula Amt. - \$750.00

GROUPED SERIOUS – The alleged violations below have been grouped because they involve similar or related hazards that may increase the potential for illness.

Citation 1, item 2a – One employee performing abrasive blasting operations on wood shutters was over exposed to respirable dust containing crystalline silica.

Citation 1, item 2b - The employer did not use a silica substitute or implement engineering controls to reduce employee exposure during abrasive blasting operations below the Permissible Exposure Limit.

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 and responded to questions from the Commissioners. Following discussion and inspection of photographs of these violations, the Commission unanimously approved issuing the citations and assessed the recommended penalty of \$1,500.00 on motion of Mr. Parker second of Mrs. Weeks.

Custom Farm Service, Inc.
25816 S. Ellsworth Road
Queen Creek, AZ 85142

Planned
Yrs/Business – 45
Empl. Cov. by Insp. – 2

Site Location: 25816 S. Ellsworth Road, Queen Creek, AZ 85142

Insp. #: Y8053/313848962

Insp. Date: 09/01/09

SERIOUS – Citation 1, item 1 – A forklift was not equipped with a seat belt. 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 110/220 volt electrical panel was lacking 11 blackout covers. There was another instance of this violation.

Div. Proposal - \$750.00

Formula Amt. - \$750.00

SERIOUS – Citation 1, item 3 – Oxygen cylinders were stored next to flammable gases with no barrier.

Div. Proposal - \$ 600.00

Formula Amt. - \$ 600.00

TOTAL DIV. PROP. - \$2,100.00

TOTAL FORMULA AMT - \$2,100.00

Darin Perkins summarized the citations and proposed penalty as listed and responded to

questions from the Commissioners. Following discussion and inspection of photographs of these violations, the Commission unanimously approved issuing the citations and assessed the recommended penalty of \$2,100.00 on motion of Mrs. Weeks, second of Mr. Delfs.

Eurofresh, Inc.
26050 S. Eurofresh Avenue
Willcox, AZ 85643

Complaint
Yrs/Business – 18
Empl. Cov. by Insp. – 150

Site Location: 650 N. Industrial Avenue, Snowflake, AZ 85937
Insp. #: K4591/313738148
Insp. Date: 08/05/09

SERIOUS – Citation 1, item 1 – The employer failed to eliminate potential chemical exposure hazards in the fertilizer mix room.

(No inspection history in the past three years).

Div. Proposal - \$1,500.00

Formula Amt. - \$1,500.00

SERIOUS – Citation 1, item 2 – Three sections of guardrail were missing on an open-sided floor above the fertilizer mixing tank pit.

Div. Proposal - \$2,500.00

Formula Amt. - \$2,500.00

SERIOUS – Citation 1, item 3 – The eye-wash and shower station adjacent to the 5,000 gallon 90% sulphuric acid tank was not maintained in a working condition.

Div. Proposal - \$2,500.00

Formula Amt. - \$2,500.00

TOTAL DIV. PROP. - \$6,500.00

TOTAL FORMULA AMT - \$6,500.00

Darin Perkins summarized the citations and proposed penalty as listed and responded to questions from the Commissioners. Following discussion and inspection of photographs of these violations, the Commission unanimously approved issuing the citations and assessed the recommended penalty of \$6,500.00 on motion of Mr. Lujano, second of Mr. Parker.

Norman D and Norma F Hubule dba Refrac Systems
7201 W. Oakland Street
Chandler, AZ 85226

Planned
Yrs/Business – 25
Empl. Cov. by Insp. – 18

Site Location: 7201 W. Oakland Street, Chandler, AZ 85226
Insp. #: I7163/313980808
Insp. Date: 09/23/09

SERIOUS – Citation 1, item 1 – Two employees stored material on a mezzanine 20' deep, 20' long and 12' high which was lacking standard guardrails on all open sides and ends.

(No inspection history in the past three years).

Div. Proposal - \$750.00

Formula Amt. - \$750.00

SERIOUS – Citation 1, item 2 – Employees operating a forklift were not adequately trained.

Div. Proposal - \$ 600.00

Formula Amt. - \$ 600.00

TOTAL DIV. PROP. - \$1,350.00

TOTAL FORMULA AMT - \$1,350.00

Darin Perkins summarized the citations and proposed penalty as listed and responded to questions from the Commissioners. Following discussion and inspection of photographs of these violations, the Commission unanimously approved issuing the citations and assessed the

recommended penalty of \$1,350.00 on motion of Mr. Lujano, second of Mrs. Weeks.

With regard to the previous case file, Eurofresh, Mr. Parker asked whether the company had a hazard control plan or if one was needed. Mr. Perkins responded that he did not know but could go back and check to see what their total chemical amount is. He stated that they did have an emergency response plan. Mr. Delfs stated that with the acids and chemicals they have he was sure one was required and this was something the DEQ and Fire Department could check in to. Mr. Perkins stated that he would talk to the compliance officer about that as well.

Discussion & Action of Request for Lump Sum Commutation

Jerry Berkbigler #98252-346278 - Noreen Thorsen presented this lump sum petition. She advised that Mr. Berkbigler requested a lump sum commutation of his unscheduled award of \$449.22 per month (present value \$120,220.25) in order to purchase a house, land, car and pay off existing debt. He would also use the lump sum to pay for living expenses and educational expenses while he is in training. If any money is left over, he will put it into an account with Smith Barney for emergency and basic necessities until retraining program is complete. After subtracting attorney fees and advanced amounts, Mr. Berkbigler would receive \$88,090.24. Mr. Berkbigler is unemployed. He receives social security disability in the amount of \$86.00 per month and a supplemental security income payment of \$108.00.

Ms. Thorsen advised that Mr. Berkbigler is interested in vocational rehabilitation and the Special Fund is willing to provide the training in conjunction with DES Rehabilitation Services Administration (RSA). However, all new rehab services are currently suspended due to economic conditions. Mr. Berkbigler is on a waiting list and when the suspension is lifted, he will continue with RSA. In the meantime, Mr. Berkbigler is proposing a six month training program as an auto/boat painter. Mr. Berkbigler has been encouraged to apply for a Pell Grant to pay for the training, but he has not done so.

Ms. Thorsen advised that the Claims Department struggled with its recommendation. While the lump sum commutation would allow Mr. Berkbigler to purchase a home and car and pay off debt, she expressed concern regarding the type of training he wants to undertake and whether he could actually perform that work given the impairment to his hand.

Chairman Delfs briefly left the room at this point, and Vice Chairman Weeks took over chairmanship.

Mrs. Weeks stated that Mr. Berkbigler's plan seemed well thought out. Mr. Lujano agreed and stated that Mr. Berkbigler seemed capable of succeeding and made a motion to approve the lump sum. Mr. Parker stated that he was conflicted since he tended to believe Mr. Berkbigler could manage the plan but would only have \$20,000 to live on and only \$200 per month income.

Mrs. Weeks seconded the motion for further discussion and asked whether the Commissioners wanted to vote at this time or whether the vote should be held until later on in the meeting. Chairman Delfs returned to the meeting and the Commissioners agreed to vote at this time. Mr. Delfs stated that he was abstaining from the vote since he had missed part of the discussion. The Commission approved the lump sum commutation with the three voting Commissioners voting in approval.

Discussion & Action of Requests for Renewal of Self Insurance Authority

Pilot Travel Centers, LLC – Gary Norem presented staff’s renewal report along with current Dunn and Bradstreet credit report ratings. Administration is recommending renewal of workers’ compensation self-insurance authority based on the company’s consistent record of profitability with assets of just over \$2.1 billion, a clean audit report and an acceptable credit rating. Mrs. Weeks questioned the working capital ratio and noted that the company has not drawn on revolving credit agreements and asked whether staff had any concerns. Mr. Norem stated that the company had debt restructuring and the other ratios were good with debt status down and a 15% profit ratio. Following further discussion, the Commission unanimously granted continuance of self-insurance authority and signed a Resolution to that effect on motion of Mr. Lujano, second of Mrs. Weeks.

TMC Healthcare – Gary Norem presented staff’s renewal report along with current Dunn and Bradstreet credit report ratings. Administration is recommending renewal of workers’ compensation self-insurance authority based on the company’s financial stability, large size with assets totaling \$402.7 million as of December 31, 2008, a clean audit report and an acceptable credit rating. The Commission discussed the securities lending and investment issues that affected net assets. Following further discussion, the Commission unanimously granted continuance of self-insurance authority and signed a Resolution to that effect on motion of Mr. Delfs, second of Mr. Lujano.

Discussion &/or Action regarding Legislation

Scot Butler advised that the Governor’s Chief of Staff has resigned and that Eileen Klein is the new Chief of Staff. Brian McNeil has also announced his resignation. Ms. Klein and Paul Senseman are the top Governor’s staff and bring a good track record with extensive experience on budget issues and legislative matters. The legislature has not decided whether to convene a Special Session in November or December.

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

Andrew Wade gave a brief update regarding the Superior Court action and advised that two groups have filed Motions to Intervene. The first group consists of the Arizona Police Association, the Professional Firefighters of Arizona, the Phoenix Building and Construction Trades Council and the Arizona Education Association and is represented by attorney Stanley G. Feldman. The second group consists of SCF Arizona, the Arizona Contractors Association, the National Federation of Independent Businesses, the American Insurance Association, the

Arizona Self-Insurers Association, the Arizona Multihousing Association, the Arizona Beef Council and the Alliance of Construction Trades. This group is represented by attorneys S. David Childers and Charles E. Jones, and William Sheldon represents the SCF Arizona. Both groups seek to intervene as party plaintiffs as a matter of right and under the permissive intervention rules. He advised that filing of dispositive motions will commence on October 30, 2009.

Mr. Wade stated that he had further information to provide and it would be appropriate to present the information in Executive Session. The Commission unanimously voted to go into Executive Session on motion of Mrs. Weeks, second of Mr. Lujano. Following the Executive Session, the Commission returned to General Session.

Executive Session Minutes are kept separately.

Discussion & Action of Proposed Civil Penalties Against Uninsured Employers

2C08/09-1181	AZ Dermatology, LLC dba AZ Dermatology
2C09/10-0556	BMJ Transport, Inc.
2C08/09-1622	Nicolas Del Rio & Irma Del Rio, Husband & Wife dba Oasis Sports Bar
2C09/10-0557	SVP Manufacturing, Inc.

Mr. 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 that civil penalties of \$1,000.00 be assessed against employers #1181 and 1622. With regard to employers #0556 and 0557, Mr. Wade is recommending civil penalties of \$5,000.00 since this is their second civil penalty. Mr. Wade responded to questions from the Commissioners regarding these employers. The Commission unanimously assessed the recommended penalties of \$1,000.00 against employers #1181 and 1622 and \$5,000.00 against employers #0556 and 0557 on motion of Mr. Lujano, second of Mrs. Weeks.

In response to a question from Mr. Parker, Mr. Wade explained the process for second penalties and injunctions and what is done if it is determined that the employer did have insurance.

Discussion & Action regarding June 25, 2009 form of Resolution Adopting New Maximum Average Monthly Wage.

Mr. Wade stated that the form of Resolution dated June 29, 2009 contains a typographical error. The May 2007 State Occupational Employment and Wage Estimates for Arizona identified the mean hourly wage for "all occupations" as being \$18.06. The May 2008 State Occupational Employment and Wage Estimates for Arizona identified the mean hourly wage for "all occupations" as being \$18.88. The increase in the average mean wage is \$0.82. Mr. Wade explained that the data supplied the Commission was correct as is the final amount for the 2010 maximum average monthly wage. The error is in the actual form of Resolution, where the difference between the May 2007 and May 2008 wage estimates is listed as \$0.88. Mr. Wade explained that the correct amount is \$0.82 and recommended the Commission adopt a revised form of Resolution that reflects the correct number. The Commission unanimously approved the new form of Resolution on motion of Mr. Parker, second of Mr. Lujano.

Discussion &/or Action regarding Budget and Operations of the Industrial Commission.

Ms. McGrory advised that the Governor's Office has posted the agency responses regarding potential impact of additional budget cuts. The Commission and staff discussed the agency's efforts to address the budget and the impact of the budget on its operations and workers' compensation system. They expressed appreciation to Ms. McGrory and staff for their work.

Announcements

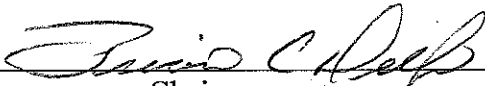
Ms. Hilton reminded the Commissioners that the next meeting is scheduled for Thursday, October 29th and there is also a meeting scheduled for Thursday, November 5th. The Commissioners scheduled further meetings for Thursday, November 12th, Thursday, November 19th and Wednesday, December 2nd. There will not be a meeting the week of Thanksgiving.

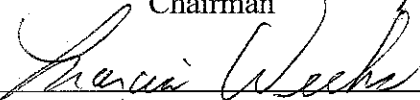
Mr. Parker stated that the Federal OSHA review of Nevada's state program is available. Ms. McGrory stated that she has seen the report and the agency is conducting an internal assessment of our program based on the Nevada report. She stated that this will be a future agenda item for discussion.

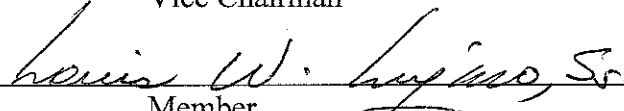
There being no further business to come before the Commission and no public comment, Chairman Delfs adjourned the meeting at 2:45 p.m.

APPROVED:

THE INDUSTRIAL COMMISSION OF ARIZONA

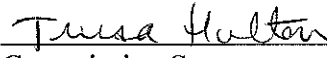
By 
Chairman

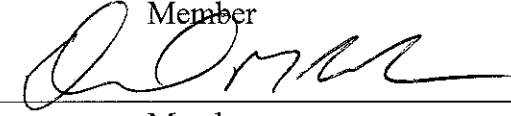
By 
Vice Chairman

By 
Member

ATTEST:

By _____
Member


Commission Secretary

By 
Member