

MINUTES OF MEETING  
OF THE INDUSTRIAL COMMISSION OF ARIZONA

Held at 800 West Washington Street

Conference Room 308

Phoenix, Arizona 85007

Wednesday, December 5, 2012 – 1:00 p.m.

Present:	David Parker	Chairman (video conference)
	John A. McCarthy, Jr.	Member
	Susan Strickler	Member
	Michael G. Sanders	Member
	Laura McGrory	Director
	Andrew Wade	Chief Counsel
	Miral Sigurani	Legal Counsel
	Darin Perkins	Director, ADOSH
	Teresa Hilton	Commission Secretary

Chairman Parker convened the Commission meeting at 1:00 p.m. noting a quorum present. Ms. Oster was not able to attend. Also in attendance was Eda Barolli of Snell & Wilmer.

Approval of Minutes of November 28, 2012 Meeting

The Commission unanimously approved the Minutes of the November 28, 2012 General Session on motion of Mr. McCarthy, second of Ms. Strickler.

The Commission unanimously approved the Minutes of the November 28, 2012 Executive Session, ICA v. Martin, et al, on motion of Ms. Strickler, second of Mr. McCarthy.

The Commission unanimously approved the Minutes of the November 28, 2012 Executive Session, Superior Equipment Sales, on motion of Mr. Sanders, second of Mr. McCarthy.

Consent Agenda:

a. Approval of Proposed Civil Penalties Against Uninsured Employers.

1. 2C11/12-1362 I-Ten Barbershop & Salon, L.L.C.  
dba The League Barbershop
2. 2C11/12-0288 Arizona Home Health Services, L.L.C.  
dba Preferred Care At Home – Scottsdale
3. 2C11/12-0499 Molino Home Furnishings, L.L.C.
4. 2C10/11-0969 Traditional Transportation Service, L.L.C.
5. 2C11/12-2821 The Leighton Institute for Aesthetic and  
Reconstructive Plastic Surgery, Ltd.

Chairman Parker asked whether any items needed to be removed from the consent agenda. Secretary Hilton stated that there were not. The Commission unanimously approved the consent agenda on motion of Mr. McCarthy, second of Mr. Sanders.

Discussion & Action of Proposed OSHA Citations & Penalties

Youngtown Health, Inc. dba Sunview  
Health and Rehabilitation Center  
12207 North 113<sup>th</sup> Avenue  
Youngtown, AZ 85363

Complaint  
Yrs/Business – 3  
Empl. Cov. by Insp. – 45

Site Location: 12207 North 113<sup>th</sup> Avenue, Youngtown, AZ 85363  
Inspection #: U9805/316801695  
Insp. Date: 10/17/12

SERIOUS – Citation 1 - Item 1 – An employee working with occupational exposure to blood borne pathogens did not receive a hepatitis B vaccination within 10 working days of initial assignment (1910.1030(f)(2)(i)).

Div. Proposal - \$2,000.00

Formula Amt. - \$2,000.00

SERIOUS – Citation 1 - Item 2 – The employer failed to make a confidential medical evaluation immediately available to an exposed employee following an exposure incident (1910.1030(f)(3)).

Div. Proposal - \$2,000.00

Formula Amt. - \$2,000.00

TOTAL PENALTY - \$4,000.00

TOTAL FORMULA AMT. - \$4,000.00

Darin Perkins summarized the citations and proposed penalty as listed and responded to questions from the Commissioners. Mr. Parker asked if an adjustment factor should be applied for good faith. Mr. Perkins responded that was up to the Commissioners, but a good faith reduction is usually not applied if the violation relates to an integral part of the employer's recurring operations. The Commission unanimously approved issuing the citations and assessed the recommended penalty of \$4,000.00 on motion of Mr. Sanders, second of Ms. Strickler.

Imperial Ironworks, LLC  
P. O. Box 2823  
Peoria, AZ 85380

Complaint  
Yrs/Business – 20  
Empl. Cov. by Insp. – 15

Site Location: 7910 West Market Street, Peoria, AZ 85380  
Inspection #: R1538/316801927  
Insp. Date: 10/22/12

GROUPED SERIOUS – Citation 1 - Item 1(a) – The employer did not establish and implement a written respiratory protection program where employees were required to use respirators (1910.134(c)(1)).

Citation 1 - Item 1(b) – An employee required to wear a 3M half-mask respirator had not been medically evaluated prior to using the respirator (1910.134(e)(1)).

Citation 1 - Item 1(c) – The employer did not ensure that employees required to wear 3M half-mask respirators were fit tested (1910.134(f)(1)).

Citation 1 - Item 1(d) – The employer did not ensure that an employee utilizing a 3M respirator could demonstrate knowledge of why the respirator was necessary and how improper fit, usage, or maintenance could compromise the protective effect of the respirator (1910.134(k)(1)(i)).

Div. Proposal - \$750.00

Formula Amt. - \$750.00

SERIOUS – Citation 1 - Item 2 – Employees operating a forklift were not trained in the safe operation of powered industrial trucks (1910.178(l)(1)(i)).

Div. Proposal - \$750.00

Formula Amt. - \$750.00

SERIOUS – Citation 1 - Item 3 – The cut-off saw was inadequately guarded (1910.215(b)(5)).

Div. Proposal - \$750.00

Formula Amt. - \$750.00

GROUPED SERIOUS – Citation 1 - Item 4(a) – A 220 volt homemade black flexible extension power cord with a pendant box (labeled for wall use) on the end which was supplying power to the welder was not used in accordance with instructions included in the listing or labeling (1910.303(b)(2)).

Citation 1 - Item 4(b) – One 20' orange extension cord that is used daily to power handheld grinder and other hand tools had two cuts in the cord approximately one half inch long. The damage on the cord was three feet from the end of the cord (1910.303(b)(7)(iv)). There were two other instances of this violation.

Citation 1 - Item 4(c) – One 220 volt junction or pendant box was lacking a cover. The subject box was being used to supply power to a mig welder (1910.305(b)(2)(i)).

Citation 1 - Item 4(d) – A black flexible power cord supplying power to the welder did not have strain relief (1910.305(g)(2)(iii)). There were four other instances of this violation.

Div. Proposal - \$ 750.00

Formula Amt. - \$ 750.00

TOTAL PENALTY - \$3,000.00

TOTAL FORMULA AMT. - \$3,000.00

Darin Perkins summarized the citations and proposed penalty as listed and responded to questions from the Commissioners. Mr. McCarthy asked if it was appropriate to apply a 10% adjustment factor for history. Mr. Perkins clarified that the serious citation was actually issued four years ago, so the reduction for history would be appropriate. Mr. Parker asked whether the prior inspection noted violations for respiratory protection. Mr. Perkins stated that there were nonserious citations that dealt with respiratory protection and some of the same issues – medical evaluation and fit testing. Mr. Parker stated that he thought the file should be reviewed for a possible willful since the employer was cited for the same violation four years ago and asked Mr. Perkins if there was anything in the file that would indicate that a willful citation would be appropriate. Mr. Perkins stated there was no information to that effect from the compliance officer, but staff could perform additional review to determine if a willful designation is appropriate. Ms. Strickler agreed with having further review for willful potential. Mr. Parker tabled consideration of the proposed citations pending further review by ADOSH and Legal for possible willful classification.

Discussion &/or Action regarding ADOSH Discrimination Complaint number 12-02, Handy vs. Loomis Armored U.S. L.L.C. The Commission may move into executive session under A.R.S. §§ 38-431.03(A)(3) and (A)(4) for discussion and consultation with Commission attorneys for legal advice and in order to consider its position and instruct its attorneys regarding the Commission's position regarding pending or contemplated litigation or settlement discussions conducted in order to avoid or 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

Darin Perkins stated that Mr. Handy has requested the Commission review and reconsider its determination not to pursue his complaint against Loomis. Mr. Perkins provided a background of the facts, and described the procedural history. He noted that ADOSH had recommended this matter not be pursued further because there was insufficient evidence to support a connection between protected activity and adverse action and the Commission decided on October 3, 2012 not to pursue this matter. Mr. Perkins noted that the Commission had been provided with the e-mails Mr. Handy sent ADOSH requesting review and he summarized what Mr. Handy wrote.

Mr. Perkins stated that taking into consideration the information supplied by Mr. Handy in his e-mails requesting review along with the evidence obtained during the investigation, that the evidence established that Mr. Handy engaged in protected activity, that the employer had knowledge of that protected activity and there was adverse action, but there is insufficient evidence to support a connection between the protected activity and the adverse action.

Mr. Wade described the process for review and noted that federal OSHA requires that the Commission offer a complainant the opportunity to have a determination reviewed. He explained that two Commission attorneys have reviewed the evidence and the law and did not find anything that would change the Commission's analysis or that would warrant reconsideration.

Mr. Parker stated there were things about this case that he still did not like. He stated he understands that with the amount of money that the messengers carry and the responsibility that each of the people on that truck has, why Loomis has very strict personnel policies and rules, but he completely disagrees with the concept of treating a 15-year employee the same as the person who is in their first year, who makes a mistake with the exact same penalty. Mr. Parker noted that, unfortunately, that particular company practice is not within the Commission's purview and has to be kept separate from the Commission's jurisdiction over OSHA discrimination.

Mr. Sanders stated that he took a little bit of exception with the assertion that the Commissioners have all information. He addressed the information regarding there being only one previous incident, when it appears there were two previous incidents. Mr. Sanders also commented on the amount of cash the armored trucks carried. Mr. Sanders also related his recent observation of a lone Loomis employee crouched down, replacing money in an ATM and that he felt the employee was in a very vulnerable position. He stated he gave a great deal of credibility to Mr. Handy's real concern about the lack of a guard and how not having a guard would make someone nervous. Mr. Sanders stated the Commission should investigate further, as a very good employee expressed real and valid concerns, filed an ADOSH complaint, and it appeared the employer was looking for a way to fire him. Mr. Parker stated he appreciated the facts that Mr. Sanders was bringing out.

Mr. Wade and Mr. Perkins clarified information in response to Mr. Sanders' observation about the other incidents. The Commission discussed the facts of the matter and the conclusions that could be drawn from the facts. Mr. Parker stated that if the request for reconsideration is granted, the Commission will then discuss the issues and decide what to do at that point. For consideration of the request for reconsideration, the question is whether the outcome would have been different but for the protected activity. If the outcome would have been the same, then the Commission should not reconsider. Mr. Parker asked Mr. Wade if that was a fair description of the process. Mr. Wade stated there are two approaches – one is whether the protected activity

was a substantial reason for the adverse action or but for the protected activity, there would not have been any adverse action. Mr. Parker stated that a motion to reconsider needs to be made by a Commissioner who voted in favor of the original motion. Once there is a motion and a second, all Commissioners can vote whichever way they prefer. With that in mind, he asked if there was a motion for reconsideration. Hearing none, he stated that the determination not to pursue will remain in place.

#### Discussion & Action regarding Attorney Fees' Petition

Merle Stickley v. J. Patrick Butler - Andrew Wade advised that J. Patrick Butler, attorney with Tretschok, McNamara & Miller, P.C., has petitioned the Industrial Commission to set attorneys' fees with respect to work performed for Mr. Stickley in connection with Mr. Stickley's July 22, 2005 workers' compensation claim. Mr. Wade presented a history of the claim and the work performed by Mr. Butler on behalf of Mr. Stickley. Attorney fees in the amount of \$3,457.74 have been paid to date, and it is estimated that Mr. Butler spent 42 hours on the case.

Mr. Wade explained the options available to the Commission and staff's recommendation and responded to questions from the Commission. Following discussion, the Commission unanimously granted additional attorneys' fees of 25% of the permanent disability (LEC) benefits for a term of five years with a provision to be included in the Findings and Award that states that the award of fees is not contingent on Mr. Butler continuing to represent Applicant and that any further attorney services that Mr. Butler might provide after the date of the Findings and Award be a matter subject to negotiation between the parties on motion of Ms. Strickler, second of Mr. Sanders.

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 Commission attorneys for legal advice and in order to consider its position and instruct its attorneys regarding the Commission's position regarding pending or contemplated litigation or settlement discussions conducted in order to avoid or 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

Mr. Wade stated that after last week's meeting, staff realized that the Commission is limited regarding what may be disclosed and requested that the Commission address in regular session its instructions to counsel. Following discussion, the Commission unanimously directed its legal counsel to proceed with the filing of a motion for reconsideration with the Court of Appeals and if necessary, a petition for review with the Arizona Supreme Court on motion of Mr. McCarthy, second of Ms. Strickler.

#### Discussion &/or Action regarding Legislation

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

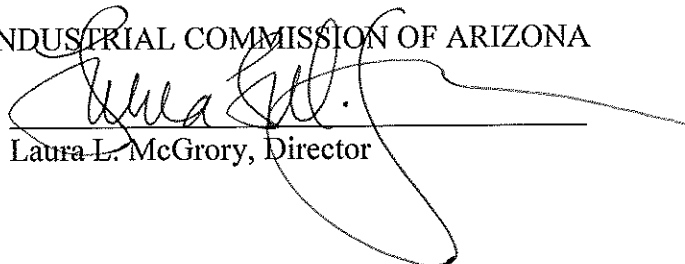
Announcements and Scheduling of Future Meetings

The Commissioners agreed to cancel the meeting previously scheduled for December 12, 2012. The next Commission meeting will be held on Wednesday, December 19, 2012.

There being no further business to come before the Commission and no public comment, Chairman Parker adjourned the meeting at 1:53 p.m.

THE INDUSTRIAL COMMISSION OF ARIZONA


By



A large, stylized handwritten signature in black ink, appearing to read 'Laura L. McGrory', is written over a horizontal line. The signature is highly cursive and loops around the line.

Laura L. McGrory, Director

ATTEST:

  
\_\_\_\_\_  
Teresa Hilton, Commission Secretary