MINUTES OF MEETING OF THE INDUSTRIAL COMMISSION OF ARIZONA

Held in the Palm Room at the Wigwam Resort

300 East Wigwam Boulevard, Litchfield Park, Arizona Friday, August 14, 2015 – 11:00 a.m.

Present:

Dale L. Schultz

Chairman

David M. Parker

Commissioner

Michael G. Sanders Joseph M. Hennelly, Jr. Commissioner Commissioner

Clint Bolick

Commissioner

Laura McGrory

Director

Andrew Wade William Warren

Chief Legal Counsel ADOSH Director

Kara Dimas

Commission Secretary

Chairman Schultz convened the Commission meeting at 11:30 a.m. noting a quorum present. Also in attendance was Jason Weber of Snell and Wilmer, Rick Jorgic from Waddell Landscape, LLC, and Amanda Caldwell and Melody Goodwin representing Modesto Noriz.

Approval of Minutes of August 6, 2015 Regular Meeting and Executive Session Minutes.

Commissioner Parker described changes to the draft August 6, 2015 regular meeting Minutes; on page 2 the words "Super Fund" should be "Superfund" and, on page 9, changing the last sentence in the 4th paragraph to read "Commissioner Parker commented on difficulties created when regulatory standards refer to outdated industry standards while protective equipment that is currently available meets the new industry standards, not obsolete standards incorporated by reference." The Commission unanimously approved the Minutes of the August 6, 2015 regular session, as amended, on motion of Commissioner Parker, second of Commissioner Hennelly.

The Commission unanimously approved the August 6, 2015 executive session Minutes on motion of Commissioner Parker, second of Commissioner Hennelly.

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.

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1.	2C14/15-0588	Fatema	LLC	dba	El	Paisano	Market,	aka	El	Paisano

2. 2C14/15-2152 Ronald Williams & Courtney Williams, H&W, dba Classic Colorworks

3. 2CSP-15/16-0039 Stetson Village Family Dentistry, P.L.C.

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 Sanders, second of Commissioner Parker

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.

Chairman Schultz stated he would like to move into executive session to discuss the Modesto Noriz vs. Waddell Landscape, LLC discrimination complaint. Commissioner Sanders moved the Commission enter into executive session to obtain legal advice and to discuss contemplated litigation related to discrimination complaint number 14-2919-07, Modesto Noriz vs. Waddell Landscape, LLC. Commissioner Parker seconded the motion. The Commission unanimously voted in favor of the motion. Executive session minutes are kept separately.

The Commission returned to regular session at 11:44 a.m.

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

14-2919-07 Modesto Noriz vs. Waddell Landscape, LLC

William Warren presented a summary of Mr. Noriz's complaint, the employer's response, and the results of the ADOSH investigation. Mr. Warren summarized the evidence supporting the elements such as protected activity and adverse action and he recommended that the Commission pursue the matter. Commissioner Parker noted the recordings and texts stand for themselves and asked about the employer's response to requests for documents. Mr. Warren responded to the question. Commissioner Parker asked for additional details related to the interview with the employee's former supervisor. Mr. Warren responded to Mr. Parker's question. Chairman Schultz asked if there were any other questions and hearing none, he asked Mr. Rick Jorgic if he would like to address the Commission.

Mr. Jorgic stated he listened to the comments and noted that he did not know anyone at the table. Chairman Schulz introduced himself and asked the Commissioners and Commission staff to introduce themselves. Mr. Jorgic presented Waddell Landscape's position. Chairman Schultz asked if there were any questions for Mr. Jorgic. Commissioner Sanders replied that he would have some questions, but wanted to hear from Mr. Noriz attorney if she had any comments.

Chairman Schultz invited Ms. Amanda Caldwell to comment on this matter. Ms. Caldwell noted that she is an attorney with Community Legal Services and represents Mr. Noriz. She thanked the Commission for the opportunity address the Commission. She described her client's position.

Chairman Schultz asked if there were questions for Ms. Caldwell and or if Ms. Goodwin had anything to add. Ms. Melody Goodwin replied that she was just observing.

Chairman Schultz asked Commissioner Sanders if he had any questions. Commissioner Sanders asked for more information about the records that ADOSH had requested and asked Mr. Jorgic about some records that he mentioned. Mr. Jorgic replied that he had provided records to

the investigator and he summarized some of his interactions with the investigator. Commissioner Sanders asked additional questions regarding the records and Mr. Jorgic responded to the questions. Mr. Warren read the letter sent to the employer on December 9, 2014.

Chairman Schultz commented on the focus of the investigation and how the records may be important. Mr. Jorgic described some additional facts. Chairman Schultz thanked Mr. Jorgic and described the next steps in the process. Mr. Jorgic asked if he could represent Waddell Landscape in court and Mr. Wade replied to Mr. Jorgic that the only advice that he could provide is that he should consult with an attorney.

Chairman Schultz asked if there were any further questions or comments from any of the parties present. Hearing none, he asked if there was a motion. Commissioner Sanders moved that the Commission pursue the matter and Commissioner Bolick seconded the motion. Mr. Wade asked if the motion include authorizing staff to file a complaint and take other action as necessary to pursue this matter. Commissioner Sanders acknowledged that his motion did include that direction and Commissioner Bolick acknowledged the second did as well. Commissioner Parker commented on his view of the evidence. Commissioner Bolick stated he concurred with Commissioner Parker's comments.

Chairman Schultz noted there was a motion to pursue with a second and asked if there were any further comments or discussion. There were no comments or discussion. Commission unanimously voted in favor of the motion.

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

Fierro Lath and Plaster, Inc.

Fatality/Accident

5150 N Cresosote Canyon Dr.

9 Years in Business: 2

Tucson, AZ 85749

Empl. Covered by inspection:

Site Location:

5150 N Cresosote Canyon Dr.

Tucson, AZ 85749

Inspection No:

F3875-1046519

Inspection Date:

03/12/2015

SERIOUS - Citation 1 - Item 1 - Office: The employer did not report the fatality to the Occupational Safety and Health Administration within eight hours after the death of an employee from a work-related incident. (29 CFR 1904.39(a)(1)).

Div. Proposal - \$600.00

Formula Amt. - \$600.00

SERIOUS - Citation 1 - Item 2 - 5150 Creosote Canyon Drive, Tucson, AZ: An employee installing lath on a parapet wall without fall protection fell 13 feet to the ground resulting in his death. (29 CFR 1926.501(b)(13)).

Div. Proposal - \$7,000.00

Formula Amt. - \$7,000.00

SERIOUS - Citation 1 - Item 3 - 5150 Creosote Canyon Drive, Tucson, AZ: An employee who was installing lath to a parapet wall at a height of 13 feet above the lower level, was not trained to recognize the hazards of falling and in procedures to be followed to minimize those hazards. The victim fell off the roof and died from the injuries sustained from the fall. 1926.503(a)(1)).

Div. Proposal - \$750.00

Formula Amt. - \$750.00

Fatality/Accident Years in Business:

Empl. Covered by inspection:

Unprogrammed Related

Empl. Covered by inspection:

Years in Business:

38

1

35

Mr. Warren summarized the citation and proposed penalty as listed. Commissioner Sanders asked for additional details concerning the cause of death. Mr. Warren described the information available concerning the cause of death. Commissioner Bolick asked whether Citation 1 Item 1 was a willful violation and Mr. Warren responded to the question. Commissioner Bolick asked why a reduction for size was not applied to Citation 1 Item 2 and Mr. Warren explained why there was no adjustment factor for size. Commissioner Parker commented on the adjustment factors and the maximum penalty amount in the context of a fatality. Following discussion, the Commission unanimously approved issuing the citation and assessed the recommended penalty of \$8,350.00 on motion of Commissioner Hennelly, second of Commissioner Bolick.

Chairman Schultz announced that the Commission would take a momentary recess at 12:28 p.m., and the Commission reconvened at 12:33 p.m.

Quantex IG Systems, Inc.

6680 Parkland Boulevard Solon, OH 44139

Site Location:

5107 N 51st Ave Ste 2

Inspection No:

Н9685-1058376

Glendale, AZ 85301

Inspection Date:

04/23/2015

Mr. Warren summarized ADOSH's investigation into a fatal accident and noted that the investigation did not identify any violations and ADOSH was not recommending any citations. Commissioner Parker asked for additional details concerning the circumstances of the fatality and Mr. Warren responded to the question.

Avanti Industries, LLC 5107 N 51st Ave Ste 2

Glendale, AZ 85301

Site Location:

5107 N 51st Ave Ste 2

Glendale, AZ 85301

Inspection No:

H9685-1058366

Inspection Date: 04/2

04/22/2015

SERIOUS – Citation 1 - Item 1 – South Central Side of Warehouse: The exit door on the south wall of the warehouse was locked from the inside with a keyed deadbolt. (29 CFR 1910.36(d)(1)).

Div. Proposal - \$1,250.00

Formula Amt. - \$1,250.00

<u>SERIOUS</u> – Citation 1 - Item 2 – Warehouse Area: Racks of vinyl product that were being offloaded from a delivery truck exceeded the rated capacity for the Hyundai Forklift Truck, Model 30L-7A and Product Identification Number HHKHHF09CD0000901. (29 CFR 1910.178(o)(2)).

Div. Proposal - \$1,250.00

Formula Amt. - \$1,250.00

<u>SERIOUS</u> – Citation 1 - Item 3 – Warehouse Area: A modification was made to the fork of a Hyundai Forklift Truck, Model 30L-7A and Product Identification Number HHKHHF09CD0000901, where a hole near the tip of the operator's right side fork was made, and a bolt was attached through the hole in the fork to drag out racks of vinyl from the trailer of delivery trucks. (29 CFR 1910.178(a)(4)).

Formula Amt. - \$1,250.00 TOTAL FORMULA AMT. - \$3,750.00

Mr. Warren summarized the citation and proposed penalty as listed and described the photographs. Commissioner Parker referred to the penalty policy, noted the unsafe practice of using a forklift in excess of rated capacity, and explained why the violation in Citation 1 Item 2 should be \$7,000.00 without any penalty reduction. Commissioner Bolick agreed. Chairman Schultz added that he had a similar view and believed the load was definitely a proximate cause, he commented on the role the locked exit door may have played in the fatality, and that the user-modified forklift tine did not appear safe.

Commissioner Sanders referred to mounted photograph number 5, asked about the weight of the bundles and what would be a more appropriate method of moving the bundles. Mr. Warren responded to the questions. Commissioner Sanders commented on how different elements may contribute to an accident and that this fatality was avoidable.

Commissioner Parker asked if this would be an appropriate matter for a legal review. He commented on the multiemployer worksite doctrine, how Avanti had control of the worksite, the worker operating the forklift was an Avanti employee, the load clearly exceeded the rated capacity of the forklift, and the unsafe condition was well within Avanti's knowledge or ability to know. Chairman Schultz commented on what appeared to be a consensus and that he would entertain a motion to include an amended penalty.

Mr. Wade explained that the Commission has the discretion to assess a penalty of up to \$7,000.00 for a serious violation and described ADOSH's modification to the federal Field Operations Manual (FOM) that removes the application of any of the reduction factors if a violation causes or contributes to a fatality or serious injury or illness.

Commissioner Parker explained that the violation in Citation 1 Item 2 is clearly a direct cause of the fatality and it would be appropriate for a \$7,000.00 gravity based penalty with no reduction. He explained why he did not consider Citation 1 Items 1 and 3 to rise to the same level regarding causation. Commissioner Bolick moved to approve the citations with a \$1,250.00 penalty for Item 1, \$7,000.00 for Item 2 because the violation was a direct cause of the fatality, and a \$1,250.00 penalty for Item 3, for a total penalty of \$9,500.00. Commissioner Parker seconded the motion. The Commission unanimously voted in favor of the motion.

Airbagit.com Suspension LLC

260 S Hibbert

Mesa, AZ 85210

260 S Hibbert

Mesa, AZ 85210

Inspection No:

Site Location:

V1001-1063445

Inspection Date:

05/18/2015

<u>SERIOUS</u> — Citation 1 - Item 1 — The employer did not establish an energy control program for the location, or energy control procedures for specific equipment in order to prevent the unexpected startup or energization of equipment that could cause injury to an employee performing service or maintenance on the equipment. (29 CFR 1910.147(c)(1)).

Div. Proposal - \$800.00

Formula Amt. - \$800.00

Complaint

Years in Business:

Empl. Covered by inspection:

17

25

<u>SERIOUS</u> – Citation 1 - Item 2 – Two employees who operated a YALE powered industrial truck Model number GLC040DENVAE092 Serial number N593241 were not certified by the employer that they had been trained and evaluated in the safe operation of the equipment. (29 CFR 1910.178(1)(6)).

Div. Proposal - \$1,000.00

Formula Amt. - \$1,000.00

<u>SERIOUS</u> – Citation 1 - Item 3 – Machine shop area: One SHARP variable speed vertical milling machine Model number LMV Serial number 30428198 was used to manufacture parts and was not guarded. (29 CFR 1910.212(a)(3)(ii)).

Div. Proposal - \$800.00

Formula Amt. - \$800.00

TOTAL PENALTY - \$2,600.00

TOTAL FORMULA AMT. - \$2,600.00

Mr. Warren summarized the citation and proposed penalty as listed. The Commission unanimously approved issuing the citation and assessed the recommended penalty of \$2,600.00 on motion of Commissioner Sanders, second of Commissioner Bolick.

J & F Sand Gravel and Construction, L.L.C.

Complaint

11262 S 14E

Years in Business:

Empl. Covered by inspection:

35 5

Yuma, AZ 85367

11262 S 14E

Yuma, AZ 85367

Inspection No:

Site Location:

F3875-1058694

Inspection Date:

04/15/2015

<u>SERIOUS</u> – Citation 1 - Item 1 – Corner of 16th Street and Sunridge Dr., Yuma, Az.: Employees conducted work in an excavation that measured 11 feet 8 inches deep, 3 feet wide at the bottom, 10 feet wide at the top and 300 feet long, without training. (29 CFR 1926.21(b)(2)).

Div. Proposal - \$750.00

Formula Amt. - \$750.00

<u>SERIOUS</u> – Citation 1 - Item 2 – 16th Street and Sunridge Dr., Yuma, AZ: The employees conducted work in the excavation that measured 11 feet 8 inches deep, three feet wide at the bottom, ten feet wide at the top and 300 feet long, and were not provided a safe means of egress out of the excavation. (29 CFR 1926.651(c)(2)).

Div. Proposal - \$750.00

Formula Amt. - \$750.00

<u>SERIOUS</u> – Citation 1 - Item 3 – 16th Street and Sunridge Dr., Yuma, AZ: At least a manual and visual inspection were not completed by a competent person for employees who were working in the excavation that measured 11 feet 8 inches deep, three feet wide at the bottom, ten feet wide at the top and 300 feet long. (29 CFR 1926.651(k)(1)).

Div. Proposal - \$750.00

Formula Amt. - \$750.00

<u>SERIOUS</u> – Citation 1 - Item 4 – Job-site: Employees conducted work in the excavation that measured 11 feet 8 inches deep, 3 feet wide at the bottom, 11 feet wide at the top and 300 feet long, without a protective system installed. (29 CFR 1926.652(a)(1)).

Div. Proposal - \$750.00

Formula Amt. - \$750.00

TOTAL PENALTY - \$3,000.00

TOTAL FORMULA AMT. - \$3,000.00

Mr. Warren summarized the citation and proposed penalty as listed, explained that this inspection resulted from a complaint, and noted that many of the photographs were provided by the Complainant. Commissioner Sanders asked Mr. Warren to summarize soil classifications. Mr.

Warren summarized Type A, B, and C soil. Chairman Schultz commented on the Complainant's photographs. The Commission unanimously approved issuing the citation and assessed the recommended penalty of \$3,000.00 on motion of Commissioner Sanders, second of Commissioner Hennelly.

Discussion and Action Regarding Selection of Vice Chair of the Industrial Commission.

Chairman Schultz asked if there were any nominations for Vice Chairman. Commissioner Parker nominated Commissioner Michael Sanders. Commissioner Hennelly seconded the motion. Commissioner Sanders agreed that he would be willing to serve, and the Commission unanimously selected Commissioner Sanders as Vice Chairman.

Announcements, Scheduling of Future Meetings and Retirement Resolutions.

Ms. McGrory announced that the Committee of Reference has scheduled hearings on the Commission's Sunset Review for August 25, 2015 beginning at 10:00 a.m. She explained that the first hearing will relate to the Boiler Advisory Board, and the second hearing will include the Industrial Commission, the OSHA Advisory Committee, and the Employment Advisory Council. She added that she will forward a copy of the agendas to the Commissioners and noted that there are live feeds on the Legislature's website for those who may be interested in viewing the hearings from a remote location.

Ms. McGrory explained that the Commission is being presented with a retirement resolution recognizing William Garton, ADOSH safety consultant, for 20 years of State service.

Public Comment.

There was no public comment and Chairman Schultz asked if there was a motion to adjourn. Vice Chairman Sanders moved to adjourn and Commissioner Bolick seconded the motion. The Commission unanimously voted to adjourn and the meeting was adjourned at 12:58 p.m.

THE INDUSTRIAL COMMISSION OF ARIZONA

By

Laura McGrory, Director

ATTEST:

Kara Dimas, Commission Secretary