

MINUTES OF MEETING
OF THE INDUSTRIAL COMMISSION OF ARIZONA
Held at 800 West Washington Street
Conference Room 308
Phoenix, Arizona 85007
Thursday, January 14, 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
	Andrew Wade	Chief Legal Counsel
	Bob Charles	Legislative Affairs Chief / Public Information Officer
	Sylvia Simpson	Chief Financial Officer
	Renee Pastor	Accounting
	Karen Axsom	Labor Director
	Kathleen McLeod	Claims Manager
	Molly Jones	Claims
	Pam Sanchez	Claims
	Robert Galyen	Claims
	William Warren	ADOSH Director
	Larry Gast	Assistant ADOSH Director
	Wendi Frasier	Compliance Officer
	Patrick Ireland	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 was Tim Coons representing Stuart Glenn, Stuart Glenn, Charlotte Felker and Ernest Calderon representing Costco, and Jason Weber of Snell & Wilmer.

Chairman Schulz introduced himself and asked the Commissioners, Commission staff and everyone in the room to introduce themselves.

Approval of Minutes of December 10, 2015, December 17, 2015 and January 7, 2016 Regular Meeting.

The Commission approved the Regular Minutes of the December 10, 2015 meeting on motion of Vice Chair Hennelly, second of Commissioner LeMarr. Chairman Schultz, Vice Chair Hennelly, and Commissioner LeMarr voted in favor of the motion. Commissioner Orchard did not vote.

The Commission unanimously approved the Regular Minutes of the December 17, 2015 meeting on motion of Commissioner LeMarr, second of Commissioner Orchard. Chairman Schultz, Commissioner LeMarr, and Commissioner Orchard voted in favor of the motion. Vice Chair Hennelly did not vote.

The Commission unanimously approved the Regular Minutes of the January 7, 2016 meeting on motion of Vice Chair Hennelly, second of Commissioner Orchard. Chairman Schultz, Vice Chair Hennelly, and Commissioner Orchard voted in favor of the motion. Commissioner LeMarr did not vote.

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. 2C14/15-2908 Millwrights4hire, L.L.C. (a Kentucky Limited Liability Company)
2. 2C15/16-1040 Pinnacle Communications AZ, 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.

Bob Charles summarized recent activity at the Legislature; commented on Senate confirmation for Chairman Schultz, Commissioner LeMarr, Commissioner Orchard, and Director Ashley. Chairman Schultz commented on the confirmation process.

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 recent media inquiries. He added that the Commission went live on Twitter last week, commented on some tweets, and the use of technology to improve interactions between the Commission and stakeholders, the Governor's Office, and the Legislature. Chairman Schultz commented on supplying Mr. Charles with topics to tweet.

Discussion and Action regarding Appointment of Special Assistant to the Industrial Commission of Arizona.

Mr. Ashley requested that this item be moved to follow agenda item 14, since both relate to the Claims Division. Chairman Schultz announced that this item would be addressed after item 14.

Discussion and Action regarding Establishment of Discount Rate for Calculating Lump Sum Commutations under A.A.C. R20-5-121(B).

Renee Pastor stated that the Commission is required to establish the discount rate each year for use in calculating the present value of an award that is commuted to a lump sum under A.R.S. § 23-1067. She explained the process under A.A.C. R20-5-121(B) and identified the applicable 3-month Treasury bill rates reported on last business day of December of 2015 and for the prior four years. Based on the rates and the formula in A.A.C. R20-5-121(B), the Administrative Division is recommending that the discount rate be set at 0.07% for calculating fixed period and permanent lump sum settlements. The 0.07% discount rate, if adopted, will replace the current discount rate of 0.06% as of today and will be in effect until the Commission calculates a new rate. Chairman Schultz thanked Ms. Pastor for performing the calculations. The Commission unanimously approved the discount rate of 0.07% on motion of Commissioner LeMarr, second of Commissioner Orchard.

Discussion and/or Action regarding rulemaking to Arizona Administrative Code, Title 20, Chapter 5, Article 7, Self-Insurance Requirements for Workers' Compensation Pools Organized Under A.R.S. § 23-961.01.

Mr. Ashley noted this topic pertains to the self-insurance program and Rule 715. He explained how the insurance market has changed since Rule 715 was adopted in 1998 and the rule needs to be updated. He added that several Arizona trade associations have expressed an interest in establishing self-insurance pools for workers' compensation. He provided the Commissioners a copy of Rule 715 with suggested revisions and recommended Option 1. He commented on his use of best practice studies in exploring opportunities to improve Arizona's system. He added that the Office of the Arizona Governor has already approved moving forward with the rulemaking.

Chairman Schultz asked about the suggested revisions presented in option 2 and Mr. Ashley replied that option 2 is presented as a secondary option and he explained why.

Vice Chair Hennelly commented that based on his experience the prior limit was antiquated and the amounts shown in option 1, not more than \$1,250,00 for specific and not less than \$1,000,000 for aggregate, are much more realistic and up to date. He added that he would be in favor of the language and the amounts in amendment option 1. Vice Chair Hennelly referred to option 2 and noted that he would have comments on the language if other Commissioners are in favor of option 2.

Chairman Schultz commented on the language regarding the maximum retention for specific excess that reads "shall not be less than \$100,000" and asked if Nevada had the same amount. He explained why the maximum amount is the key component and he was curious about having a minimum. Mr. Ashley commented on the use of similar language with Nevada's program.

Vice Chair Hennelly moved to direct staff to submit a notice of proposed rulemaking to amend Rule 715 using the amendments shown in Option 1. Commissioner LeMarr seconded the motion. The Commission unanimously approved the motion.

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

Complainant Request for Reconsideration
14-2919-11 – Glenn vs. Costco Wholesale Corporation dba Costco

Chairman Schultz ask if was anyone who would like to speak. Tim Coons representing Mr. Glenn and Ernest Calderon and Charlotte Felker representing Costco stated they would like to speak.

Mr. Warren explained that this matter was previously presented to the Commission and the Commission decided not to pursue the matter. Mr. Glenn has submitted a request for reconsideration and Mr. Warren summarized Mr. Glenn's request for reconsideration and the further review performed as a result of Mr. Glenn's request for reconsideration. Mr. Warren noted that there is no new information that would warrant any change in the decision not to pursue. Commissioner Orchard asked about the investigation process noting staff turnover and the timeframe. Mr. Warren responded to the question.

Chairman Schultz asked Mr. Coon if he had any comments. Mr. Coons introduced himself and commented on Mr. Glenn's performance evaluations and the documents related to termination. Mr. Coons also commented on his not having the information that Costco provided to ADOSH prior to the August 6, 2015 Commission meeting. He presented Mr. Glenn's view of what Costco characterized as insubordinate conduct. Chairman Schultz explained his understanding regarding what Costco has characterized as the insubordinate action. Mr. Coons described what he viewed as flaws in the ADOSH investigation and why Mr. Glenn believed the facts supported his complaint of retaliation.

Commissioner LeMarr asked Mr. Warren to describe the investigation process and disclosure of information obtained during the investigation. Mr. Warren and Mr. Gast described the process. Chairman Schultz responded to one of Mr. Coons' comments regarding the weight the Commission applies to the investigator's conclusions. He explained that the Commissioners receive all of the materials and they review all of the materials de novo and, although staff has made a recommendation, the Commissioners are completely free to assign whatever weight they want to the evidence and make their own decision. He added that there were extensive discussions during the prior meeting about the information obtained during the investigation and that this reconsideration is about reconsidering the decision that was made before, that decision was made on the basis of complete review of all of the materials and now, again, there has been an additional opportunity for comments and the Commission has made another complete review of all of the materials.

Vice Chair Hennelly noted that Mr. Coons was at the meeting in August and now has all of the material that Costco supplied ADOSH, and he asked Mr. Coons if there was anything else he wanted to tell them about that was not included in the documents or in response to something that was said during the August meeting. Mr. Coons replied that they have summarized the information available and believe it is complete at this time. Vice Chair Hennelly stated that he wanted to make sure there was nothing else since Mr. Coons had raised an issue about whether they had seen the responses and it now seems that the issue about having copies of the materials is no longer an issue for purposes of the reconsideration.

Chairman Schultz asked if there were any other questions for Mr. Coons, hearing none, he asked Mr. Calderon if he wanted to address the Commission. Mr. Calderon described Costco's view of the legal standard for reconsideration, noted that Mr. Glenn has not supplied any new information today, or any legal authority to support his argument that ADOSH staff acted contrary to Arizona law or contrary to the Commission rules. He commented on the detailed administrative record and the opportunity provided to Mr. Coons to present the same arguments he lost on previously. Mr.

Calderon added that the Commission has been extraordinarily fair and there is no evidence nor any citation to any legal authority to suggest there is reversible error. Mr. Calderon concluded his arguments.

Commissioner LeMarr noted that he was not on the Commission in August, and asked Chairman Schultz or Vice Chair Hennelly about their thoughts whether there is anything new since August 2015. Vice Chair Hennelly acknowledged Mr. Calderon's comments regarding a limited review, and explained that he treats the reconsiderations as a complete review of the evidence, performed as thoroughly as if it is a new presentation. He noted that he is open to the possibility that the Commission erred and, as a result, he thoroughly reviews all the evidence, including all new information and he did not see anything that changed his mind. He referred to the comments of then Commission Parker and Commissioner Bolick with respect to the matter and agreed with then Commissioner Bolick's comment that they do take these things very seriously and does not limit himself to the weight the investigators might put on a particular item.

Chairman Schultz asked Mr. Wade about the rules of order for a reconsideration and noted the traditional rules. Mr. Wade acknowledged the traditional rules and added that it would be appropriate in this matter to allow any member of the Commission to move for reconsideration. He noted that if there is no motion to reconsider at all, then the prior decision not to pursue would stand.

Chairman Schultz asked if there was a motion to reconsider. Hearing none, he announced that the matter is closed relative to any motion to reconsider.

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 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.

Discussion and Action regarding ADOSH Advisory Committee Appointment pursuant to A.R.S. §23-409.

Mr. Warren advised that ADOSH recommends the appointment of James Biddle to the Arizona Occupational Safety and Health Advisory Committee as a representative of the public sector. Mr. Warren commented on Mr. Biddle's background. Commissioner LeMarr asked how often the Committee meets and how many items are typically on the agenda. Mr. Warren responded that the Committee meets quarterly and there is always a large agenda. The Commission unanimously appointed James Biddle to the Arizona Occupational Safety and Health Advisory Committee on motion of Commissioner LeMarr, second of Commissioner Orchard.

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

Balfour Beatty Construction, LLC
5401 N Pima Rd Ste 125
Scottsdale, AZ 85250

Site Location: 7575 E Princess Blvd
Scottsdale, AZ 85250

Planned
Years in Business: 82
Empl. Covered by inspection: 5

Inspection No: W0250-1098266
Inspection Date: 10/09/2015

SERIOUS – Citation 1 - Item 1 – Third floor of the building: One employee of TPAC a Division of Kiewit Western Co. was working on the third floor of a building under construction without the use of a guardrail system, safety net system, or personal fall arrest system to prevent an approximate 20' fall hazard. (29 CFR 1926.501(b)(2)(i)).

Div. Proposal - \$2,250.00

Formula Amt. - \$2,250.00

SERIOUS – Citation 1 - Item 2 – Third floor of building: Protruding reinforcing steel (i.e., rebar) which employee of TPAC a Division of Kiewit Western Co. could fall onto, were not protected by appropriate caps, covers or other equivalent means to protect employees from the hazard created by impalement. (29 CFR 1926.701(b)).

Div. Proposal - \$2,250.00

Formula Amt. - \$2,250.00

TOTAL PENALTY - \$4,500.00

TOTAL FORMULA AMT. - \$4,500.00

Mr. Warren summarized the citation and proposed penalty as listed and reviewed the photographs. Commissioner LeMarr referred to mounted photograph number 2, noted that it appears there is a single worker on the roof wearing a harness and asked whether the worker was tied off. Mr. Warren responded to the question. Commissioner LeMarr asked if the compliance officer asked the worker why he was wearing a harness and not tied off. Wendi Frasier responded to the question. Commissioner Orchard asked for more details regarding the circumstance where a worker is not wearing a harness versus improper use. Mr. Warren and Ms. Frasier responded to the question. Commissioner LeMarr asked for more details about the number of employees. Ms. Frasier described how many employees were on site and the location of the other employees. Commissioner Orchard referred to mounted photograph number 4 and asked about the date and time of the photo. Ms. Frasier responded to the question. Vice Chair Hennelly asked about the responsibilities of the general contractor and sub-contractors. Mr. Warren summarized the employers' responsibilities.

Chairman Schultz noted the citation for failure to use a fall protection system, the lack of any citation relative to training, and whether the rebar was low enough that an employee could trip and fall onto the rebar. Mr. Warren and Ms. Frasier responded to the question. Commissioner LeMarr referred to mounted photograph number 3 that depicts some capped rebar and asked if the employer was in the process of capping when the compliance officer arrived. Ms. Frasier and Mr. Warren responded to the question.

Commissioner LeMarr moved the recommended citations and penalties of \$4,500.00. Vice Chair Hennelly seconded the motion. The Commission unanimously approved issuing the citation and assessed the penalty of \$4,500.00.

Kiewit Western Co. dba
TPAC A Division of Kiewit Western Co.
3052 S 19th Ave
Phoenix, AZ 85009

Planned
Years in Business: 50
Empl. Covered by inspection: 11

Site Location: 7575 E Princess Blvd
Scottsdale, AZ 85250
Inspection No: W0250-1098136
Inspection Date: 10/09/2015

SERIOUS – Citation 1 - Item 1 – Third floor of the building: One employee was working on the third floor of a building under construction without the use of a guardrail system, safety net system, or personal fall arrest system to prevent an approximate 20' fall hazard. (29 CFR 1926.501(b)(2)(i)).

Div. Proposal - \$1,750.00

Formula Amt. - \$1,750.00

SERIOUS – Citation 1 - Item 2 – Third floor of building: Protruding reinforcing steel (i.e., rebar) which employees could fall onto, were not protected by appropriate caps, covers or other equivalent means to protect employees from the hazard created by impalement. (29 CFR 1926.701(b)).

Div. Proposal - \$1,750.00

Formula Amt. - \$1,750.00

TOTAL PENALTY - \$3,500.00

TOTAL FORMULA AMT. - \$3,500.00

Mr. Warren summarized the citation and proposed penalty as listed. Commissioner LeMarr asked about the employer of the worker shown in the photographs. Ms. Frasier responded to the question. Commissioner Orchard commented on applying a quick-fix penalty reduction. Following discussion, Commissioner Orchard moved to apply a \$1,000 penalty reduction for prompt abatement to Citation 1, Item 1 for a total penalty of \$2,500.00. Commissioner LeMarr seconded the motion. The Commission unanimously approved issuing the citation and assessed a penalty of \$2,500.00.

Shaughnessy Contracting, Inc.
15278 W Bell Rd Ste 103
Surprise, AZ 85374

Referral
Years in Business: 28
Empl. Covered by inspection: 3

Site Location: 13738 Camino Del Sol
Sun City West, AZ 85375
Inspection No: H1793-1100734
Inspection Date: 10/22/2015

SERIOUS – Citation 1 - Item 1 – Jobsite: Three employees engaged in replacing the original tar paper roof cover with a BoraTileSeal water resistant cover on a steep roof (6 and 7/12 pitch), at a height of 11 feet 3 inches from the roof edge to the ground, were not protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems. (29 CFR 1926.501(b)(11)).

Div. Proposal - \$1,500.00

Formula Amt. - \$1,500.00

SERIOUS – Citation 1 - Item 2 – Roof: Three employees working at a height of approximately 11 feet 3 inches and exposed to fall hazards were not provided training to recognize the hazards of falling or the procedures to be followed to minimize these hazards. (29 CFR 1926.503(a)(1)).

Div. Proposal - \$1,500.00

Formula Amt. - \$1,500.00

TOTAL PENALTY - \$3,000.00

TOTAL FORMULA AMT. - \$3,000.00

Mr. Warren summarized the citation and proposed penalty as listed. Commissioner LeMarr asked for more details about the gravity based penalty factors of higher-greater and higher-lesser. Mr. Warren explained the differences. Commissioner Orchard stated that ADOSH does a great job promoting the partnership with businesses in the community and asked about compliance officer practices during inspections regarding correcting violations and the potential impact of quick abatement on penalties. Mr. Warren responded to the question.

Chairman Schultz commended the compliance officer relative to the ladder, it was a clear violation and subject to citation and was abated immediately and moved to a non-serious. He stated

it would be such an easy fix from the manufacturers of ladders to just put a warning line at the three foot point so workers can easily determine whether the ladder was properly extended beyond the roof line.

Commissioner LeMarr moved to issue the citation as recommended and Commissioner Orchard seconded the motion. The Commission unanimously approved issuing the citation and assessed the penalty of \$3,000.00.

Presentation and discussion regarding the Division of Occupational Safety and Health (ADOSH) citation process and practices. This agenda item may include information related to the matters addressed at the January 7, 2016 Commission meeting under Agenda Item 8, including citations against WAG Services, Inc., Central Arizona Block, Inc. dba Central Arizona Block Company, Marvin Yazzie, A Single Man dba Marvin Construction, and Palo Verde Plastering, Inc.

Mr. Wade commented on why this item was added to the agenda. Mr. Warren commented on ADOSH practices related to issuing citations after the Commission votes to issue. Commissioner LeMarr asked about the process after the employer receives the citation. Mr. Warren responded to the question.

Presentation and discussion regarding the operations of the Claims Division.

Kathleen McLeod summarized her background and introduced her management team; Assistant Claims Manager Pam Sanchez, Assistant Claims Manager Molly Jones and Ombudsman Robert Galyen. Chairman Schultz thanked them for all they do. Mr. Ashley commented on the Ombudsman position and why that position in any agency is important. Ms. McLeod summarized the Claims Division's role in the Arizona workers' compensation system and described the units within Claims; records, insurance and error resolution, compliance, awards, and administration. Commissioner LeMarr asked about liability for claims when an employer changes carriers and Ms. McLeod responded to the question.

Chairman Schultz asked if she would attend a future meeting and discuss the phases of a workers' compensation claim, including temporary and permanent total and partial disability, and scheduled injury verses unscheduled. He added that he appreciated all of the efforts of her division.

Discussion and Action regarding Appointment of Special Assistant to the Industrial Commission of Arizona.

Kathleen McLeod requested that employee Molly Jones be appointed as Special Assistant and explained her responsibilities. The Commission unanimously appointed Molly Jones as Special Assistant on motion of Commissioner Orchard, second of Commissioner LeMarr.

Announcements, Scheduling of Future Meetings and Retirement Resolutions.

Mr. Ashley commented on potential dates for meetings outside the valley that would coincide with the Safety Summit scheduled for April near Tucson and an OSHA Advisory Committee meeting scheduled for March in Yuma. Ms. Dimas stated that the OSHA Advisory Committee is scheduled for March 2, 2016 and the Commission meeting is now scheduled for March 2 in Yuma and ADOSH has scheduled the Safety Summit for April 13 and 14 in Marana, and the

Commission meeting already scheduled for April 14 will be held in the Industrial Commission Tucson Office.

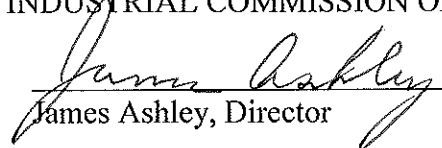
Mr. Ashley announced that David Sosa, the Special Fund Manager, will be retiring effective the end of February.

Public Comment.

There was no public comment. Vice Chair Hennelly moved to adjourn and Commissioner LeMarr seconded the motion. The Commission unanimously voted to adjourn and the meeting was adjourned at 3:24 p.m.

THE INDUSTRIAL COMMISSION OF ARIZONA

By


James Ashley, Director

ATTEST:


Kara Dimas, Commission Secretary