

MINUTES OF MEETING  
OF THE INDUSTRIAL COMMISSION OF ARIZONA

Held at 800 W. Washington

Conference Room 308

Phoenix, Arizona 85007

Thursday, April 2, 2009 – 1:00 p.m.

Present:	Brian Delfs	Chairman (telephonic)
	Joe Gosiger	Vice Chairman (telephonic)
	Louis W. Lujano, Sr.	Member
	Marcia Weeks	Member
	John A. McCarthy, Jr.	Member
	Laura McGrory	Director
	Andrew Wade	Chief Legal Counsel
	Darin Perkins	Director, ADOSH
	Renee Pastor	Self Insurance Manager
	Gary Norem	Chief Financial Officer
	Glenn Hurd	Financial Officer
	Jeri McAnerny	Tax Accountant
	Teresa Hilton	Commission Secretary

Commissioner Lujano convened the Commission meeting at 1:00 p.m. noting a quorum present. Also in attendance were Scot Butler, the agency's lobbyist, Jen Jones of Snell & Wilmer, David Ouimette and Tricia Schafer of Mariscal Weeks.

Approval of Minutes of March 19, 2009 Meeting

The Commission approved the Minutes of the March 19, 2009 general session on motion of Mr. McCarthy, second of Mr. Gosiger. Mrs. Weeks abstained.

The Commission approved the Minutes of the March 19, 2009 executive session on motion of Mr. McCarthy, second of Mr. Gosiger. Mrs. Weeks abstained.

Discussion & Action of ADOSH Discrimination Complaint

Jarrod Phifer v. Miller Bonded, Inc. #09-05 - Darin Perkins presented a summary of the Division's investigation of a discrimination complaint filed by Mr. Phifer. In his complaint, Mr. Phifer alleged that he was terminated because he filed a complaint with OSHA about a hygiene condition at his workplace and continued to complain when the situation was not rectified. The employer's response was that Mr. Phifer walked off of the jobsite despite the immediate response to address the issue, surmounting to Mr. Phifer quitting his job.

Mr. Perkins described the allegations and the employer's response in detail. He stated that in the Division's analysis of the complaint, Mr. Phifer was not the only employee on the jobsite to complain about the condition of the portable toilets. Mr. Phifer, however, was the only employee to file an OSHA complaint, to contact the union hall's business agent directly and to take his complaint to the property owner, Banner Health. Based on the information provided, Mr. Perkins believed that Mr. Phifer was terminated for the exercise of protected activity and he recommended that the Commission pursue the case. Following discussion of whether Mr. Phifer was terminated for the participation in protected activity, the Commission voted to pursue the complaint on motion of Mr. Gosiger, second of Mrs. Weeks.

Discussion & Action of Proposed OSHA Citations and Penalties

Johnson Manley Havasu Lumber, Inc.  
1785 Kiowa Blvd.  
Lake Havasu City, AZ 86403

Planned  
Yrs/Business – 37  
Empl. Cov. by Insp. – 4

Site Location: 3727 Hwy 95, Bullhead City, AZ 86442  
Inspection #: A7717/313048878  
Insp. Date: 02/03/09

SERIOUS – Citation 1, item 1 – Two employees were working 19'10" above the ground level without the use of a fall protection system to prevent a fall.

(One inspection with one nonserious violation in the past three years).

Div. Proposal - \$1,250.00

Formula Amt. - \$1,250.00

Darin Perkins summarized the citation and proposed penalty as listed. Following discussion and inspection of photos of this violation, the Commission unanimously approved issuing the citation and assessed the recommended penalty of \$1,250.00 on motion of Mrs. Weeks, second of Mr. McCarthy.

Ky-Ko Roofing Systems, Inc.  
1912 W. Parkside Lane  
Phoenix, AZ 85027

Complaint  
Yrs/Business – 15  
Empl. Cov. by Insp. – 10

Site Location: NWC 7<sup>th</sup> Street & Greenway Pkwy, Phoenix, AZ 85022  
Inspection #: R0738/313060923  
Insp. Date: 02/20/09

SERIOUS – Citation 1, item 1 – Three employees were working on a low-slope roof 14' above the concrete sidewalk below without utilizing a fall protection system or other equivalent means to prevent a fall. There were two other instances of this violation.

(No inspection history in the past three years).

Div. Proposal - \$1,250.00

Formula Amt. - \$1,250.00

Darin Perkins summarized the citation and proposed penalty as listed. Following discussion and inspection of photos of this violation, the Commission unanimously approved issuing the citation and assessed the recommended penalty of \$1,250.00 on motion of Mr. McCarthy, second of Mrs. Weeks.

Royal Sign Company, Inc.  
2631 N. 31<sup>st</sup> Avenue  
Phoenix, AZ 85009

Planned  
Yrs/Business – 50  
Empl. Cov. by Insp. – 1

Site Location: 9945 W. Lower Buckeye Road, Phoenix, AZ 85383  
Inspection #: R0738/313941980  
Insp. Date: 01/28/09

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

Citation 1, item 1a – An employee's personal fall arrest system was rigged in such a way that the employee could contact the ground in the event of a free fall.

Citation 1, item 1b - An employee was using a personal fall arrest system that was attached to the guardrail of an aerial ladder boom basket.  
(No inspection history in the past three years).

Div. Proposal - \$1,250.00

Formula Amt. - \$1,250.00

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 \$1,250.00 on motion of Mr. McCarthy, second of Mrs. Weeks.

U.S. Prefab, Inc.  
6525 W. State Avenue  
Glendale, AZ 85301

Complaint  
Yrs/Business - 30+  
Empl. Cov. by Insp. - 9

Site Location: 6525 W. State Avenue, Glendale, AZ 85301

Inspection #: U9805/313041832

Insp. Date: 01/28/09

SERIOUS - Citation 1, item 1 - The mezzanine area was approximately 12' high and did not have a guardrail system installed to prevent a 12' fall hazard.  
(No inspection history in the past three years).

Div. Proposal - \$750.00

Formula Amt. - \$750.00

SERIOUS - Citation 1, item 2 - The employer did not provide point of operation guarding for the punch press.

Div. Proposal - \$750.00

Formula Amt. - \$750.00

SERIOUS - Citation 1, item 3 - The outer insulation jacket of an extension cord providing power to a charging GLC was damaged, exposing the inner wire. There were two other instances of this violation.

Div. Proposal - \$ 750.00

Formula Amt. - \$ 750.00

TOTAL DIV. PROP. - \$2,250.00

TOTAL FORMULA AMT - \$2,250.00

Darin Perkins summarized the citations and proposed penalty as listed. Following discussion of these violations and inspection of photos, the Commission unanimously approved issuing the citations and assessed the recommended penalty of \$2,250.00 on motion of Mrs. Weeks, second of Mr. McCarthy.

VF Electric, Inc.  
2432 W. Peoria Ave., Ste. 1083  
Phoenix, AZ 85029

Accident  
Yrs/Business - 7  
Empl. Cov. by Insp. - 2

Site Location: 4110 E. Wood Street, Phoenix, AZ 85040

Inspection #: Z5834/312737620

Insp. Date: 10/15/08

SERIOUS - Citation 1, item 1 - The employer did not assess the service entrance section to determine if hazards were present which necessitated the use of personal protective equipment to protect against electrical shock or burns while employees were working on energized equipment.  
(No inspection history in the past three years).

Div. Proposal - \$2,500.00

Formula Amt. - \$2,500.00

SERIOUS – Citation 1, item 2 – Electricians were not provided with safety-related work practices training pertaining to their respective job assignments.

Div. Proposal - \$5,000.00

Formula Amt. - \$5,000.00

SERIOUS – Citation 1, item 3 – Safety-related work practices had not been developed or implemented for the service electricians performing work on or near equipment or circuits that were energized or could be energized.

Div. Proposal - \$5,000.00

Formula Amt. - \$5,000.00

SERIOUS – Citation 1, item 4 – Employees were not provided with adequate personal protective equipment designed to protect employees while working on energized equipment.

Div. Proposal - \$5,000.00

Formula Amt. - \$5,000.00

SERIOUS – Citation 1, item 5 – Insulated tools were not provided or required to be used while working on energized equipment.

Div. Proposal - \$5,000.00

Formula Amt. - \$5,000.00

SERIOUS – Citation 1, item 6 – Protective shields or barriers or insulating barriers were not required to be used when employees are subject to accidental contact or where electric arcing could have occurred.

Div. Proposal - \$ 5,000.00

Formula Amt. - \$ 5,000.00

TOTAL DIV. PROP. - \$27,500.00

TOTAL FORMULA AMT - \$27,500.00

Darin Perkins summarized the citations and proposed penalty as listed. The Division proposal was for the gravity-based penalties with no adjustment factors since the violations directly related to the serious injury. Following discussion and inspection of photos of these violations, the Commission unanimously approved issuing the citations and assessed the recommended penalty of \$27,500.00 on motion of Mr. McCarthy, second of Mrs. Weeks.

American Garage Door, Inc.  
3420 E. Broadway Rd.  
Phoenix, AZ 85040

Planned  
Yrs/Business – 32  
Empl. Cov. by Insp. – 8

Site Location: 3420 E. Broadway Rd., Phoenix, AZ 85040

Inspection #: U9805/313088072

Insp. Date: 03/11/09

SERIOUS – Citation 1, item 1 – A 10" radial arm saw was lacking a bottom protective guard. (No inspection history in the past three years).

Div. Proposal - \$750.00

Formula Amt. - \$750.00

SERIOUS – Citation 1, item 2 – A 10" radial arm saw did not retract back to the original position when released.

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 Mrs. Weeks, second of Mr. McCarthy.

Baker Commodities, Inc.  
PO Box 6518  
Phoenix, AZ 85005

Referral  
Yrs/Business - 13  
Empl. Cov. by Insp. - 6

Site Location: 3602 W. Elwood, Phoenix, AZ 85009  
Inspection #: A7746/313060972  
Insp. Date: 02/18/09

SERIOUS - Citation 1, item 1 - A complete hearing conservation program had not been established for employees exposed to noise levels above the 85.0 dBA action level. There was another instance of this violation.

(1 inspection with 5 serious and 11 nonserious violations in the past three years).

Div. Proposal - \$1,500.00

Formula Amt. - \$1,500.00

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

Central Arizona Shelter Services  
230 S. 12<sup>th</sup> Avenue  
Phoenix, AZ 85007

Follow-up  
Yrs/Business - 25  
Empl. Cov. by Insp. - 70

Site Location: 230 S. 12<sup>th</sup> Avenue, Phoenix, AZ 85007  
Inspection #: Q8339/313085151  
Insp. Date: 02/25/09

SERIOUS - Citation 1, item 1 - The employer failed to establish, maintain and implement engineering controls that ensured intake restrooms were kept sanitized and free of potentially infectious materials.

(Two inspections with 1 nonserious violation in the past three years).

Div. Proposal - \$1,750.00

Formula Amt. - \$1,750.00

SERIOUS - Citation 1, item 2 - The employer failed to provide adequate personal protective equipment in the form of puncture resistant gloves to employees who were exposed to sharps and/or blood borne pathogens.

Div. Proposal - \$1,750.00

Formula Amt. - \$1,750.00

SERIOUS - Citation 1, item 3 - The employer failed to ensure that employees with occupational exposure received adequate training, including an explanation of transmission and symptoms of blood borne pathogens.

Div. Proposal - \$1,750.00

Formula Amt. - \$1,750.00

TOTAL DIV. PROP. - \$5,250.00

TOTAL FORMULA AMT - \$5,250.00

Darin Perkins summarized the citations and proposed penalty as listed. Following discussion of these violations, the Commission unanimously approved issuing the citations and assessed the recommended penalty of \$5,250.00 on motion of Mr. McCarthy, second of Mrs. Weeks. The Commission authorized Director Perkins to reduce the penalties significantly in informal conference if the violations have been corrected within 15 days of the receipt of the citations.



discussion and inspection of photos of these violations, the Commission unanimously approved issuing the citations and assessed the recommended penalty of \$5,250.00 on motion of Mr. McCarthy, second of Mrs. Weeks.

Discussion & Action of Request for Renewal of Self-Insurance Authority

Viad Corp.— Renee Pastor presented staff's renewal report along with a current Dunn and Bradstreet credit report rating. Administration is recommending renewal of workers' compensation self-insurance authority based on the company's large size with total worldwide assets of \$729.4 million, a clean audit report and an acceptable credit rating. Following discussion, the Commission unanimously approved continuance of self-insurance authority and signed a Resolution to that effect on motion of Mr. McCarthy, second of Mr. Gosiger.

Discussion & Action of Proposed Civil Penalties Against Uninsured Employers

2C08/09-1449	FRANCISCO CELAYA & NEREYDA CELAYA, HUSBAND & WIFE DBA TIA NERY'S CHILDCARE
2C08/09-0737	JAVIER A. DENOGEAN & CLAUDIA DENOGEAN HUSBAND & WIFE DBA HOPE'S CATERING SERVICES
2C07/08-2010	NY 54 ENTERPRISES LLC
2C08/09-0670	PITA HOUSE, INC.
2C08/09-0897	PLEXUS WORLDWIDE, INC.

Andrew Wade advised that with regard to employer #1449, it has been determined that they did have insurance at the time of the investigation, so he is removing them from consideration for a civil penalty. With regard to the remaining above listed employers, a compliance investigation confirmed that they 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 #0737, 2010 and 0897. He further recommended a civil penalty of \$500.00 be assessed against employer #0670 since they have recently obtained workers' compensation insurance coverage. The Commission unanimously approved assessing civil penalties of \$1,000.00 against employers #0737, 2010 and 0897 and a civil penalty of \$500.00 against employer #0670 on motion of Mrs. Weeks, second of Mr. McCarthy.

Discussion & Action of Attorney Fee Petition.

Taylor and Associates, P.L.L.C. v. David Blake – Mr. Wade advised that the law firm of Taylor and Associates has petitioned the Industrial Commission to set attorney's fees with respect to the work that they performed on behalf of Mr. Blake. Mr. Blake had requested that the firm no longer represent him, although he was not dissatisfied with the work they performed on his behalf. Mr. Wade advised that Taylor and Associates has received \$8,578.45 in attorney fees. Mr. Wade described the work they performed, and advised that Legal Division review estimates that Attorney Dennis Kurth spent approximately 40 to 50 hours on Mr. Blake's case. While Mr. Blake had not done very well representing himself in the beginning, Mr. Kurth prevailed on every issue. Mr. Kurth has offered to reduce his fee to 20% rather than the 25% fee agreement between Mr. Blake and Taylor and Associates. The Legal Division is recommending awarding attorney fees of 20%, or \$98.56 per month, for a period of five years. Following discussion, the Commission unanimously awarded attorney fees of 20% for a five

year period on motion of Mr. McCarthy, second of Mrs. Weeks.

Discussion &/or Action regarding Workers' Compensation Premium Tax or Assessments Rates under A.R.S. §§23-961(J), 23-1065(A) and (F), and 23-966(D)

Gary Norem recommended that the Commission address the issue of taxes and assessments sooner than it has historically done so that the regulated community can prepare their FY '10 and calendar 2010 budgets accordingly. He explained that an assessment under A.R.S. §23-1065(F) requires a public hearing. Because it may be necessary to consider the imposition of this assessment, Administration is asking to schedule the hearing.

Mr. Norem advised that, in advance of the hearing, he will provide a financial analysis to the Commission regarding the Special Fund, including its liability for apportionment. Mrs. Weeks stated she would like to see the numbers before agreeing to schedule the hearing and she expressed concern about increasing the assessment on employers. Ms. McGrory explained the hearing process and stated that holding the hearing does not obligate the Commission to impose the assessment. The hearing is simply a prerequisite to that action and would give the Commission the opportunity and flexibility in terms of any decision it later would make regarding taxes and assessment. Ms. McGrory also stated that the Commissioners will have the numbers and financial analyses to make its decision. Ms. McGrory further explained the reasons for asking to schedule the hearing at this time.

Following further discussion, Mr. Delfs made a motion to set a date to schedule the public hearing. Since there was no second, Mr. Lujano asked if there was an alternative motion. Mr. Delfs explained his reason for his motion, stated that a hearing would allow the public to submit information and promote transparency on the issue. In response to a question from Mr. McCarthy, Mr. Norem stated that he could get some financial projections to the Commissioners next week. He briefly described the current status of the Special Fund. He further stated that there could be a cash flow problem and that the agency will not receive the full impact of an assessment until two years after the assessment. Mrs. Weeks continued to express her concern over the message the agency would be sending out by scheduling the hearing.

Mr. Lujano revisited the first motion and asked if there was a second. Mr. Gosiger seconded the motion (noting that he had already seconded the early motion, but was not heard), which was approved. Mrs. Weeks voted nay. The Commissioners agreed to hold the hearing on the assessment issue on May 6, 2009.

Discussion &/or Action regarding Operations of the Industrial Commission

Laura McGrory advised that regarding the Governor's moratorium on rulemaking, the agency's previously requested exceptions on all five rulemaking packages had been approved.

Ms. McGrory also asked the Commissioners to schedule the Fee Schedule hearing, noting that historically the hearing is scheduled for the end of May. The Commission agreed to schedule the hearing for Thursday, May 28, 2009 in the Auditorium.

Discussion &/or Action regarding Legislation. 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 Contemplated Litigation or Settlement Discussions in order to avoid Litigation arising out of Bills passed in the Forty-Ninth Legislature, First Special

Session (2009). 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

The Commission unanimously voted to move into Executive Session on motion of Mrs. Weeks, second of Mr. McCarthy. Executive Session Minutes are kept separately.

Upon return to General Session, Mr. Wade recommended that the Commission file a legal action in the Arizona Supreme Court challenging the legislative action to take Special Fund assets. The Commission unanimously approved legal counsel's recommendation and directed legal counsel to file a legal action in the Arizona Supreme Court challenging the legislative appropriation of Special Fund assets on motion of Mr. Delfs, second of Mr. McCarthy. Mr. Ouimette advised that the draft of the Petition has been prepared and will be delivered to Chief Counsel for sign off and for filing.

Mr. Gosiger thanked everyone for the great job they have done in researching this matter. Ms. McGrory stated that the Commissioners may be getting calls from the media and the Commissioners discussed how such calls should be handled.

Announcements

Ms. Hilton reminded the Commissioners that the next meeting will be held on Thursday, April 9<sup>th</sup>.

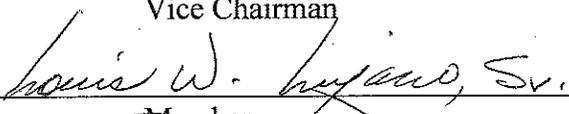
There being no further business to come before the Commission and no public comment, Commissioner Lujano adjourned the meeting at 2:50 p.m.

APPROVED:

THE INDUSTRIAL COMMISSION OF ARIZONA

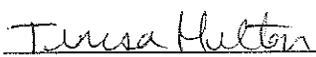
By   
Chairman

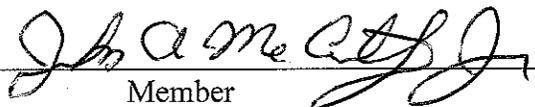
By \_\_\_\_\_  
Vice Chairman

By   
Member

ATTEST:

By \_\_\_\_\_  
Member

  
Commission Secretary

By   
Member