

MINUTES OF MEETING  
OF THE INDUSTRIAL COMMISSION OF ARIZONA  
Held at 800 West Washington Street  
Conference Room 308  
Phoenix, Arizona 85007  
Thursday, March 21, 2019 – 1:00 p.m.

Present:	Dale L. Schultz	Chairman
	Scott P. LeMarr	Commissioner
	Steven J. Krenzel	Commissioner
	James Ashley	Director
	Gaetano Testini	Chief Legal Counsel
	Jason M. Porter	Deputy Director
	Trevor Laky	Legislative Affairs Chief / Public Information Officer
	Renee Pastor	Self Insurance
	Jessie Atencio	ADOSH Director
	Mike Durso	Compliance Officer
	George Hall	Compliance Officer
	Brooks Rogers	Compliance Officer
	Richard Jackson	Compliance Officer
	Charlie Preciado	Compliance Officer
	Kara Dimas	Commission Secretary

Chairman Schultz convened the meeting at 1:00 p.m. Also in attendance were Ian Gage; Manuel H. Cairo (Assistant General Counsel for Midwestern University); Don Cash (SunState Equipment Co.); Tracy Kopp (Premier Risk Management); Steve Richardson (Eagle Rock Excavating); and Michael Fassett (Snell & Wilmer).

Approval of Minutes of March 7, 2019 Regular Meeting.

Commissioner Krenzel moved to approve the Minutes of the March 7, 2019 regular session meeting and Commissioner LeMarr seconded the motion. Chairman Schultz, Commissioner LeMarr and Commissioner Krenzel voted in favor of the motion. The motion passed.

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.

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- a. Approval of Proposed Civil Penalties Against Uninsured Employers.
  1. 2C-18/19-0256 DNT Holdings Group LLC \$1000.00
  2. 2C-LP-18/19-0247 Twilight Tree & Landscape Services \$1000.00
- b. Approval of Requests for Renewal of Self-Insurance Authority.

1. Glendale Elementary School District No. 40
2. Roman Catholic Church Diocese of Tucson

Chairman Schultz noted that the Roman Catholic Church Diocese of Tucson has been working with ADOSH consultation and has made significant improvements in their experience modification factor, providing a safe workplace for their employees.

Commissioner Krenzel moved to approve the items on the Consent Agenda and Commissioner LeMarr seconded the motion. Chairman Schultz, Commissioner LeMarr and Commissioner Krenzel voted in favor of the motion. The motion passed.

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

Chairman Schultz discussed the purpose of and process for the Commission's consideration of the ADOSH informal hearing and ADOSH citations and proposed penalties.

1. I4064 – 1285981 Midwestern University dba Diagnostic Pathology Center
2. I4064 – 1329433 Midwestern University dba Diagnostic Pathology Center

Mr. Atencio noted the first two files were on appeal by a Complainant who did not feel that ADOSH did its job correctly under the policies and procedures. He noted the Commissioners were provided a memorandum regarding the investigations. The first had two complaint items, ADOSH addressed the complaint items and they were not found to be valid. One citation was recommended but was later deleted based on information provided by the employer. The second inspection was done on information received by the complainant to the supervisor and compliance officer. The second complaint included an additional 12 items. All 12 items were not found to be valid and no citations were issued. ADOSH received a CASPA, (Complaint About State Plan Administration) submitted in November by the local federal office with three additional complaint items. In February 2019, the final CASPA results were received. The first allegation stating ADOSH needed to notify employees in a timely manner was found to have merit, the remaining two were not found to have merit, and no recommendation was made by Federal OSHA. ADOSH has provided an action plan to Federal OSHA to prevent the first allegation from happening again. Mr. Atencio stated both inspections were done according to the AZ Field Operations Manual policies and procedures.

Chairman Schultz and Mr. Atencio discussed the CASPA and the plan submitted to comply with the notification issue; Mr. Atencio described the training provided to the supervisors and line inspectors regarding this concern.

Commissioner LeMarr and Mr. Atencio discussed the timeline of the CASPA for notification.

Commissioner LeMarr and Mr. Jackson discussed the standard operating procedure and monitors used for the inspection. They discussed the results and findings of the testing. Per Mr. Jackson the company had several different active monitors in different areas throughout the unit which did not indicate there were any air quality problems. Mr. Atencio noted the ADOSH inspection is a snapshot in time.

Chairman Schultz reviewed the monitoring results which were well below the .75 parts per millions. He noted he appreciated the thoroughness of addressing each of the 12 complaints.

Chairman Schultz invited Mr. Gage to address the Commission and make a statement or answer questions. Mr. Gage provided supplemental information to that which he provided prior to the informal hearing.

Chairman Schultz thanked Mr. Gage for providing the information as it was very extensive and the event timeline was most helpful.

Chairman Schultz and Mr. Gage discussed Mr. Gage's timeline and the times that the safety concerns were reported. Chairman Schultz noted the safety concerns were not addressed going through the timeline and noted the employer response to the safety concerns were implemented for monitoring. Mr. Gage did not receive notice from Midwestern University that things were implemented and noted that during the meeting he was told his concerns were not valid.

Chairman Schultz and Mr. Gage discussed his interactions with the HR Department at Midwestern University.

Mr. Testini advised Mr. Gage on his question about the current process in this setting and noted it is an informal review under R20-5-619 and this was his opportunity to present any evidence outside of what he already provided. Mr. Gage noted he did not bring the recordings and would have brought more. Chairman Schultz noted it is an informal hearing, and about the actual inspection as opposed to a discrimination claim which is a separate action, but wanted to spend a few minutes getting a better feel of what was going on, even though not directly addressing the issue of any discrimination complaint, but the results of the inspection.

Chairman Schultz noted he understands that a lot of the issues were related to the fact that Mr. Gage did not feel safe a work, no matter what reassurances that work gave that the formaldehyde exposures were minimal and not toxic that he still felt unsafe, and that can be a concern for anybody and was seeking if Midwestern was attempting to do things in the workplace to help address the issue of questions or feeling about the fact that he felt unsafe. Chairman Schultz felt the one thing Mr. Gage was missing was corroboration; statements from other employees in the same environment. Chairman Schultz apologized for the delay in response and getting the information to Mr. Gage and glad to hear Mr. Atencio has addressed this and training has been done to make sure those delay do not occur in the future. We try to be transparent and open about what we do, and it is important the public and workers have confidence that we are representing their interest and work hard to make sure that employers provide a very safe environment for employees. The safe environment is based on standards that are established by Federal OSHA and those get to be a baseline in which we have an ability to look at and determine if the inspectors did what they were supposed to do in trying to make sure that those standards were being met by the employers.

Chairman Schultz noted medical care is not within the purview of the Commission to address, and that the decisions of the correctness of the citation and penalty are based upon the findings and not submitted by Midwestern but what the industrial hygienist found in sampling and their decisions on the exposure.

Chairman Schultz reminded the Commissioners of the actions they could take, to either affirm, modify or reverse the determination of ADOSH, to order a re-inspection, or to issue a citation on their own and need to state the reasons for the decision.

Mr. Cairo read a statement noting Midwestern University's position that it provided ADOSH in both inspections unfettered access to its facilities, employees and records to facilitate their own comprehensive investigations and relative findings and conclusions that are before the Commission. The University agrees with those findings and conclusions and maintains that it has otherwise materially complied with all applicable standards and regulations governing safety and health and proud of their efforts at the University. For these reasons, supported by voluminous records that Mr. Gage has not and cannot successfully challenge the University respectfully requests that the Commission present and approve a motion summarily affirming ADOSH's decision.

Commissioner LeMarr noted he had a few questions and asked Mr. Jackson to address Mr. Gage's comments regarding to what and how the testing of the formaldehyde exposure occurred.

Mr. Jackson noted it is a one day snapshot and took samples near the tissue area and did not record any high formaldehyde readings at all. Commissioner LeMarr asked if formaldehyde was being used during testing. Mr. Jackson said it was but it was a diluted solution and low concentration and mounted on a microscope slide. It was being used at the time and was done twice with the same process.

Commissioner LeMarr moved to affirm the determination of ADOSH based on the results of the inspection, demonstrating the environment seemed to be in compliance. Commissioner Krenzle seconded the motion. Chairman Schultz, Commissioner LeMarr and Commissioner Krenzle voted in favor of the motion. The motion passed.

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.

1. I4064 – 1285981 Midwestern University dba Diagnostic Pathology Center
2. I4064 – 1329433 Midwestern University dba Diagnostic Pathology Center

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

Eagle Rock Excavating, L.L.C. 4750 N La Cholla Blvd. Tucson, AZ 85705	Fatality/Accident Years in Business: 16 Empl. Covered by inspection: 8
Site Location: Alvernon Way and Benson Hwy. Tucson, AZ 85706	
Inspection No: E5149 - 1350494	
Inspection Date: 9/27/2018	

SERIOUS – Citation 1 - Item 1 –

- a) Alvernon and Benson Hwy., Tucson, Arizona: A John Deere grader, model #672GP and serial number unknown, was placed in service without defects corrected. 29 CFR 1926.601(b)(14)
 

Div. Proposal - \$7,000.00	Formula Amt. - \$4,900.00
<b>TOTAL PENALTY - \$7,000.00</b>	<b>TOTAL FORMULA AMT. - \$4,900.00</b>

Mr. Atencio discussed ADOSH's investigation, summarized the citation and proposed penalties.

Chairman Schultz and Mr. Atencio discussed the type of communication being used by the employees, also noting the mirror was broken or missing multiple times.

Commissioner LeMarr, Mr. Hall and Mr. Atencio discussed the photographs and discussed whether the rear camera was working.

Commissioner Krenzel and Mr. Atencio discussed the safety program and if there was anything regarding an idle policy or until a defect is corrected. Mr. Atencio reviewed the employer's general rules in the policy that would apply and that it would have been a supervisor's responsibility to take it out of service. Mr. Atencio noted that ADOSH referred back to the owner's manual.

Commissioner LeMarr noted it is an avoidable fatality.

Chairman Schultz noted the medical examiner's report indicated the victim tested positive for illicit substances and there were a significant number, and discussed with Mr. Hall and Mr. Atencio if there was evidence that this person should have been removed for the job site. Mr. Atencio noted the vehicle did not have a working mirror and if it was not this individual it could have been someone else.

Commissioner LeMarr and Mr. Atencio discussed if there was a drug testing policy.

Mr. Richardson noted they are very sad by the loss, she was an employee on numerous occasions and valued member of the team. He noted the degree of emphasis of relevance on the mirror which is misleading because the mirror was not a functional part of the event. His investigation noted the operator was not looking at the mirror and did not use the mirror for direction or control of the vehicle. The operator was looking over his shoulder and referenced earlier there was a roller onsite and was watching the roller to prevent a conflict. What is not clear in the statements is a hub (small wooden block) that had been taken out by the blade had to be replaced. The victim contacted the operator and told him a hub was missing and she went to get one. Historically she always told the operator that she was in the area, and believed she did not do that.

Commissioner LeMarr and Mr. Richardson discussed the company drug testing policy and the changes being made.

Commissioner LeMarr and Mr. Atencio discussed positive test result and if it was taken into account when looking at the citation, and the emphasis on the mirror and what it should be in the operator's manual. Mr. Atencio confirmed that the operator would turn around and not rely on anything else, however with a mirror the vision field is greater. Mr. Atencio and Mr. Hall noted there was no information from other employees about any erratic behavior.

Commissioner Krenzel moved to approve the citation and proposed penalties as presented. Commissioner LeMarr provided a reluctant second, noting having been a contractor with multiple employees and always knowing a robust drug screen process protects the employer from a variety of different mishaps and it sounds like Eagle Rock Excavating did have a program and suspect that the employee being impaired or under the influence probably contributed to this incident. However not having all of the safety equipment in working order is a problem. Chairman Schultz, Commissioner LeMarr and Commissioner Krenzel, voted in favor of the motion. The motion passed.

Sunstate Equipment Co., LLC  
5552 E Washington St.  
Phoenix, AZ 85034

Fatality/Accident  
Years in Business: 41  
Empl. Covered by inspection: 1

Site Location: 2525 N 27<sup>th</sup> Ave  
Phoenix, AZ 85009  
Inspection No: T1999 - 1351057  
Inspection Date: 10/3/19

SERIOUS – Citation 1 - Item 1 –

- a) 2525 N 27<sup>th</sup> Avenue, Phoenix, AZ, 85009: An employee used a hydraulic bottle neck jack, brand, model, and serial numbers unknown, without the load rating identified. 29 CFR 1910.224(a)(1)(ii)  
Div. Proposal - \$1,350.00 Formula Amt. - \$1,350.00

SERIOUS – Citation 1 - Item 2 –

- a) 2525 N 27<sup>th</sup> Avenue, Phoenix, AZ, 85009: The employer did not develop and implement procedures for controlling of hazardous energy while servicing equipment. 29 CFR 1910.147(c)(4)(ii)  
Div. Proposal - \$1,350.00 Formula Amt. - \$1,350.00  
TOTAL PENALTY - \$2,700.00 TOTAL FORMULA AMT. - \$2,700.00

Mr. Atencio discussed ADOSH’s investigation, summarized the citation and proposed penalty, and reviewed the photographs. Mr. Atencio noted the difficulty obtaining a report from the medical examiner to ascertain the cause of death.

Commissioner Krenzel noted the date of the inspection should be listed as 10/3/2018, and not 10/3/2019.

Mr. Cash commented that Mr. Atencio alluded to the fact that the lock out/tag out deficiency caused or is related to what may or may not have happened. He would like to make sure for the record that it is clear that neither of the citations had any causal relationship to what may or may not have happened. Mr. Atencio stated that the two citations are not directly related to any cause of the victim’s fatality or accident that took place.

Mr. Cash noted he is deeply concerned about what happened and can only imagine what the family is going through, and everyone involved is very frustrated with the medical examiner and their lack of response to this incident. All parties concerned just want the medical examiner to provide a report. He noted he has only been involved on the peripheral of the case and fairly involved and not sure if he agrees with the third party medical examiners results about a crushing injury and would like the county medical examiner to tell us what happened. They are more concerned about the victim and his family than the citation OSHA may choose to apply. He noted in 21 years they have only had one citation and asked about the gravity based penalty of a lesser/lesser citation.

Commissioner LeMarr moved to approve the citation and proposed penalties as presented and Commissioner Krenzel seconded the motion. Chairman Schultz, Commissioner LeMarr and Commissioner Krenzel voted in favor of the motion. The motion passed.

Mr. Atencio requested a short recess at 2:23.



Discussion, Action, and Potential Resolution regarding Proposed Rulemaking to A.A.C. R20-5-601, R20-5-602, and R20-5-629 to adopt the revised Federal Occupational Safety and Health standards included in the following OSHA Final Rules:

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1. Tracking of Workplace Injuries and Illnesses
2. Cranes and Derricks in Construction: Operator Qualification
3. Revising the Beryllium Standard for General Industry

Mr. Testini noted this item includes three different amendments, 601 and 629 are seeking to amend based on staying in compliance with Federal OSHA rules which make the state adopt changes within six months of the effective date of the new standards. For 602 we are not required to adopt although it is complementary to a prior rule which we are in the process of adopting, the first Beryllium standard change. He reviewed the proposed changes to the rule noting the rule changes would be less burdensome on the employer.

Chairman Schultz and Mr. Testini discussed the language on the Resolution and the next step for rulemaking.

Chairman Schultz made a motion for the Legal Division of the Commission to initiate rulemaking consistent with the attached proposed amendments to R20-5-601, 602 and 629 by seeking approval from the office of the Arizona Governor pursuant to executive Order 2019-01. Commissioner LeMarr seconded the motion. Chairman Schultz, Commissioner LeMarr and Commissioner Krenzel, voted in favor of the motion. The motion passed.

Discussion and/or Action regarding Proposed Settlement and Bond Release with American Home Assurance Company related to Great State Insurance Company (Bond No. 180532).

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Mr. Porter noted the bond release is under negotiation and confidential and if the Commission would like to discuss the specific monetary amounts we would have to go into executive session. He summarized this item and provided background on the Great State Insurance Company and bond with American Home Assurance Company that would cover a two year period. On June 30, 2015 the responsibility for benefits shifted to the Arizona Guarantee Fund at the Department of Insurance. There is a pending liquidation ongoing in California for Great State and both the Industrial Commission and Guarantee Fund have submitted claims related to the liabilities that have been paid by both groups since the insolvency. The California liquidator is wrapping up the insolvency and how much it will pay the Special Fund and Guarantee Fund for the remaining liability. The Special Fund has negotiated a settlement and the money will be placed into an escrow account jointly with the Special Fund and the Guarantee Fund subject to continuing discussions about who has what claim to what money and dividing the money, and allow the insolvency of Great States to close. Mr. Porter has already presented to the Special Fund Investment Committee and the Committee has authorized Mr. Ashley to sign on their behalf.

Commissioner LeMarr and Mr. Porter discussed the number of cases that would still be active.

Commissioner Krenzel made a motion to approve the Settlement Agreement and Bond Release, and to authorize Mr. Ashley to execute the settlement documents on behalf of the Commission. Commissioner LeMarr seconded the motion. Chairman Schultz, Commissioner LeMarr and Commissioner Krenzel, voted in favor of the motion. The motion passed.



Executive Session under A.R.S. § 38-431.03(A)(3) & (A)(4) regarding Proposed Settlement and Bond Release with American Home Assurance Company related to Great State Insurance Company (Bond No. 180532).

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This item was provisional. There was no need for an executive session.

Announcements, Scheduling of Future Meetings and Retirement Resolutions.

Mr. Ashley noted the ICA Day at the Capital on March 27, 2019 and pleased that the Commissioners will be there, and will have roles for everyone to recognize partners in safety. Senate President Karen Fann will be the keynote speaker.

Mr. Ashley noted the trip to Douglas will be postponed from May until September. In September they will be opening a new Port of Entry and this will be a more appropriate time to meet in Douglas. The second quarter will be planned for a different location.

Ms. Dimas confirmed Commission meeting dates through May 2019.

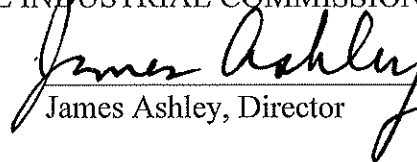
Public Comment.

There was no public comment.

Commissioner LeMarr moved to adjourn and Commissioner Krenzel seconded the motion. Chairman Schultz, Commissioner LeMarr and Commissioner Krenzel voted in favor of the motion and the meeting was adjourned at 2:58 p.m.

THE INDUSTRIAL COMMISSION OF ARIZONA

By

  
James Ashley, Director

ATTEST:

  
Kara Dimas, Commission Secretary