

# THE INDUSTRIAL COMMISSION OF ARIZONA



DALE L. SCHULTZ, CHAIRMAN  
JOSEPH M. HENNELLY, JR., VICE CHAIR  
SCOTT P. LEMARR, MEMBER  
ROBIN S. ORCHARD, MEMBER  
STEVEN J. KRENZEL, MEMBER

P.O. Box 19070  
Phoenix, Arizona 85005-9070

JAMES ASHLEY, DIRECTOR  
PHONE: (602) 542-4411  
FAX: (602) 542-7889

August 8, 2017

T. Zachary Barnett  
Area Director, Phoenix Area Office  
Occupational Safety and Health Administration  
230 N. 1<sup>st</sup> Avenue, Suite 202  
Phoenix, AZ 85003

Re: *Industrial Commission of Arizona Response to May 4, 2017 CASPA Findings and Recommendations (CASPA 2017 AZ 34)*

Dear Mr. Barnett:

I write in response to the Occupational Safety and Health Administration's ("OSHA") May 4, 2017 letter, which sets forth findings and recommendations related to CASPA 2017 AZ 34. For the reasons set forth below, the Commission respectfully disagrees with OSHA's findings.

First, the Commission is legally authorized to adjust penalties proposed by the Arizona Division of Occupational Safety and Health ("ADOSH") upward or downward and it is not constrained by the formula-based methodology in the ADOSH Field Operations Manual ("FOM"). The Arizona Legislature established the criteria *the Commission* is required to consider in performing its statutory duty: (1) gravity of the violation; (2) size of the employer; (3) good faith; and (4) history of previous violations. *See* A.R.S. § 23-418(I). As the Commission stated in its February 9, 2017 letter to OSHA, it is these long-standing criteria that guide the Commission's actions.

Second, the Commission strongly disagrees with OSHA's suggestion that it is "operating outside of its legal authority by reclassifying violations." As you know, the Arizona Legislature granted the Commission broad authority to exercise *all powers* necessary to carry out the duties and requirements of the governing occupational safety and health statutes. *See* A.R.S. § 23-405(6). Under this statutory framework, the Commission has the legal authority to reclassify proposed citations in appropriate circumstances. The Commission nonetheless recognizes that its role in reclassifying proposed violations has not been specifically addressed in previous state plan documents or other OSHA submissions. As a result, the Commission will refrain from reclassifying proposed violations until such time that the issue has been addressed in approved state plan documents.

## A. *Commission Authority for Adjusting Proposed Penalties*

The unique role of the Commission in setting penalties for violations of Arizona's safety and health standards was established by the Arizona Legislature as an underpinning of the Arizona State Plan.

The Legislature specifically granted *the Commission* the authority to assess penalties. See A.R.S. § 23-418(I). Under the terms of § 23-418(I), the Commission is to assess penalties after “giving due consideration” to the following criteria: (1) the gravity of the violation; (2) the size of the employer; (3) good faith of the employer; and (4) the history of previous violations.<sup>1</sup>

The statutory role of the Commission was recognized by OSHA during the approval of the Arizona State Plan. As you know, Arizona’s State Plan received initial approval from OSHA on November 5, 1974 (39 Fed. Reg. 39,037). The State Plan received Certification on September 18, 1981 (46 Fed. Reg. 46,322) and Final Approval under Section 18(e) of the Occupational Safety and Health Act of 1970 (“OSH Act”) on June 20, 1985 (50 Fed. Reg. 25,561).

In the years preceding final approval, there were discussions between OSHA and the State of Arizona regarding the Commission’s role in the citation and penalty process. On April 15, 1980, OSHA sent Larry Etchechury, then Director of ADOSH, questions regarding whether the Commission was using criteria outside of the ADOSH FOM to assess penalties. On February 12, 1981, Mr. Etchechury clarified the approach used by the Commission to assess civil penalties:

The State Legislature was explicit in their intent to provide a checks and balance system to avoid potential abuse with respect to penalties issued by the State of Arizona. In Arizona Revised Statute §23-418(i), the State Legislature explicitly required that the Commission assess all civil penalties, giving due consideration to gravity, number of employees, good faith of the employer and history of previous violations.

The Industrial Commissions, in my opinion, have carried their statutory burden in an extremely professional and unbiased manner. I cannot recall a case where the formula-based penalty was reduced without a factual showing of good faith on the part of the employer, in attempting to comply with the Arizona Occupational Safety and Health Act.

Letter from Etchechury to Compton, February 12, 1981 (Exhibit 1). After review of Mr. Etchechury’s letter, OSHA “determined [that] it sufficiently explain[ed] the ICA’s role in penalty assessment” and recommended approval. Internal OSHA Memoranda (Exhibit 2).

---

<sup>1</sup> The language adopted in A.R.S. § 23-418(I) is virtually identical to language adopted by Congress in the Occupational Safety and Health Act of 1970, which gave the Occupational Safety and Health Review Commission (“OSHA Review Commission”) the statutory authority to assess civil penalties after considering the same four factors. In other words, just like the Arizona Legislature’s grant of authority to the ICA, Congress granted the OSHA Review Commission the sole power to assess penalties. Notably, the OSHA Review Commission is not – and has never been – bound by the OSHA FOM in assessing penalties. Instead, like the ICA, the OSHA Review Commission applies its own interpretation of the criteria on a case-by-case basis. The ICA has the same statutory discretion, although it acknowledges that its interpretation and application of the criteria must result in enforcement of the State Plan that is “as effective as” OSHA.

In a June 1984 letter to Mr. Etchechury, OSHA reiterated that it did not have any objections with the penalty policy adopted by the State, but sought to have it included in the ADOSH FOM. *See* Letter from Hamilton Fairburn to Etchechury, June 6, 1984 (Exhibit 3). In response, ADOSH added the following language to the Arizona FOM submitted for final program approval:

Note: Section 23-418(I) of the Act specifies that the Commission has the authority to assess all civil penalties. By stated policy, the Commission reviews and approves all penalties issued which are more than \$100. For those penalties of \$100 or less, the Director is the issuing authority. The review of such penalties is conducted in an open meeting before the ICA . . . .

Letter from Etchechury to Russell Swanson, July 11, 1984 (Exhibit 4). At no time did the Commission suggest that its authority to assess penalties be limited to applying the formulaic criteria in the ADOSH FOM and, contrary to your statements in the May 4 letter, OSHA did not require that the Commission be so limited. In fact, in the written correspondence noted above, Mr. Etchechury specifically referenced Commission deviations from the “formula-based penalty” proposed by ADOSH based on the Commission’s consideration of the statutory criteria.

In OSHA’s final approval, OSHA confirmed that Arizona’s law and implementing regulations established legal authority for standards enforcement in terms virtually identical to those under OSHA and that the procedures were “at least as effective” as OSHA. OSHA also found no lack of adherence to all approved procedures. In the *Federal Register* notice announcing final approval, OSHA expressed no concerns regarding the organizational structure of the Commission or the authority of the Commission to assess penalties. *See* 50 Fed. Reg. 25561.

ADOSH’s updated state plan submission in 1992 further supports the Commission’s authority and role in assessing penalties. The 1992 State Plan submission stated:

All citations with penalties in excess of \$200.00 are presented to the Industrial Commissioners for final determination. This is done at their weekly meeting at which time *the Commissioners may agree with the formula penalty or increase, decrease or delete the penalty after review of the pertinent facts.*

1992 Updated State Plan at III-6 (Exhibit 5) (emphasis added). In submitting the Updated State Plan, then ADOSH Director Derek Mullins requested that OSHA contact him with any “areas of concern.” *Id.* As you have confirmed, OSHA has no record of raising any concerns regarding the 1992 Updated State Plan.

Contrary to OSHA’s assertions in the May 4 letter, the historical record strongly supports the Commission’s authority to assess penalties and deviate from the formula-based penalty methodology contained in the ADOSH FOM. This makes sense. Requiring the Commission to follow the formulaic approach set forth in the ADOSH FOM would negate the Commission’s statutory duty to assess appropriate penalties. The Commission would become a “rubber-stamp” for ADOSH’s proposed penalties. This is plainly contrary to the intent of the Arizona Legislature, as Mr. Etchechury stated in his February 12, 1981 letter, and is also contrary to the historical record.

The Commission recognizes that its authority is not unbounded. It must follow the statutory criteria established by the Arizona Legislature and it must act such that the State's enforcement program as a whole remains "as effective as" OSHA. In particular, the Commission recognizes that a state plan must "[p]rovide effective sanctions against employers who violate State standards and orders." 29 C.F.R. 1902.4(c)(2)(xi). OSHA has not suggested that the Commission's actions in reducing penalties in select cases has resulted in an enforcement program that is not "as effective as" OSHA. Nor could it. As the Commission stated in its February 9 letter, *by almost any metric*, the Arizona State Plan is "as effective as," if not more effective than, OSHA:

- According to Bureau of Labor Statistics data, Arizona had 69 workplace fatalities in 2015. The rate per 100,000 workers was 2.4, in comparison to the national rate of 3.4. Arizona's fatality rate for all industries has declined significantly since 2013 from 3.5 to 2.4, while the national rate has increased in the same period from 3.3 to 3.4. Only seven other states had lower fatality rates than Arizona in 2015.
- With respect to the construction industry, Arizona's fatality rate is well below the national rate. In 2015, the national fatality rate per 100,000 workers for the construction industry was 10.1; in comparison, Arizona's rate was 6.3. The national fatality rate in the construction industry is approximately 60% higher than Arizona's rate. Additionally, in 2015 the national fatality rate for the construction industry rose from 9.8 to 10.0, while Arizona's declined from 8.6 to 6.3.
- Regarding non-fatal injuries and illnesses in 2015, Arizona's overall rate for all industries combined is 3.1, which is below the national rate of 3.3 and Arizona's rate has been in near-constant decline over the last decade. Only three state plans had lower industry combined rates in 2015, Virginia, North Carolina, and South Carolina. In comparison to Federal OSHA states, at least nine states had higher rates than Arizona – some of which were significantly higher.
- Finally, Arizona's rate for days away, job transfer or restriction was 1.6, below the national rate of 1.8.

Given this data, it is hard to argue that the Arizona State Plan is not "as effective as" OSHA or that the Commission is not focused on protecting Arizona workers.

The effectiveness of the Arizona State Plan, however, is reflected in more than simply injury and illness metrics. Arizona has adopted a unique approach to addressing workplace safety and health that reflects the State's environment and culture. Arizona combines compliance (including citations and penalties) with partnerships, alliances, and consultation to proactively prevent injuries and illnesses from occurring. It is this combined approach that has resulted in the success of the ADOSH program and injury and illness rates that are below the national average.

By way of example, Arizona's Public Entity Partnership Program ("PEPP") was initiated by the State to focus resources on public sector employers, a segment of the employer population not directly addressed by OSHA. The PEPP program has effectively raised awareness of safety and

health issues in the public sector. OSHA even recognized the effectiveness of the program in the recent Federal Annual Monitoring and Evaluation (“FAME”) Report issued to the State.

Arizona has also focused significant resources on its Voluntary Protection Program (“VPP”) and consultation program. Arizona has a VPP Star Program and a C-VPP Star Program for the construction industry. In the previous federal fiscal year, 40 employers participated in the VPP program, representing over 35,000 employees. All VPP Star sites have an active safety and health management system that proactively identifies and addresses worksite hazards, ensures management commitment to safety and health, and involves employees in the program.

Arizona’s consultation program has also proven extremely effective in addressing worksite safety and health hazards. In the previous federal fiscal year, ADOSH’s consultation arm conducted 409 consultative visits with employers in the State, positively impacting 162,635 workers who are controlled by participating employers. 1,743 hazards were identified during these consultative visits. In addition, on-site safety and health training was provided by the ADOSH consultation program for approximately 500 employees across the State.

The Commission itself is very involved in *all* of ADOSH’s safety and health initiatives. The Commissioners, for example, are active participants in attending and supporting ADOSH outreach projects, reviewing the effectiveness of the initiatives, and suggesting new initiatives for the State to pursue to improve the safety and health of Arizona’s workers. The role of the Commission is not a passive one, limited to simply reviewing ADOSH proposed citations and penalties. The Commission is actively engaged in the safety and health efforts of the State and ADOSH and is committed to ensuring that all tools are used within the State to protect Arizona workers.

The Commission appreciates OSHA’s concern regarding the operations of the Arizona State Plan and the Commission’s role in assessing penalties. However, the Commission’s authority to revise, amend, or delete penalties is clear and has been accepted by OSHA for over three decades. The Commission’s authority is not constrained by the ADOSH FOM, but is guided by prescribed statutory criteria and the “as effective as” requirement in the OSH Act. The Commission does, and will continue to, take seriously its obligation to appropriately assess penalties to employers who place Arizona’s workers in harm’s way.

#### B. *Commission Authority for Reclassifying Proposed Violations*

The Commission strongly disagrees with OSHA’s suggestion that it lacks the legal authority to reclassify proposed violations. The Arizona Legislature broadly granted the Commission the authority to “[e]xercise . . . powers as are necessary to carry out the duties and requirements of the [occupational safety and health statutes].” A.R.S. § 23-405. Furthermore, ADOSH reports to the Commission and the Director of ADOSH is appointed by and serves at the pleasure of the Commission. OSHA recognized the Commission’s broad authority as early as 1974 in the *Federal Register* initial approval notice:

The Plan includes legislation enacted by the Arizona Legislature during its 1974 legislative session amending Title 23, Article 10 of the Arizona Revised Statutes . . . Under the legislation the Industrial Commission will have *full authority* to

Mr. T. Zachary Barnett  
August 8, 2017  
Page 6

enforce and administer laws respecting the safety and health of employees in all workplaces of the State.

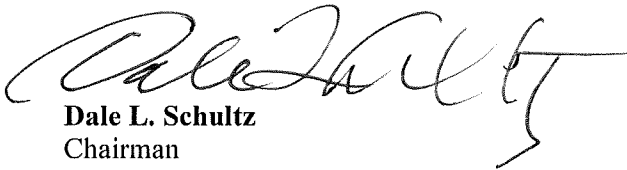
(Emphasis added.)

This “full authority” unquestionably includes the power to review and ensure proper classification of proposed violations. *See also* 50 Fed. Reg. at 25562 (“The Industrial Commission of Arizona is designated as having responsibility for administering the plan throughout the State.”). The design of the statutory scheme, which has long been approved by OSHA, provides the Commission the legal authority to ensure that ADOSH carries out the duties and requirements of Arizona’s occupational safety and health laws, including in the issuance of citations.

The Commission nonetheless recognizes that its role in reclassifying proposed violations has not been specifically addressed in previous state plan documents or other OSHA submissions. As a result, notwithstanding the broad authority granted to the Commission, the Commission will refrain from reclassifying proposed citations until such time that the issue has been addressed in approved state plan documents. The Commission may, however, request that ADOSH re-examine its determination of particular violations before issuance (*i.e.*, “remand” for further review) in appropriate cases.

The Commission is fully committed to protecting the safety and health of Arizona workers and ensuring that Arizona’s State Plan remains “as effective as” OSHA. Working with ADOSH, the Commission has implemented a robust and comprehensive approach to fulfilling the mandate given it by the Arizona State Legislature. We trust that this response resolves any remaining concerns regarding the role of the Commission in the citation and penalty process and closes CASPA 2017 AZ 34. We look forward to continuing our partnership with OSHA to advance workplace safety and health in Arizona.

Sincerely,



**Dale L. Schultz**  
Chairman  
Industrial Commission of Arizona

cc: Loren Sweatt, Deputy Assistant Secretary, OSHA  
Doug Kalinowski, Directorate of Cooperative and State Programs, OSHA  
Barbara Goto, Regional Administrator, Region IX, OSHA  
Vice Chair Joseph Hennelly, ICA Commissioner  
Scott LeMarr, ICA Commissioner  
Robin Orchard, ICA Commissioner  
Steve Krenzel, ICA Commissioner  
James Ashley, ICA Director  
Jason Porter, ICA Chief Legal Counsel  
William Warren, ADOSH Director