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ARGUMENT

Wages from concurrent dissimilar employment should not be included in the computation of one's Average Weekly Wage ("AWW") unless special circumstances warrant inclusion. Appellee Christopher Roper ("Roper") has not demonstrated special circumstances warranting an upward adjustment of his AWW. Moreover, there is no statutory authority to adjust Roper's Full Weekly Wage (FWW") based upon these facts. Accordingly, FedEx Ground respectfully submits that the Industrial Commission should be directed to vacate its June 29, 2009 Order adjusting Roper's AWW and FWW.

Appellees' proposition that wages from dissimilar concurrent employment should automatically be included in one's AWW, without examining the nature of the concurrent employment or whether an employee is able to continue to perform the concurrent employment, ignores both the historical and practical application of the "special circumstances" language set forth in R.C. 4123.61 and this Court's holding in *State ex rel. Smith v. Indus. Comm.* (1933), 127 Ohio St. 217. Likewise, the Industrial Commission's reliance upon a Bureau of Workers' Compensation policy that was not subject to formal rule making procedures commands little attention because it directly conflicts with legislative command. Appellee Roper's contention that this case is an attempt to relitigate the question of whether he should have received temporary total disability compensation ("TTC") in the first instance, is likewise unsupported by the record. This case is not about TTC or whether Roper should have received TTC. This case is about whether Roper's earnings from concurrent but dissimilar employment should have been included in his AWW, absent a showing of special circumstances.

Appellees declined to address whether special circumstances warranted the upward adjustment of Roper's AWW. Rather, they contend that the question of special circumstances need not be reached because R.C. 4123.61 requires wages from dissimilar concurrent

employment to *automatically* be included in one's AWW calculation. Significantly, neither party explains why, if the language is as "clear" as they believe, the Industrial Commission and the appellate court interpreted it quite differently in *Lipsky v. Barry* (Dec. 11, 1990), Franklin App. No. 90AO-07, 1990 Ohio App. LEXIS 5538 (issuing a writ of mandamus and ordering the Commission to consider whether wages from concurrent *similar* employment should be included in the AWW calculation based upon "special circumstances") or why the Industrial Commission hearing officers in the administrative proceedings below reached the issue of special circumstances. Neither appellee has presented case law in support of their position, which the Industrial Commission concedes is "imprecise." (I.C. Brief, p. 11).

Appellees also ignore the plain language of R.C. 4123.61, which limits the circumstances under which FWW can be adjusted. Instead, appellees contend, without offering statutory authority or the support of case law, that the Industrial Commission has discretion to calculate and adjust FWW.

If accepted by this Court, appellees' arguments would not only disregard legislative intent and statutory directives, but would also undermine the risk based system of workers' compensation insurance. Accordingly, FedEx Ground respectfully requests that this Court adopt the propositions of law set forth in its merit brief and issue a writ of mandamus directing the Industrial Commission to vacate its June 29, 2007 order.

A. Proposition of Law No. I: Wages from concurrent dissimilar employment should not be included in the computation of one's Average Weekly Wage unless special circumstances warrant inclusion.

1. *Smith* and the "special circumstances" rule must be read in conjunction with one another.

This Court's holding in *Smith v. Indus. Comm.* (1933), 127 Ohio St. 217 should be read in conjunction with R.C. 4123.61 and the "special circumstances" provision contained therein.

Appellees suggest that the 1937 amendment to General Code Section 1465-84 (the predecessor to R.C. 4123.61) and specifically, the addition of the term “for the year preceding the injury” overruled *Smith*. Appellees’ argument is erroneous because “for the year preceding the injury” was added to address the appropriate “look back” period for calculating AWW – not to overrule *Smith*.

If this Court is inclined to agree with appellees’ interpretation of the 1937 amendment, then no further inquiry is necessary and FedEx Ground’s request for a writ should be denied. But if instead, this Court agrees that “for the year preceding the injury” was added to establish a definitive “look back” period, then *Smith* is still good law and wages from concurrent dissimilar employment should only be included in one’s AWW upon a showing of “special circumstances.”

In the 1933 *Smith* case, when this Court first interpreted the term “average weekly wage,” General Code Section 1465-84 stated as follows:

The average weekly wage of the injured person at the time of the injury shall be taken as the basis upon which to compute benefits.

This Court examined G.C. 1465-84 again in 1934; this time, in an effort to determine the appropriate number of weeks to use when calculating one’s AWW. In *ex rel. State ex rel. Kildow v. Indus. Comm.* (1934), 128 Ohio St. 573, the phrase “at the time of the injury” was interpreted to mean the shortest possible time immediately prior to the injury. Examining specific time periods for calculating AWW, the Court questioned, “[m]ust you go back one week, two weeks, six weeks or six months in order to determine ‘average weekly wage...?’” Ultimately, the Court held that four weeks was likely the shortest practical time within which an appropriate AWW could be ascertained. *Id.*

The issue of a “look back” period arose again in 1936 when the Court again examined G.C. 1465-84. In *State ex Brownell v. Indus. Comm.* (1936), 131 Ohio St. 124, the Industrial

Commission used a period of ten weeks immediately preceding the injury to calculate AWW. Relator complained that ten weeks did not adequately reflect his earnings and argued that the entire year preceding the injury should have been used. The Court denied relator's request for a writ. *Id.*

The issue of the appropriate "look back" period arose again in *State ex rel. Boris v. Indus. Comm.* (Franklin Co. 1938), 1938 Ohio Misc. LEXIS 948, 28 Ohio L. Abs. 244 (interpreting the 1933 version of G.C. 1465-84). In *Boris*, the Industrial Commission used a period of 20 2/7 weeks to calculate relator's AWW. After a lengthy discussion of the appropriate time period to be used, the court ultimately declined to decide the issue, instead finding that relator's ten year lapse before seeking a writ of mandamus warranted denial. *Id.*

In 1937, in response to the confusion about the appropriate "look back" period, the General Assembly amended G.C. Section 1465-84 to state as follows:

In death claims, permanent total disability claims, permanent partial disability claims and claims for impairment of earnings, the claimant's or the decedent's average weekly wage *for the year preceding the injury* shall be the weekly wage upon which compensation shall be based. In ascertaining the average weekly wage for the year previous to the injury, any period of unemployment due to sickness, industrial depression, strike or lockout, shall be eliminated.

117 Laws of Ohio 252. (Emphasis added).

There is no foundation for appellees' suggestion that "for the year preceding the injury" was intended to overrule *Smith*. Rather, the case law rendered prior to the 1937 amendment indicates that "for the year preceding the injury" was added in direct response to the courts' difficulties with the previously undefined "look back" period. See also *Fulton*, Ohio Workers' Compensation Law, 2d ed. (suggesting that "for the year preceding the injury" was added to lengthen the time used for computing AWW). There is no indication in case law, legislative

history, or workers' compensation commentary that the addition of "for the year preceding the injury" bore any relation to the *Smith* case.

Contrary to other cases decided pursuant to G.C. 1465-84, the Court in *Smith* did not address a "look back" period but instead, addressed the very limited issue of *contemporaneous dissimilar* employment. In addition to the language discussed above, the 1937 amendment contained the following addition:

In cases where there are special circumstances under which the average weekly wage cannot justly be determined by applying the above provisions the commission, in determining the average weekly wage, in such cases, shall use such method as will enable it to do substantial justice to claimants.

117 Ohio Laws 253. Both courts and commentators have suggested that this language was added to lessen the impact of the *Smith* case:

We also note that *R.C. 4123.61* (formerly GC § 1465-84) was amended only four years after the *Smith* decision was released. At that time, the Legislature inserted the final paragraph in the current statute which directs the commission to calculate the average weekly wage by any means which will enable it to do substantial justice to the claimant when special circumstances exist. At least one commentator is of the opinion that the amendment was intended to correct the harsh impact of the *Smith* case. Young, *Workmen's Compensation Law of Ohio* (1971) 127, § 74.4.

Lipsky v. Barry, Adm'r, Franklin App. No. 90AP-07, 1990 Ohio App. LEXIS 5538, at *7; see also *Clark v. Searpelli* (2001), 91 Ohio St.3d 271, 278 (the General Assembly is presumed to be fully aware of any prior judicial interpretation of an existing statute when enacting an amendment). Thus, the history of the 1937 amendment demonstrates that the General Assembly added the "special circumstances" language to address situations where, absent such special circumstances, wages from concurrent dissimilar employment might otherwise be excluded.

In summary, appellees' argument that "for the year preceding the injury" was added to overrule *Smith* is neither supported by the precise language of the amendment nor the history of

cases interpreting of G.C. 1465-84. Thus, because the purpose of “for the year preceding the injury” was to define a specific “look back” period – and not to overrule *Smith –Smith* and the “special circumstances” provision of R.C. 4123.61 must both be given meaning.

2. The reasoning enunciated by this Court in *Smith* remains sound.

The AWW must do substantial justice to a claimant, without providing a windfall. *State ex rel. Wireman v. Indus. Comm.* (1990), 49 Ohio St.3d 286. This basic tenet of workers’ compensation law is incorporated into the General Assembly’s flexible approach to calculating AWW, as illustrated by the scenarios set forth in FedEx Ground’s merit brief. Conversely, the “automatic inclusion” rule advanced by appellees is contrary to the General Assembly’s intent and is, by the Industrial Commission’s own admission, imprecise. (Indus. Comm. Br. p. 11).

Significantly, appellee Roper has not addressed the illustrations contained in FedEx Ground’s brief or otherwise addressed the “similar employment” rule. This declination suggests that Roper agrees with the illustrations and the reasoning behind the “similar employment” rule.¹ Likewise, the Industrial Commission concedes that the “automatic inclusion rule” which it seeks to advance “cannot always maintain precision.” (Indus. Comm. p. 11).

Appellee Industrial Commission disregards the risk based nature of the workers’ compensation system and ignores both statutory and case law when it erroneously asserts that the scenarios are “applicable only if the employer is self-insured for purposes of workers’ compensation.” (Indus. Comm. p. 10). Notably absent from appellee’s brief is any discussion regarding R.C. 4123.29 and the legislative mandate contained therein requiring the assessment of

¹ Roper’s position in this Court is contrary to the position he took during the administrative process and in the Court of Appeals. Specifically, during the administrative proceedings, Roper argued that special circumstances warranted an upward adjustment of his AWW. Similarly, in the Appellate Court, Roper agreed that his wages from concurrent dissimilar employment could only be included upon a showing of special circumstances.

premiums based upon two factors: (1) an employer's payroll and (2) the degree of hazard associated with the particular employer's employment. The "automatic inclusion" rule advanced by appellees disregards this directive because it incorporates a third factor by requiring employers to insure against employment over which they have no control.

Moreover, R.C. 4123.29 provides that if an employer's payroll is not sufficient to cover the claims of its injured workers, the commission may determine the premium rates on another basis which is consistent with insurance principles. R.C. 4123.29. "The workers' compensation fund is calculated to be a solvent state insurance fund.... To ensure solvency, *premiums should be collected on the same basis as that used for claims paid.*" *Hiram House v. Indus. Comm.* (1987), 42 Ohio App.3d 29, 34, 536 N.E.2d 36. (Emphasis added). Thus, workers' compensation insurance is no different than any other type of insurance – if there is an increase in claims paid, so too will there be an increase in premiums. Accordingly, the Industrial Commission's proposition that state funded employers may not be as affected by the manner in which AWW is computed is simply wrong. State funded employers' premiums are directly affected by the amount of claims paid and as a result, state funded employers will (like self-insured employers) be detrimentally affected by the "automatic inclusion" rule advanced by appellees. In any event, the Industrial Commission concedes the unfairness of the proposed "automatic inclusion rule" to self insured employers. (*Indus. Comm. Br.*, pp. 11-12) (suggesting that FedEx Ground is not required to be self insured).

Additionally, appellee Industrial Commission contends that the flexible approach to calculating AWW is flawed because, under certain circumstances, concurrent wages may be included in the calculation of one's AWW if the concurrent employment is similar. FedEx Ground acknowledges that there may be certain circumstances under which an employer is

required to pay a premium disproportionate to its risk (or in the case of a self-insured employer, disability compensation disproportionate to its risk). However, this is the nature of the “similar employment rule,” which reasonably assumes that an injured worker who is disabled from one job would be similarly disabled from performing a similar job. Contrary to the “automatic inclusion” rule, the more flexible approach established by the General Assembly satisfies the objectives of the AWW as articulated in *State ex rel. Wireman v. Indus. Comm.* (1990), 49 Ohio St. 3d 286 because it achieves substantial justice without providing a windfall.

Finally, although the Industrial Commission acknowledges that the “similar employment” rule is followed by a majority of jurisdictions, it urges the Court to rely upon Professor Larson’s criticism of the rule. Professor Larson’s commentary should be disregarded because (1) he is not interpreting or otherwise discussing R.C. 4123.61, but rather, is discussing the general concept of the rule; and (2) he is advocating a position that has specifically been disregarded by this Court and by Ohio’s General Assembly.²

In summary, this Court’s holding in *Smith*, which incorporates the “similar employment” rule, achieves the basic function of the AWW because it provides the claimant with substantial justice without creating a windfall.

3. Appellees have not articulated any legitimate reason for their contention that *Smith* was overruled.

Appellees contend that giving effect to *Smith* would require the Court to read into the statute words which are not otherwise there. (Industrial Comm. Br., p. 9; Roper Br. p. 7).

² Additionally, the Industrial Commission’s insistence on “deference” commands little attention because its interpretation of the standard calculation for computing AWW has changed. See *Lipsky v. Barry* (Dec. 11, 1990), Franklin App. No. 90AO-07, 1990 Ohio App. LEXIS 5538 (during the administrative process, the Industrial commission excluded wages from concurrent employment). The Industrial Commission has advanced no reason why its current interpretation should be given more weight than its previous contrary interpretations. In any event, its current interpretation is inconsistent with legislative command.

Specifically, they suggest the computation of AWW would be restricted to wages earned from the employer of record and that wages earned from previous employers, even if earned during the year preceding the injury, would be excluded. This argument is not only unjustifiable, but was not advocated by FedEx Ground. This Court's holding in *Smith* was limited to the very narrow issue of whether contemporaneous dissimilar employment should be included in one's AWW. The question of whether dissimilar previous employment should be included in one's AWW was not before the Court. Accordingly, appellees' argument is without merit. Further, given the 1937 amendment, wages from one's concurrent but dissimilar employment may be included in one's AWW, but only if "special circumstances" warrant inclusion.

In addition to the argument addressed above, appellees' positions diverge on matters of BWC policy and temporary total disability compensation. Specifically, appellee Industrial Commission relies upon a BWC policy that has not been subjected to formal rule making procedures while appellee Roper inaptly focuses his attention on the matter of compensation. Appellees' positions fail for lack of legal and factual support.

a. The policy upon which the Industrial Commission relies cannot be considered because the BWC did not comply with the appropriate rule making procedures.

Appellee Industrial Commission urges this Court to seek guidance from a Bureau of Workers' Compensation ("BWC") policy that establishes a formula for calculating AWW. (Industrial Comm. Br., pp. 8-9). The BWC policy has never been subject to formal rule making procedures, was not cited in the June 29, 2007 staff order, and is not a part of the stipulated evidence. Therefore, the policy is not properly before the Court.

The policy upon which the Industrial Commission relies provides:

When setting the AWW, include all earnings from all employers for whom the injured worker was employed at the time of injury....

(Industrial Comm. Br. p. 8) (Emphasis added). The purported policy unambiguously adds language and meaning that is not contained in R.C. 4123.61.

The purported policy has not been subject to formal rule making procedures. The purpose of the administrative rule-making process is “to permit a full and fair analysis of the impact and validity of a proposed rule.” *State ex rel. United Auto Aerospace & Agricultural Implement Workers of America v. Ohio Bureau of Workers’ Compensation* (2002), 95 Ohio St. 3d 408, 410 citing *Condee v. Lindley* (1984), 12 Ohio St.3d 90, 93. The process provides “an opportunity for opponents of a proposed regulation to express their views as to the wisdom of the proposal and to present evidence with respect to its illegality.” *State ex. rel. Saunders v. Industrial Commission* (2003), 101 Ohio St.3d 125, 128 citing *Northeast Ohio Regional Sewer Dis. v. Shank* (1991), 58 Ohio St.3d 16, 24.

As an administrative agency of the State, the BWC has a “clear mandatory duty to comply with all statutory provisions before exercising its rule-making power. *In re Appeal from Rules and Regulations of the Div. of Social Administration Department of Public Welfare* (1963), 118 Ohio App. 407, 412. Its failure to do so invalidates any rule or amendment adopted and renders unlawful any discipline/penalty issued pursuant to such rule or amendment. *Id.*; see also *Hyde v. State Medical Board* (1986), 33 Ohio App.3d 309; O.R.C. 119.02.

Here, the BWC’s policy cannot be given effect because it expands upon R.C. 4123.61 and the relevant case law, yet never proceeded through the administrative rule making process. *State ex rel. Saunders v. Industrial Commission*, 101 Ohio St.3d. 125 (an agency’s authority to promulgate policies governing operating procedure and criteria for decision making is limited to providing a kind of employee instruction manual on the duties established by statute, promulgated rules, and case law).

The purported policy was intended to have widespread and uniform application – a hallmark of agency determination that should be addressed by rule-making. *Ohio Hospital Ass. v. Ohio Bureau of Workers' Compensation* (March 30, 2007), Franklin App. No. 06AP-471, 2007-Ohio-1499. To the extent this policy includes wages from concurrent dissimilar employment, it directs employers to pay AWW in a manner much broader than that contemplated by R.C. 4123.61 and in direct contravention of *Smith*. Accordingly, because the BWC did not provide the public with an opportunity to present evidence with respect to the legality of the policy, the purported policy is invalid.

Even if the purported policy were legitimate, it has no legal force and cannot serve as binding authority. *Ohio Hospital Association v. Ohio Bureau of Workers' Compensation*, Franklin App. No. 06AP-471 (“[p]olicy guidelines do not establish any binding rules,’ but are merely ‘general policy statements *with no legal force.*’”)(Emphasis added) (Citations omitted). Based on the foregoing, the BWC policy upon which the Industrial Commission urges this Court to rely should not be given effect.

b. Roper’s contentions lack a factual basis.

Roper incorrectly asserts that the question of whether he was disabled from working at both jobs was litigated during the administrative proceedings. To that extent, he contends that this case is an attempt to re-litigate whether he should have received temporary total disability compensation (“TTC”) in the first instance. Appellee Roper is wrong on both accounts.

Significantly, appellee Roper’s “backdoor” argument, contained in Section 3 of his brief, was raised for the first time in this Court. It is a well established principle of law that an appellate court will not address arguments that were not raised in the proceedings below. *Kalish v. Trans World Airlines, Inc.* (1977), 50 Ohio St.2d 73. Accordingly, because Roper did not

raise his “backdoor” argument in the appellate court, that argument should not be considered here. Nevertheless, it is addressed below.

Roper argues that because FedEx Ground voluntarily paid him TTC, “it is uncontested that the work injury temporarily totally disabled Claimant/Appellee from his employment with *both*” jobs. (Roper Br., p. 8, 9). Roper’s contention is not supported by the record evidence.

FedEx Ground voluntarily began paying Roper TTC (based upon his earnings from FedEx Ground) in January of 2007 when it could no longer accommodate his restrictions. There is no record evidence that FedEx Ground had knowledge of Roper’s concurrent dissimilar employment. In fact, the record suggests that FedEx Ground did not learn of Roper’s concurrent dissimilar employment until April of 2007 when Roper filed a motion asking the Industrial Commission to retroactively and prospectively adjust his AWW and FWW. (Supp. 42). Pursuant to Roper’s motion, the issue before the Industrial Commission was whether Roper’s AWW should be adjusted because of his concurrent but dissimilar employment – not whether he should receive TTC. (Supp. 52, 66).

There is no record evidence to support Roper’s contention that the question of whether he was physically disabled from working for Integrated Pest Control was litigated. FedEx Ground did not know of Roper’s employment with Integrated Pest Control until several months after it began paying TTC. Indeed, FedEx Ground concedes that, if the record evidence suggested that Roper was physically unable to work for Integrated Pest Control as a result of the injury he sustained at FedEx Ground, special circumstances may have warranted an upward adjustment of

his AWW. But that is not the case here. Roper's contention that he was physically disabled from working both jobs is simply not supported by the record.³

To that end, Roper argues that FedEx Ground is precluded "from any argument that Appellee is not entitled to receive TTD compensation." (Roper Br., p. 15). The questions before this Court do not concern Roper's entitlement to TTC. As Appellee Industrial Commission aptly stated in its brief:

"[T]his case does not question the propriety of Roper's entitlement to temporary total disability compensation.... Rather, [this] case focuses solely on the Industrial Commission's inclusion of the wages from Integrated in the calculation of the AWW and FWW for this claim."

(Indus. Comm. p. 1) (Emphasis added). Thus, the question here is not whether Roper was entitled to receive TTC but whether the Industrial Commission should have adjusted his AWW absent a showing of special circumstances.

Additionally, Roper cites to *State ex rel. Logan v. Indus. Comm.* (1995), 72 Ohio St.3d 599 and *State ex rel. Powell v. C.R. O'Neil & Co.* (2007), 116 Ohio St. 3d 22; 2007-Ohio-5504, two cases cited by the appellate court and addressed at length in FedEx Ground's merit brief, for the proposition that wages from concurrent dissimilar employment should automatically be included in the calculation of one's AWW. Roper's misinterpretation of these cases mirrors that of the appellate court. Because Roper has not advanced any arguments distinct from those of the appellate court, and because FedEx Ground has already distinguished these cases, it will not do so again. Significantly though, the Industrial Commission presumably agrees with FedEx

³ To the contrary, the record suggests that Roper was physically able to continue working for Integrated Pest Control when he could not perform the tasks of his employment with FedEx Ground. Roper seemingly confuses the question of whether he was physically able to work for Integrated Pest Control with the question of whether he worked for Integrated Pest Control.

Ground's reading of both cases, as it has neither relied upon them in its merit brief or contended that FedEx Ground's reading is inaccurate.

In summary, appellees' entire case rests on the erroneous assumption that the 1937 amendment to G.C. 1465-84, adding "for the year preceding the injury," overruled *Smith*. However, the history of case law leading up to the 1937 amendment dictates a different result; "for the year preceding the injury" was added to define the "look back" period for calculating AWW – not to overrule *Smith*. Rather, the "special circumstances" provision was added in response to *Smith* and thus *Smith* and R.C. 4123.61 must be read in conjunction with one another. This flexible formula for calculating AWW will consistently provide the claimant with substantial justice but will prevent him from attaining a windfall. At the same time, it will maintain the integrity of Ohio's risk based system of insurance, by giving effect to R.C. 4123.29, and because employers will not be forced to automatically bear the risk of employment over which they have no control. For these reasons, FedEx Ground respectfully requests that this Court require a showing of special circumstances before allowing one's AWW to include wages from dissimilar concurrent employment.

4. Roper has not demonstrated special circumstances warranting an upward adjustment of his AWW.

FedEx Ground is entitled to a writ of mandamus because the Industrial Commission abused its discretion when it adjusted Roper's AWW simply based on his part-time employment. As explained in FedEx Ground's merit brief, the record does not reflect the existence of special circumstances and the Industrial Commission failed to conduct the necessary inquiry into the cause of Roper's part-time employment. Because appellees have not argued that special circumstances warrant an upward adjustment, a writ should issue ordering the Industrial Commission to vacate its order.

B. Proposition of Law No. II: FWW can be adjusted only under the limited circumstances set forth in O.R.C. 4123.61.

FedEx Ground is entitled to a writ of mandamus because, pursuant to the facts presented here, R.C. 4123.61 does not provide a mechanism to adjust Roper's FWW. There is no statutory authority to support appellees' argument that the Industrial Commission has unfettered discretion to calculate and adjust FWW or that they may do so in a manner that is inconsistent with R.C. 4123.61.

Appellee Industrial Commission contends that it has discretion to calculate FWW in the manner it deems appropriate; for this proposition, it relies upon a BWC policy that purports to include "all earnings from all employers" in the calculation of one's FWW. The formula contained in the purported policy is much broader than contemplated by statute, which limits the calculation to "the full weekly wage ... at the time of the injury." The term "full weekly wage" is expressed in the singular, which does not suggest that "all earnings from all employers" was contemplated by the General Assembly. Nevertheless, the purported policy is not part of the record, was not relied upon by the hearing officers below, and has never proceeded through the formal rule making process. For the reasons set forth in Section A.3.a. above, the purported policy should not be relied upon and is not binding authority.

Acknowledging the absence of statutory authority permitting the Industrial Commission to adjust one's FWW, appellee Industrial Commission suggests that because it has continuing jurisdiction over workers' compensation matters, it has unfettered discretion to adjust FWW as it deems appropriate. Contrary to the Industrial Commission's contention, neither the concept of continuing jurisdiction nor R.C. 4123.52 provide the Industrial Commission with authority to disregard legislative directives or take action inconsistent with R.C. 4123.61. As explained in FedEx Ground's merit brief, the "special circumstances" provision of R.C. 4123.61 does not

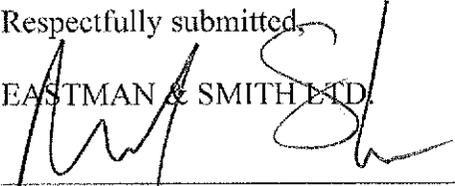
apply to the calculation of FWW. Moreover, the statute explicitly sets forth certain circumstances under which the BWC may adjust FWW and does not otherwise provide the BWC or the Industrial Commission with authority to adjust FWW based upon other factors. Thus, assuming that the BWC and the Industrial Commission have discretion to calculate FWW, such discretion does not entitle them to “read into a statute words that are not contained therein.” *State ex rel. McDulin v. Indus. Comm.* (2000), 89 Ohio St.3d 390 at 392, 2000-Ohio-205. Thus, there is no legal authority for adjusting Roper’s FWW based upon “special circumstances” or otherwise.

CONCLUSION

For the reasons set forth herein and contained in FedEx Ground’s merit brief, FedEx Ground Package Systems, Inc. respectfully requests that this Court issue a writ of mandamus ordering the Industrial Commission to vacate its June 29, 2007 order and to enter a new order denying Roper’s request to adjust his AWW and FWW or, in the alternative, issue a limited writ of mandamus ordering the Industrial Commission to vacate its order, to conduct a further hearing on the matter, and to issue an order which complies in all respects with the requirements of the law.

Respectfully submitted,

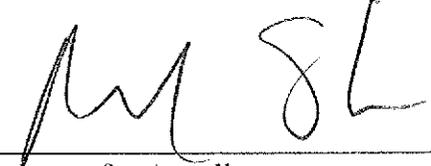
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PROOF OF SERVICE

A copy of the foregoing Reply Brief has been sent by ordinary U.S. Mail this 3rd day of December, 2009 to Theodore Bowman, Esq., 3516 Granite Circle, Toledo, Ohio, 43617, attorney for Appellee Christopher Roper and to Gerald Waterman, Assistant Attorney General, Workers' Compensation Section, 150 E. Gay Street, 22nd Floor, Columbus, Ohio 43215, attorney for Appellee Industrial Commission of Ohio.



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SUPPLEMENTAL APPENDIX

119.02 Compliance - validity of rules.

Every agency authorized by law to adopt, amend, or rescind rules shall comply with the procedure prescribed in sections 119.01 to 119.13, inclusive, of the Revised Code, for the adoption, amendment, or rescission of rules. Unless otherwise specifically provided by law, the failure of any agency to comply with such procedure shall invalidate any rule or amendment adopted, or the rescission of any rule.

Effective Date: 10-01-1953

4123.29 Duties of administrator.

(A) The administrator of workers' compensation, subject to the approval of the bureau of workers' compensation board of directors, shall do all of the following:

(1) Classify occupations or industries with respect to their degree of hazard and determine the risks of the different classes according to the categories the national council on compensation insurance establishes that are applicable to employers in this state;

(2)(a) Fix the rates of premium of the risks of the classes based upon the total payroll in each of the classes of occupation or industry sufficiently large to provide a fund for the compensation provided for in this chapter and to maintain a state insurance fund from year to year. The administrator shall set the rates at a level that assures the solvency of the fund. Where the payroll cannot be obtained or, in the opinion of the administrator, is not an adequate measure for determining the premium to be paid for the degree of hazard, the administrator may determine the rates of premium upon such other basis, consistent with insurance principles, as is equitable in view of the degree of hazard, and whenever in this chapter reference is made to payroll or expenditure of wages with reference to fixing premiums, the reference shall be construed to have been made also to such other basis for fixing the rates of premium as the administrator may determine under this section.

(b) If an employer elects to obtain other-states' coverage pursuant to section 4123.292 of the Revised Code through either the administrator, if the administrator elects to offer such coverage, or an other-states' insurer, calculate the employer's premium for the state insurance fund in the same manner as otherwise required under division (A) of this section and section 4123.34 of the Revised Code, except that when the administrator determines the expenditure of wages, payroll, or both upon which to base the employer's premium, the administrator shall use only the expenditure of wages, payroll, or both attributable to the labor performed and services provided by that employer's employees when those employees performed labor and provided services in this state only and to which the other-states' coverage does not apply.

(c) The administrator in setting or revising rates shall furnish to employers an adequate explanation of the basis for the rates set.

(3) Develop and make available to employers who are paying premiums to the state insurance fund alternative premium plans. Alternative premium plans shall include retrospective rating plans. The administrator may make available plans under which an advanced deposit may be applied against a specified deductible amount per claim.

(4)(a) Offer to insure the obligations of employers under this chapter under a plan that groups, for rating purposes, employers, and pools the risk of the employers within the group provided that the employers meet all of the following conditions:

(i) All of the employers within the group are members of an organization that has been in existence for at least two years prior to the date of application for group coverage;

(ii) The organization was formed for purposes other than that of obtaining group workers' compensation under this division;

(iii) The employers' business in the organization is substantially similar such that the risks which are grouped are substantially homogeneous;

(iv) The group of employers consists of at least one hundred members or the aggregate workers' compensation premiums of the members, as determined by the administrator, are expected to exceed one hundred fifty thousand dollars during the coverage period;

(v) The formation and operation of the group program in the organization will substantially improve accident prevention and claims handling for the employers in the group;

(vi) Each employer seeking to enroll in a group for workers' compensation coverage has an industrial insurance account in good standing with the bureau of workers' compensation such that at the time the agreement is processed no outstanding premiums, penalties, or assessments are due from any of the employers.

(b) If an organization sponsors more than one employer group to participate in group plans established under this section, that organization may submit a single application that supplies all of the information necessary for each group of employers that the organization wishes to sponsor.

(c) In providing employer group plans under division (A)(4) of this section, the administrator shall consider an employer group as a single employing entity for purposes of group rating. No employer may be a member of more than one group for the purpose of obtaining workers' compensation coverage under this division.

(d) At the time the administrator revises premium rates pursuant to this section and section 4123.34 of the Revised Code, if the premium rate of an employer who participates in a group plan established under this section changes from the rate established for the previous year, the administrator, in addition to sending the invoice with the rate revision to that employer, shall send a copy of that invoice to the third-party administrator that administers the group plan for that employer's group.

(e) In providing employer group plans under division (A)(4) of this section, the administrator shall establish a program designed to mitigate the impact of a significant claim that would come into the experience of a private, state fund group-rated employer for the first time and be a contributing factor in that employer being excluded from a group-rated plan. The administrator shall establish eligibility criteria and requirements that such employers must satisfy in order to participate in this program. For purposes of this program, the administrator shall establish a discount on premium rates applicable to employers who qualify for the program.

(f) In no event shall division (A)(4) of this section be construed as granting to an employer status as a self-insuring employer.

(g)(i) An employer that is merging operations with another employer shall notify the administrator of workers' compensation of the merger not more than thirty days after the merger takes effect.

(ii) If the administrator receives a notice from one or more employers of a merger of operations between those employers as described in division (A)(4)(f)(i) of this section, and if any employer involved in the merger participates in a group plan established under this section, the administrator shall provide a written notice to the organization that sponsors and the third party administrator that administers the group plan in which an employer who is involved in the merger participates informing that organization and the third party administrator about the merger.

(iii) The administrator shall comply with the notice requirements of division (A)(4)(f)(i) of this section relative to every employer that participates in a group plan that is involved in a merger about which the administrator receives a notice described in that division.

The administrator shall develop classifications of occupations or industries that are sufficiently distinct so as not to group employers in classifications that unfairly represent the risks of employment with the employer.

(5) Generally promote employer participation in the state insurance fund through the regular dissemination of information to all classes of employers describing the advantages and benefits of opting to make premium payments to the fund. To that end, the administrator shall regularly make employers aware of the various workers' compensation premium packages developed and offered pursuant to this section.

(6) Make available to every employer who is paying premiums to the state insurance fund a program whereby the employer or the employer's agent pays to the claimant or on behalf of the claimant the first fifteen thousand dollars of a compensable workers' compensation medical-only claim filed by that claimant that is related to the same injury or occupational disease. No formal application is required; however, an employer must elect to participate by telephoning the bureau after July 1, 1995. Once an employer has elected to participate in the program, the employer will be responsible for all bills in all medical-only claims with a date of injury the same or later than the election date, unless the employer notifies the bureau within fourteen days of receipt of the notification of a claim being filed that it does not wish to pay the bills in that claim, or the employer notifies the bureau that the fifteen thousand dollar maximum has been paid, or the employer notifies the bureau of the last day of service on which it will be responsible for the bills in a particular medical-only claim. If an employer elects to enter the program, the administrator shall not reimburse the employer for such amounts paid and shall not charge the first fifteen thousand dollars of any medical-only claim paid by an employer to the employer's experience or otherwise use it in merit rating or determining the risks of any employer for the purpose of payment of premiums under this chapter. A certified health care provider shall extend to an employer who participates in this program the same rates for services rendered to an employee of that employer as the provider bills the administrator for the same type of medical claim processed by the bureau and shall not charge, assess, or otherwise attempt to collect from an employee any amount for covered services or supplies that is in excess of that rate. If an employer elects to enter the program and the employer fails to pay a bill for a medical-only claim included in the program, the employer shall be liable for that bill and the employee for whom the employer failed to pay the bill shall not be liable for that bill. The administrator shall adopt rules to implement and administer division (A)(6) of this section. Upon written request from the bureau, the employer shall provide documentation to the bureau of all medical-only bills that they are paying directly. Such requests from the bureau may not be made more frequently than on a semiannual basis. Failure to provide such documentation to the bureau within thirty days of receipt of the request may result in the employer's forfeiture of participation in the program for such injury. The provisions of this section shall not apply to claims in which an employer with knowledge of a claimed compensable injury or occupational disease, has paid wages in lieu of compensation or total disability.

(B) The administrator shall supply an employer, at the time the employer institutes coverage under this chapter and first selects a managed care organization under the health partnership program, with a list of all groups participating in the group rating program created pursuant to this section and a list of all premium discount programs offered by the administrator pursuant to this chapter.

(C) The administrator, with the advice and consent of the board, by rule, may do both of the following:

(1) Grant an employer who makes the employer's semiannual premium payment at least one month prior to the last day on which the payment may be made without penalty, a discount as the administrator fixes from time to time;

(2) Levy a minimum annual administrative charge upon risks where semiannual premium reports develop a charge less than the administrator considers adequate to offset administrative costs of processing.

(D) The administrator shall adopt a rule that sets an estimated discount for programs or alternative premium plans not later than the first day of September prior to the policy year in which the premium rate is to be in effect and shall adopt a rule that sets the actual discount for programs or alternative premium plans not later than the first day of January of the year in which the discount for programs or alternative premium plans is to be in effect, except for the premium year starting July 1, 2010, in which case the rule that sets the estimate shall not be adopted.

Amended by 128th General Assembly ch. 3, HB 15, §101, eff. 6/30/2009 and 9/29/2009.

Effective Date: 09-01-1995; 2006 SB7 06-30-2006; 2007 HB100 09-10-2007; 2008 SB334 09-11-2008; 2008 HB79 01-06-2009

4123.52 Continuing jurisdiction of commission.

The jurisdiction of the industrial commission and the authority of the administrator of workers' compensation over each case is continuing, and the commission may make such modification or change with respect to former findings or orders with respect thereto, as, in its opinion is justified. No modification or change nor any finding or award in respect of any claim shall be made with respect to disability, compensation, dependency, or benefits, after five years from the date of injury in the absence of the payment of medical benefits under this chapter or in the absence of payment of compensation under section 4123.57, 4123.58, or division (A) or (B) of section 4123.56 of the Revised Code or wages in lieu of compensation in a manner so as to satisfy the requirements of section 4123.84 of the Revised Code, in which event the modification, change, finding, or award shall be made within five years from the date of the last payment of compensation or from the date of death, nor unless written notice of claim for the specific part or parts of the body injured or disabled has been given as provided in section 4123.84 or 4123.85 of the Revised Code. The commission shall not make any modification, change, finding, or award which shall award compensation for a back period in excess of two years prior to the date of filing application therefor. This section does not affect the right of a claimant to compensation accruing subsequent to the filing of any such application, provided the application is filed within the time limit provided in this section.

This section does not deprive the commission of its continuing jurisdiction to determine the questions raised by any application for modification of award which has been filed with the commission after June 1, 1932, and prior to the expiration of the applicable period but in respect to which no award has been granted or denied during the applicable period.

The commission may, by general rules, provide for the destruction of files of cases in which no further action may be taken.

The commission and administrator of workers' compensation each may, by general rules, provide for the retention and destruction of all other records in their possession or under their control pursuant to section 121.211 and sections 149.34 to 149.36 of the Revised Code. The bureau of workers' compensation may purchase or rent required equipment for the document retention media, as determined necessary to preserve the records. Photographs, microphotographs, microfilm, films, or other direct document retention media, when properly identified, have the same effect as the original record and may be offered in like manner and may be received as evidence in proceedings before the industrial commission, staff hearing officers, and district hearing officers, and in any court where the original record could have been introduced.

Effective Date: 06-14-2000; 2006 SB7 10-11-2006

4123.61 Basis for computation of benefits.

The average weekly wage of an injured employee at the time of the injury or at the time disability due to the occupational disease begins is the basis upon which to compute benefits.

In cases of temporary total disability the compensation for the first twelve weeks for which compensation is payable shall be based on the full weekly wage of the claimant at the time of the injury or at the time of the disability due to occupational disease begins; when a factory, mine, or other place of employment is working short time in order to divide work among the employees, the bureau of workers' compensation shall take that fact into consideration when determining the wage for the first twelve weeks of temporary total disability.

Compensation for all further temporary total disability shall be based as provided for permanent disability claims.

In death, permanent total disability claims, permanent partial disability claims, and impairment of earnings claims, the claimant's or the decedent's average weekly wage for the year preceding the injury or the date the disability due to the occupational disease begins is the weekly wage upon which compensation shall be based. In ascertaining the average weekly wage for the year previous to the injury, or the date the disability due to the occupational disease begins any period of unemployment due to sickness, industrial depression, strike, lockout, or other cause beyond the employee's control shall be eliminated.

In cases where there are special circumstances under which the average weekly wage cannot justly be determined by applying this section, the administrator of workers' compensation, in determining the average weekly wage in such cases, shall use such method as will enable the administrator to do substantial justice to the claimants, provided that the administrator shall not recalculate the claimant's average weekly wage for awards for permanent total disability solely for the reason that the claimant continued working and the claimant's wages increased following the injury.

Effective Date: 10-20-1993; 2006 SB7 10-11-2006