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## STATEMENT OF THE FACTS

Appellee Robert L. Mason (“Mason”) sustained an injury within the course of and arising out of his employment with Appellant Old Dominion Freight Line, Inc. (“Old Dominion”) on January 18, 2005 when he slipped on ice and fell to the ground, landing on his left hip. (Supplement, hereinafter “Supp.,” 1). Mason filed an application for workers’ compensation benefits, which was assigned Bureau of Workers’ Compensation (“Bureau”) Claim No. 05-806440. Mason’s workers’ compensation claim is currently allowed for the following conditions: (1) hip fracture; (2) left intertrochanteric femur fracture; (3) left femoral neck fracture; (4) depressive disorder; (5) left short leg syndrome; (6) lumbar sprain; and (7) post-traumatic stress disorder. (Supp. 477) (Appendix, hereinafter “App.” 34). His claim has been specifically disallowed for the condition of “aggravation of pre-existing sleep apnea.” (Supp. 477) (App. 34). The orders allowing the claim for the condition of “post traumatic stress disorder” and disallowing the claim for the condition of “aggravation of pre-existing sleep apnea” were appealed into the Franklin County Court of Common Pleas by Old Dominion and Mason, respectively. (Supp. 507-511, 512-516). The two court appeals (Franklin County Common Pleas Case No. 10CVD07-10944 and Case No. 10CVD08-11263) have been stayed per order of the Franklin County Court of Common Pleas due to the status of Mason’s health. (Supp. 517-519).

Mason filed two applications for permanent and total disability (“PTD”) compensation. His first application was filed on April 26, 2006. (Supp. 21-29). After a hearing held on February 28, 2007, a staff hearing officer denied Mason’s application for PTD compensation. (Supp. 65-67) (App. 25-27). The staff hearing officer found that “the injured worker retains the

residual physical and intellectual abilities to engage in sustained remunerative employment of the sedentary nature.” *Id.*

Mason filed his second application for PTD compensation on July 22, 2009. (Supp. 359-366). The evidence Mason attached in support of his second application included the reports of Drs. May, Ward, and Howard. (See Supp. 167-168, 207-210, 224-240, 352-354, 417-420, 421-429). The Industrial Commission of Ohio (“Industrial Commission”) mailed a letter to the parties on July 24, 2009, which acknowledged that an application for PTD compensation had been filed. (Supp. 371-372). In the acknowledgement letter, the Industrial Commission notified Old Dominion that it may submit evidence relating to the application for PTD compensation, indicating, in pertinent part, the following:

Employers may submit additional medical evidence relating to this issue, including reports from Employer request examinations. Medical evidence must be submitted by 09/22/2009.” Employers must notify the Industrial Commission in writing of their intent to submit medical evidence by 08/07/2009, if the evidence is to be considered by the Industrial Commission specialist(s).

*Id.* (emphasis added).

Old Dominion timely notified the Industrial Commission of its intent to timely submit medical evidence by facsimile on July 29, 2009 at 10:38 a.m. (Supp. 374). Subsequently, Old Dominion arranged for Mason to be examined by Oscar F. Sterle, M.D. and Michael A. Murphy, Ph.D., and for Richard H. Clary, M.D. to conduct a medical file review, for the purpose of addressing the issue of permanent total disability.

Dr. Sterle’s examination report is dated September 8, 2009, Dr. Clary’s file review report is dated September 3, 2009, and Dr. Murphy’s examination report is dated September 8, 2009. (Supp. 391-400, 387-388, 401-410). In compliance with the Industrial Commission’s July 24, 2009 acknowledgement letter, Old Dominion timely submitted the medical reports by Drs.

Sterle, Clary, and Murphy to the Industrial Commission as indicated by an Industrial Commission file-stamped date of September 22, 2009 on each report. *Id.*

By letter mailed on September 23, 2009, the Industrial Commission notified Industrial Commission specialist physician William R. Fitz, M.D. that Mason had been referred to him for an examination to be conducted on October 7, 2009. (Supp. 411-412). Similarly, by letter mailed on October 5, 2009, the Industrial Commission notified Industrial Commission specialist physician John M. Malinky, Ph.D. that Mason had been referred to him for an examination to be conducted on October 21, 2009. (Supp. 415-416). The September 23, 2009 and October 7, 2009 letters stated that all "pertinent records" relative to the issue of permanent total disability had been provided; however, Old Dominion's timely-submitted medical reports (i.e., the reports by Drs. Sterle, Clary, and Murphy) were not included in the forwarded materials. (Supp. 411-412, 415-416).

Additionally, part of the record which was forwarded to Drs. Fitz and Malinky included a Statement of Facts prepared by the Industrial Commission. The Statement of Facts included a section which listed the "Injured Worker's Medical Evidence" and the "Employer's Medical Evidence." (Supp. 379). The Statement of Facts listed the evidence submitted by Mason in support of his application for PTD compensation, but listed "None" as the evidence submitted by Old Dominion, despite the evidence from Drs. Sterle, Clary, and Murphy. *Id.* Therefore, prior to their examinations and formations of their opinions, Drs. Fitz and Malinky received all of the medical evidence Mason submitted in support of his application for PTD compensation, including the reports of Drs. May, Ward, and Howard, but none of the evidence submitted by Old Dominion. Consequently, Drs. Fitz and Malinky never reviewed or considered the reports of Old Dominion's medical specialists prior to issuing their reports to the Industrial Commission.

On November 10, 2009, Old Dominion requested permission from the Industrial Commission Hearing Administrator to take the oral depositions of Drs. Fitz and Malinky. (Supp. 433-435, 436-437). Mason objected to Old Dominion's request to depose, and a hearing was held before a staff hearing officer on December 17, 2009. In two separate orders, the staff hearing officer denied Old Dominion's request to depose Drs. Fitz and Malinky. (Supp. 451-452, 453-454) (App. 28-29, 30-31). With regard to the request to take the oral deposition of Dr. Fitz, the staff hearing officer found the following:

The Staff Hearing Officer finds that the request is unreasonable because the Employer's evidence from Dr. Sterle, Murphy and Clary was filed on either 09/22/2009 or 09/23/2009, and the examination with Dr. Fitz was scheduled by letter mailed 09/23/2009. The lack of inclusion of the Employer's medical reports in the evidence cited by Dr. Fitz is not found to be sufficient reason to grant a deposition of Dr. Fitz.

(Supp. 451) (App. 28). With regard to the request to take the oral deposition of Dr. Malinky, the staff hearing officer found the following:

The Staff Hearing Officer finds that the request is unreasonable, because the reports submitted by the Employer from Drs. Murphy and Clary were not reasonably available to be included in the packet of information sent to Dr. Malinky prior to his examination of the Injured Worker. The lack of citation to all of the Employer's medical evidence is not a basis to grant the request to depose Dr. Malinky, and any potential defect can be remedied by the Employer by other means.

(Supp. 453) (App. 30). On January 4, 2010, Old Dominion sought reconsideration of the staff hearing officer's orders but the requests for reconsideration were denied by the Industrial Commission. (Supp. 457-459, 460-462, 473-474).

Instead of starting over by including Mason's and Old Dominion's timely-submitted medical evidence at the same time and arranging medical examinations with different specialist physicians, the Industrial Commission attempted to rectify its failure to forward Old Dominion's timely-submitted medical evidence by requesting clarifications from Drs. Fitz and Malinky. The

Industrial Commission forwarded to Dr. Malinky the reports of Drs. Sterle, Clary, and Murphy, but failed to forward to Dr. Fitz the report of Dr. Clary. When requesting the clarifications, the Industrial Commission expressly admitted to Drs. Fitz and Malinky that it had “omitted [the] timely reports” by Drs. Sterle, Clary, and Murphy. (Supp. 467, 468-469, 470) (emphasis added).

The Industrial Commission simply asked Drs. Fitz and Malinky whether their original opinions had changed, and each doctor responded with a one sentence response that their opinions had not changed. No further exploration was performed by the Industrial Commission, nor was any further explanation provided by Drs. Fitz and Malinky. *Id.*

Mason’s second application for PTD compensation was heard before an Industrial Commission staff hearing officer on March 16, 2010. By order typed March 26, 2010 and mailed March 31, 2010, the staff hearing officer granted Mason’s application for PTD compensation from September 25, 2007 forward. (Supp. 477-479) (App. 34-36). The basis for the staff hearing officer’s decision was as follows:

In reaching this conclusion, the Staff Hearing Officer relies upon the independent medical examinations and evaluations performed at the direct of the Industrial Commission: William R. Fitz, M.D., who examined with respects [sic] to the allowed physical injuries, and John M. Malinky, Ph.D., who examined with respects [sic] to the allowed psychological conditions.

*Id.* The staff hearing officer also particularly noted that he considered the January 28, 2008 report of Dr. Ward, the September 25, 2007 and September 26, 2007 reports of Dr. May, and the July 7, 2009 report of Dr. Howard in “evaluating the credibility” of the reports issued by Drs. Fitz and Malinky. *Id.* Old Dominion timely sought reconsideration of the staff order, which was denied by the Industrial Commission. (Supp. 480-488, 505-506) (App. 37-38).

Thereafter, Old Dominion instituted an action for mandamus relief in the Tenth District Court of Appeals. On December 16, 2011, Magistrate Kenneth W. Macke issued a decision

recommending Old Dominion's request for a writ of mandamus be granted. (App. 24). Mr. Mason and the Industrial Commission filed objections to the Magistrate's decision. (App. 6). The Tenth District Court of Appeals sustained Mr. Mason's first and second objections and the Industrial Commission's first and second objections. (App. 10). Old Dominion filed a notice of appeal to this Court on July 16, 2012. (App. 1-3).

## ARGUMENT

### A. Standards for Mandamus Relief and Appeal.

Three elements must be demonstrated to establish entitlement to a writ of mandamus: (1) a clear legal right to the relief prayed for; (2) a clear legal duty on the part of the Industrial Commission to perform the requested act; and (3) no plain and adequate remedy exists in the ordinary course of law. *State ex rel. Westchester Estates, Inc. v. Bacon*, 61 Ohio St.2d 42, 44, 399 N.E.2d 81 (1980); *see also State ex rel. Pressley v. Indus. Comm.*, 11 Ohio St.2d 141, 152, 228 N.E.2d 631 (1967). Old Dominion is entitled to the requested writ of mandamus if these criteria are satisfied. *State ex rel. Berger v. McMonagle*, 6 Ohio St.3d 28, 29, 451 N.E.2d 225 (1983).

A clear legal right to a writ of mandamus exists if Old Dominion can show that the Industrial Commission abused its discretion. *State ex rel. Hutton v. Indus. Comm.*, 29 Ohio St.2d 9, 14, 278 N.E.2d 34 (1972). "It is well-established that where there is some evidence to support the commission's decision, this court will not disturb the commission's findings. \* \* \*. However, where there is no evidence upon which the commission could have based its decision, an abuse of discretion is present and mandamus is appropriate." *State ex rel. White v. U.S. Gypsum Co.*, 49 Ohio St. 3d 134, 551 N.E.2d 139 (1990), citing *State ex rel. Fiber-Lite Corp., v. Indus.*

*Comm.*, 36 Ohio St. 3d 202, 204, 522 N.E. 2d 548 (1988); *State, ex rel. Kramer, v. Indus. Comm.*, 59 Ohio St. 2d 39, 42, 391 N.E. 2d 1015 (1979).

Like all statutorily created agencies, the Industrial Commission has a clear legal duty to follow its own rules as written. *State ex rel. H.C.F., Inc. v. Ohio Bureau of Workers' Comp.*, 80 Ohio St. 3d 642, 647, 687 N.E.2d 763 (1998), citing *State ex rel. Cincinnati v. Ohio Civil Rights Comm.*, 2 Ohio App. 3d 287, 288, 441 N.E.2d 829 (10th Dist. 1981). Moreover, the Industrial Commission cannot give selective effect to its own rules in order to achieve desired outcomes. See *State ex rel. V&A Risk Servs. v. State Bureau of Workers' Compensation*, 10th Dist. No. 11AP-742, 2012-Ohio-3583, 2012 Ohio App. LEXIS 3169, ¶ 30 (Court ruling the "BWC can exercise only those powers conferred upon it by the General Assembly.").

Administrative remedies constitute plain and adequate remedies in the ordinary course of law. *State ex rel. Hodge v. Ryan*, 131 Ohio St. 3d 357, 2012-Ohio-999, 965 N.E.2d 280, ¶ 6. An individual will not be entitled to mandamus relief if he or she did not exhaust those remedies available to him or her at the Industrial Commission of Ohio. *Id.* (Court finding the claimant was not entitled to mandamus relief because she did not appeal staff orders to the Industrial Commission).

Old Dominion is entitled to a writ of mandamus because all three elements for mandamus relief have been satisfied. First, a clear legal right exists because there is no evidence to support the Industrial Commission's failure to forward Old Dominion's medical evidence to the Industrial Commission specialist physicians prior to their respective independent medical examinations. Second, the Industrial Commission has a clear legal duty to follow its own rules, which requires the Industrial Commission claims examiner to submit the employer's medical evidence to the Industrial Commission examining physicians prior to their examinations. Third,

no plain and adequate remedy exists in the ordinary course of law because Old Dominion exhausted all available administrative remedies. (*See* App. 25-38). Therefore, Old Dominion is entitled to mandamus relief.

**B. Proposition of Law No. 1: Where an employer timely submits medical evidence pursuant to Ohio Adm. Code 4121-3-34(C)(4)(b), the Industrial Commission must submit such evidence to the examining physician selected by the claims examiner prior to the date of the examination.**

Well-established case law provides that a state agency must follow its own rules as written. In *H.C.F., Inc.*, the Court had to determine whether H.C.F., a self-insuring employer, had to buy Crestview and Piketon out of the State Insurance Fund after H.C.F. purchased certain assets of such businesses. *Id.* at 645. According to former Ohio Adm. Code 4121-7-02(B)(1), a buy-out was required where a legal entity “not having coverage in the most recent experience period,” wholly succeeded another entity in the operation of a business. *Id.* at 646. The Bureau and Industrial Commission argued H.C.F. wholly succeeded Crestview and Piketon and thus was liable for the assessed buy-out payments, notwithstanding the “not having coverage language” language contained within the rule. *Id.* at 646, 647. This Court rejected the attempt by the Bureau and Industrial Commission to give selective effect to Ohio Adm. Code 4121-7-02(B)(1), writing the following:

[the] BWC and the [industrial] commission must follow their own rules as written. *State ex rel. Cincinnati v. Ohio Civ. Rights Comm.*, 2 Ohio App.3d 287, 288, 441 N.E.2d 829. They cannot give selective effect to provisions to produce a desired result or otherwise change them without complying with the R.C. Chapter 119 rule-making procedure. *State ex rel. Reider’s, Inc. v. Indus. Comm.*, 48 Ohio App.3d 242, 549 N.E.2d 532 (1988).

*Id.* at 647. Because H.C.F. was self-insured and thus had “coverage,” the rule did not apply to H.C.F. and therefore H.C.F. was not required to buy Crestview and Piketon out of the State Insurance Fund. *Id.* at 648. *See also State ex rel. Consumers League of Ohio v. Ratchford*, 8

Ohio App.3d 420, 422, 457 N.E.2d 878 (10th Dist. 1982) (“It is well-settled that an agency is required to follow its own regulations.”) (citations omitted).

The processing and adjudication of applications for PTD compensation is governed by Ohio Adm. Code 4121-3-34. When an application for PTD compensation is filed by a claimant, the Industrial Commission is required to serve a copy of the application and supporting documents along with a letter acknowledging the receipt of the application to the employer’s representative. Ohio Adm. Code 4121-3-34(C)(2). Upon receipt of the acknowledgement letter, the employer is then given an opportunity to submit evidence relating to the application for PTD compensation:

The employer shall be provided fourteen days after the date of the industrial commission acknowledgment letter provided for in paragraph (C)(2) of this rule to notify the commission if the employer intends to submit medical evidence relating to the issue of permanent total disability compensation to the commission. Should the employer make such written notification the employer shall submit such medical evidence to the commission within sixty days after the date of the commission acknowledgment letter unless relief is provided to the employer under paragraph (C)(4)(d) of this rule. Should the employer fail to make such written notification within fourteen days after the date of the commission acknowledgment letter, the employer shall be provided sixty days after the date of the commission acknowledgement letter to submit medical evidence relating to the issue of permanent total disability compensation to the commission, but the scheduling of the injured worker for appropriate medical examinations by physicians selected by the commission under paragraph (C)(5)(a)(iii) of this rule will proceed without delay.

Ohio Adm. Code 4121-3-34(C)(4)(b).

Mason filed his application for PTD compensation with the Industrial Commission on July 22, 2009. (Supp. 359-366). The Industrial Commission mailed its acknowledgement letter to Old Dominion on July 24, 2009. (Supp. 371-372). Therefore, Old Dominion had 14 days after July 24, 2009, or until August 7, 2009, to notify the Industrial Commission in writing of its

intent to submit medical evidence relating to Mason's application for PTD compensation. Ohio Adm. Code 4121-3-34(C)(4)(b).

Old Dominion timely notified the Industrial Commission of its intent to submit medical evidence relating to Mason's application for PTD compensation by letter dated July 28, 2009, which was filed on July 29, 2009. (Supp. 374). Old Dominion then had 60 days from July 24, 2009, or until September 22, 2009, to submit its medical evidence. Ohio Adm. Code 4121-3-34(C)(4)(b). Old Dominion complied with the rule and submitted medical reports from Drs. Sterle, Clary, and Murphy on September 22, 2009. (Supp. 386-388, 391-400, 401-410).

If an employer satisfies the fourteen day deadline, then its timely submitted evidence must be copied by the claims examiner and forwarded to the examining physicians prior to their examinations as provided by Ohio Adm. Code 4121-3-34(C)(5)(a). Ohio Adm. Code 4121-3-34(C)(5)(a) provides the following:

Following the date of filing of the permanent and total disability application, the claims examiner shall perform the following activities:

(i) Obtain all the claim files identified by the injured worker on the permanent total disability application and any additional claim files involving the same body part(s) as those claims identified on the permanent total disability application.

(ii) Copy all relevant documents as deemed pertinent by the commission including evidence provided under paragraphs (C)(1) and (C)(4) of this rule and submit the same to an examining physician to be selected by the claims examiner.

(iii) Schedule appropriate medical examination(s) by physician(s) to be selected by the commission provided that the scheduling of said exams shall not be delayed where the employer fails to notify the commission within fourteen days after the date of the commission acknowledgment letter that it intends to submit medical evidence to the commission relating to the issue of permanent total disability compensation.

(iv) Prepare a statement of facts. A copy of the statement of facts shall be mailed to the parties and their representatives by the commission.

Ohio Adm. Code 4121-3-34(C)(5)(a) (emphasis added).

“A court must give meaning to the words used and not delete words used or insert words not used.” *Dailey v. Trimble*, 10th Dist. No. 95APE07-951, 1995 Ohio App. LEXIS 6120 at \*20 (Dec. 29, 1995) citing *Cline v. Ohio Bur. of Motor Vehicles*, 61 Ohio St. 3d 93, 97, 573 N.E.2d 77 (1991). Moreover, “the [industrial] commission has the discretion to interpret its own rules; however, where the application of those rules to a unique factual situation gives rise to a patently illogical result, common sense should prevail.” *State ex rel. Harris v. Indus. Comm.*, 12 Ohio St.3d 152, 153, 465 N.E.2d 1286 (1984) (emphasis added).

Prior to April 1, 2004, Ohio Adm. Code 4121-3-34(C)(4)(b) provided:

The employer shall be provided sixty days after the date of the industrial commission acknowledgment letter provided for in paragraph(C)(2) of this rule to submit medical evidence relating to the issue of permanent total disability compensation to the commission.

Further, Ohio Adm. Code 4121-3-34(C)(5)(a)(iii) provided:

(a) During the sixty days following the date of filing of the permanent and total disability application, the claims examiner shall perform the following activities:  
(iii) Schedule appropriate medical examination(s) by physician(s) to be selected by the industrial commission.

Ohio Adm. Code 4121-3-34 was changed to create a difference in the processing of an application for permanent total disability. Each word added or changed must be given a meaning, and must serve some purpose or create some difference or the change is rendered unnecessary and irrelevant. The rule clearly now ascribes meaning to an employer timely filing a fourteen day notice. One function of the rule change is that the claims examiner either waits or does not wait sixty days to schedule an examination. If that was the only difference made by the change in 2004, it would merely encourage an employer to cause a delay by filing a fourteen day notice. Because the rule cannot have been intended to encourage a delay, the logical conclusion is that the delay itself is for a reasonable purpose. The first part of that purpose is to assure the

employer a sixty day time period in which to submit its medical evidence. However, that assurance alone has no value either. It is only when that assurance includes a second assurance that any medical evidence provided will be included in the information the claims examiner provides for the medical examination that actual value exists and that an actual purpose exists in the 2004 change to (C)(4)(b) and (C)(5)(a)(iii). The value is not trivial. It is unlikely in the extreme that an injured worker would not ascribe value to having his supporting medical reports provided to the Industrial Commission's examiner(s) before the examination(s). That value is no less diminished where an employer who has completely complied with the requirements of Ohio Adm. Code 4121-3-34(C)(4)(b) is denied its opportunity to have its medical evidence provided to the Industrial Commission's examiner(s) before the examination(s).

Here, the Tenth District Court of Appeals' and the Industrial Commission's interpretation of Ohio Adm. Code 4121-3-34(C)(4)(b) entirely eliminated the significance of the "fourteen day" language contained within the rule. The Tenth District found the following:

If the commission's rules specifically permit a doctor to consider additional evidence after the examination when the employer fails to file a timely notice of intent to submit medical records, we see no reason why a doctor should not be permitted to consider supplemental evidence after the examination when the commission, in good faith, fails to timely submit all medical evidence to the doctor prior to the examination. If the rules allow the former without any prejudicial effect, then the rules should also permit the latter without any prejudicial effect.

(App. 8) (emphasis added).

When read as a whole, Ohio Adm. Code 4121-3-34(C)(4)(b) and Ohio Adm. Code 4121-3-34(C)(5)(a) direct that all timely-submitted relevant documents pertaining to an applicant's request for PTD compensation – including the applicant's evidence and the employer's evidence – be submitted to the examining physician prior to his or her respective examination. Any interpretation of Ohio Adm. Code 4121-3-34(C)(4)(b) and Ohio Adm. Code 4121-3-34(C)(5)(a)

that allows ignoring a violation of such rules, where an employer's timely-submitted medical evidence is not provided to the selected physicians prior to their respective examinations, is an illogical result.

The logical interpretation of Ohio Adm. Code 4121-3-34(C)(4)(b) is that the fourteen day language contained within the rule is used as a line in the sand: employers filing notifications to submit medical evidence on or before fourteen days receive the benefit of the Industrial Commission waiting until day 60 or thereafter to schedule the examinations, and employers filing notifications after day fourteen bear the risk of having the Industrial Commission schedule examinations prior to day 60. By necessary implication, the Industrial Commission must submit the employer's timely-submitted medical evidence to the examining physicians prior to their respective examinations. Otherwise, the fourteen day requirement contained in Ohio Adm. Code 4121-3-34(C)(4)(b) serves no reasonable purpose.

There is no incentive for employers to timely-notify the Industrial Commission of their intention to submit medical evidence if such evidence does not have to be sent to the examining physicians for consideration prior to their examinations. In essence, the fourteen day language would be written out of Ohio Adm. Code 4121-3-34(C)(4)(b).

Here, Old Dominion notified the Industrial Commission of its intent to submit medical evidence within the fourteen day time period provided by Ohio Adm. Code 4121-3-34(C)(4)(b). (Supp. 374). Additionally, Old Dominion timely submitted its medical evidence. (Supp. 391-400, 387-388, 401-410). Nevertheless, instead of submitting both Mason's and Old Dominion's medical evidence to the examining physicians at the same time, the Industrial Commission submitted only Mason's medical evidence to Drs. Fitz and Malinky prior to their examinations. Moreover, the Industrial Commission expressly mised Drs. Fitz and Malinky on two instances:

(1) by stating on the Medical Examination Referral letters that all “pertinent” medical evidence was submitted to them; and (2) by indicating on the Statement of Facts there was no evidence from the employer. (Supp. 411-412, 415-416, 379).

The sole purpose of Ohio Adm. Code 4121-3-34 is “to ensure that applications for compensation for permanent total disability are processed and adjudicated in a fair and timely manner.” Ohio Adm. Code 4121-3-34(A) (emphasis added). The Tenth District expressly acknowledged the Industrial Commission “fail[ed] to timely submit all medical evidence to the doctor[s] prior to the examination[s].” (App. 8). Whether the Industrial Commission acted in good faith is irrelevant. The Industrial Commission abused its discretion by not following its own rules as written. *See H.C.F.* at 647 (Court ruling “BWC and the commission must follow their own rules as written.”). The Industrial Commission’s failure to follow its own rules precluded its ability to ensure that Mason’s application for PTD compensation was adjudicated and processed in a “fair” manner as required by Ohio Adm. Code 4121-3-34(A).

Furthermore, the fact that the Industrial Commission later obtained clarifications from Drs. Fitz and Malinky does not remedy its violation of its own rules. Instead, the Industrial Commission’s attempt to cure its own mistake by obtaining clarifications amounted to an improper effort to give selective effect to Ohio Adm. Code 4121-3-34(C)(4)(b) and Ohio Adm. Code 4121-3-34(C)(5)(a). *See V&A Risk Servs.*, ¶ 30.

C. **Proposition of Law No. 2: A finding of harmless error is erroneous when such finding is based upon a speculative inquiry into what might have occurred regarding hearsay medical reports.**

An error is harmless when the trier of fact would probably have made the same decision had the error not occurred. *Hallworth v. Republic Steel Corp.*, 153 Ohio St. 349, 91 N.E.2d 960 (1950), paragraph three of the syllabus. In other words, an error is not harmless when the

outcome of the proceeding would have been different absent such error. See *Theobald v. Univ. of Cincinnati*, 160 Ohio App.3d 342, 2005-Ohio-1510, 827 N.E.2d 365 (10th Dist.), ¶ 17 (“When avoidance of the error would not have changed the outcome of the proceedings, then the error neither materially prejudices the complaining party nor affects a substantial right of the complaining party.”). However, harmless error analysis should not be applied in a context where such analysis “would be a speculative inquiry into what might have occurred in an alternative universe.” *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150, 126 S. Ct. 2557 (2006) (Court refusing to apply harmless error analysis in case where defendant was denied choice of counsel because it was “impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings”).

Here, the Tenth District found “it was not prejudicial” for the Industrial Commission to submit Old Dominion’s medical evidence to Drs. Fitz and Malinky “until after their initial examinations.” (App. 8). The Tenth District’s finding of harmless error (i.e., no prejudice) required speculation based on a set of unknown facts. It is impossible to know how Dr. Fitz’s or Dr. Malinky’s opinions would have changed if they were presented with Old Dominion’s medical evidence prior to their examinations. For instance, Dr. Fitz and Dr. Malinky may have approached their examinations differently if they read and reviewed the reports from Drs. Clary, Sterle, and Murphy. The ultimate impact on Drs. Fitz and Malinky’s ultimate opinions could not be determined, even by asking them for clarification, because it is impossible to say what might have occurred in an alternative universe. *Gonzalez-Lopez* at 150.

The Industrial Commission compounded its mistake by denying Old Dominion's request to depose Drs. Fitz and Malinky.<sup>1</sup> The staff hearing officer's reasons for denying Old Dominion's request to depose Drs. Fitz and Malinky were nonsensical. First, in regards to Old Dominion's request to depose Dr. Malinky, the staff hearing officer clearly erred when finding that Old Dominion's medical reports from Drs. Murphy and Clary were "not reasonably available." (Supp. 453) (App.30). Secondly, in regards to Old Dominion's request to depose Dr. Fitz, the staff hearing officer erred when finding that Old Dominion's medical evidence was filed on "either 9/22/2009 or 9/23/2009." (Supp. 451) (App. 28). In fact, none of Old Dominion's medical reports were filed on September 23, 2009.

The only reasonable opportunity to cure the Industrial Commission's mistake was to allow Old Dominion to conduct the deposition of Drs. Fitz and Malinky. A deposition would have at least allowed Drs. Fitz and Malinky to explain the bases for their opinions and discuss what impact the reports of Drs. Sterle, Clary, and Murphy would have had on their examinations and opinions. For example, Dr. Sterle found that the only residual impairment of Mason was due to short-leg syndrome and that such condition is addressed with a lift and does not preclude the ability to engage in sustained remunerative employment. (Supp. 391-400). This information was not provided to Dr. Fitz before his conclusions were already drawn. Old Dominion should have been provided the opportunity to explore these findings with Dr. Fitz through an oral deposition.

Moreover, from a psychological prospective, Dr. Murphy found that Mason had "fully intact" cognitive functions, a normal energy level, and the ability to conduct normal activities of daily living. (Supp. 401-410). These findings and information should be critical to an

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<sup>1</sup> R.C. 4123.09 authorizes the deposition of an Industrial Commission medical specialist. The procedure for obtaining an oral deposition is governed by Ohio Admin. Code 4121-3-09(A)(7).

examining physician. Old Dominion should have been provided the opportunity to depose Dr. Malinky to explore what impact the findings of Dr. Murphy had on Dr. Malinky's conclusions and opinions, as well as whether such findings preclude sustained remunerative employment.

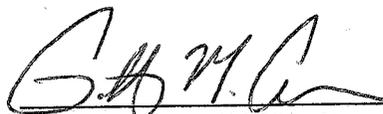
As this Court has stated, a "doctor's opinion based on an incomplete or inaccurate medical history is pointless." *Kokita v. Ford Motor Co.*, 73 Ohio St.3d 89, 93-94, 652 N.E.2d 671 (1995). The Industrial Commission erred by not permitting Old Dominion to depose Drs. Fitz and Malinky to determine if their opinions were based on complete and accurate information. The denial of this request further compounded the Industrial Commission's mistake and further evidences the Tenth District's finding of harmless error speculative. Therefore, any determination of harmless error was impossible.

### CONCLUSION

The Industrial Commission's failure to follow its own rules illustrates a clear abuse of discretion by the Industrial Commission and runs contrary to the goal of Ohio Adm. Code 4121-3-34(A), which is to ensure that all applications for PTD compensation are "processed and adjudicated in a fair and timely manner." For all the foregoing reasons, Old Dominion respectfully requests this Court reverse the Tenth District's Decision and issue a Writ of Mandamus ordering the Industrial Commission to vacate its staff order typed March 26, 2010, and mailed March 31, 2010, and to enter a new order denying Mason's application for PTD compensation.

Respectfully submitted,

EASTMAN & SMITH LTD.

A handwritten signature in black ink, appearing to read 'M.A. Shaw', is written over a horizontal line.

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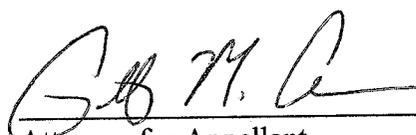
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Attorneys for Relator

Old Dominion Freight Line, Inc.

**CERTIFICATE OF SERVICE**

The foregoing **Merit Brief of Appellant Old Dominion Freight Line, Inc.** has been sent by ordinary U.S. Mail this 19<sup>th</sup> day of November, 2012 to: Katie Kimmet, Connor, Evans & Hafenstein, LLP, 501 South High Street, Columbus, Ohio 43215, attorney for Appellee Robert L. Mason; and to Eric Tarbox, Assistant Attorney General, Workers' Compensation Section, 150 East Gay Street, 22nd Floor, Columbus, Ohio 43215-3130, attorney for Appellee Industrial Commission of Ohio.



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Attorney for Appellant  
Old Dominion Freight Line, Inc.

**APPENDIX**

APPENDIX

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12-1193

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IN THE SUPREME COURT OF OHIO

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State of Ohio, *ex rel.*  
Old Dominion Freight Line, Inc.,

Appellant,

v.

Industrial Commission of Ohio

and

Robert L. Mason,

Appellees.

On Appeal from the Franklin County  
Court of Appeals, Tenth Appellate  
District

Court of Appeals  
Case No. 11AP-350

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NOTICE OF APPEAL OF APPELLANT OLD DOMINION FREIGHT LINE, INC.

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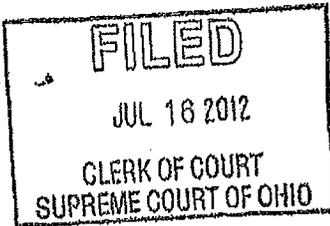
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CERTIFICATE OF SERVICE

The foregoing Notice of Appeal of Appellant Old Dominion Freight Line, Inc. has been sent by ordinary U.S. Mail this 16<sup>th</sup> day of July, 2012 to: Nicole E. Rager, Connor, Evans & Hafenstein, LLP, 501 South High Street, Columbus, Ohio 43215, attorney for Appellee Robert L. Mason; and to Eric Tarbox, Assistant Attorney General, Workers' Compensation Section, 150 East Gay Street, 22nd Floor, Columbus, Ohio 43215-3130, attorney for Appellee Industrial Commission of Ohio.



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Attorney for Appellant  
Old Dominion Freight Line, Inc.

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

FILED  
COURT OF APPEALS  
10th DISTRICT  
2012 JUN -5 PM 1:47  
CLERK OF COURTS

State of Ohio ex rel.  
Old Dominion Freight Line, Inc.,

Relator,

v.

Industrial Commission of Ohio and  
Robert L. Mason,

Respondents.

No. 11AP-350

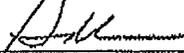
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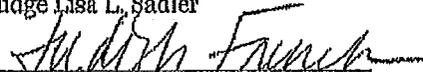
JOURNAL ENTRY

For the reasons stated in the decision of this court rendered herein on May 31, 2012, the commission's and claimant's objections to the decision of the magistrate are sustained. Having found the commission committed prejudicial error, the magistrate did not reach Old Dominion's argument that the commission improperly relied upon the medical reports of Drs. Charles May, Richard Ward, and Lee Howard in evaluating the credibility of Drs. Fitz and Malinky. To afford Old Dominion with the full review available in mandamus, we remand the matter to the magistrate to determine the outstanding arguments that remain.

Within three (3) days from the filing hereof, the clerk of this court is hereby ordered to serve upon all parties not in default for failure to appear, notice of this judgment and its date of entry upon the journal.

  
\_\_\_\_\_  
Judge Susan Brown, P.J.

  
\_\_\_\_\_  
Judge Lisa L. Sadler

  
\_\_\_\_\_  
Judge Judith L. French

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TENTH APPELLATE DISTRICT 2012 MAY 31 PM 12:40  
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO

State of Ohio ex rel. Old Dominion Freight Line, Inc.,	:	
	:	
Relator,	:	No. 11AP-350
	:	
v.	:	(REGULAR CALENDAR)
	:	
Industrial Commission of Ohio and Robert L. Mason,	:	
	:	
Respondents.	:	

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D E C I S I O N

Rendered on May 31, 2012

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*Eastman & Smith Ltd., Mark A. Shaw, and Garrett M. Cravener, for relator.*

*Michael DeWine, Attorney General, and Eric Tarbox, for respondent Industrial Commission of Ohio.*

*Connor, Evans & Hafenstein, LLP, Nicole E. Rager, and Katie W. Kimmert, for respondent Robert L. Mason.*

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IN MANDAMUS  
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

BROWN, P.J.

{¶ 1} Relator, Old Dominion Freight Line, Inc. ("Old Dominion"), has filed this original action requesting that this court issue a writ of mandamus ordering respondent, Industrial Commission of Ohio ("commission"), to vacate its order that awarded permanent total disability ("PTD") compensation to respondent, Robert L. Mason ("claimant"), and to enter an order denying said compensation.

{¶ 2} This matter was referred to a court-appointed magistrate pursuant to Civ.R. 53(C) and Loc.R. 12(M) of the Tenth District Court of Appeals. The magistrate issued the appended decision, including findings of fact and conclusions of law, and recommended that this court grant Old Dominion's request for a writ of mandamus. The commission and claimant have filed objections to the magistrate's decision.

{¶ 3} We will address the commission's first and second objections and claimant's first objection together, as they are related. The commission argues in its first objection that its failure to send copies of medical reports submitted by Old Dominion to Drs. John Malinky and William Fitz until after their medical examinations did not prejudice Old Dominion. The commission argues in its second objection that the Ohio Administrative Rules allow it to cure oversights by submitting reports after an examination and requesting an addendum report. Claimant argues in his first objection that the magistrate erred when he concluded that the commission failed to follow its own rule when it did not submit Old Dominion's reports to its examining physicians prior to their independent medical examinations.

{¶ 4} Ohio Adm. Code 4121-3-34(C)(4)(b) provides:

The employer shall be provided fourteen days after the date of the industrial commission acknowledgment letter provided for in paragraph (C)(2) of this rule to notify the commission if the employer intends to submit medical evidence relating to the issue of permanent total disability compensation to the commission. Should the employer make such written notification the employer shall submit such medical evidence to the commission within sixty days after the date of the commission acknowledgment letter unless relief is provided to the employer under paragraph (C)(4)(d) of this rule. Should the employer fail to make such written notification within fourteen days after the date of the commission acknowledgment letter, the employer shall be provided sixty days after the date of the commission acknowledgement letter to submit medical evidence relating to the issue of permanent total disability compensation to the commission, but the scheduling of the injured worker for appropriate medical examinations by physicians selected by the commission under paragraph (C)(5)(a)(iii) of this rule will proceed without delay.

{¶ 5} In a related manner, Ohio Adm.Code 4121-3-34(C)(5) provides, in pertinent part:

(a) Following the date of filing of the permanent and total disability application, the claims examiner shall perform the following activities:

\* \* \*

(iii) Schedule appropriate medical examination(s) by physician(s) to be selected by the commission provided that the scheduling of said exams shall not be delayed where the employer fails to notify the commission within fourteen days after the date of the commission acknowledgment letter that it intends to submit medical evidence to the commission relating to the issue of permanent total disability compensation.

{¶ 6} In his first objection, claimant argues that there is no mention in Ohio Adm.Code 4121-3-34(C)(4) that the submission of the medical reports must be prior to the date of the examinations. Claimant contends the magistrate impermissibly added language to this rule when he found it was implicit in the rule that the medical examinations must be delayed where the employer provides notice within the 14-day period provided in that provision.

{¶ 7} In support of its objections, the commission points to the portion of Ohio Adm.Code 4123-3-34(C)(4)(b) that indicates that, when an employer fails to provide written notification of an intent to provide medical records, the employer must be provided 60 days to submit medical evidence, but the scheduling of the injured worker for appropriate medical examinations by physicians selected by the commission will proceed without delay. The commission's contention is that, because this section of Ohio Adm.Code 4123-3-34(C)(4)(b) permits a doctor to review medical evidence after the doctor performs the examination, the commission should also be permitted to forward medical evidence to the doctor after the examination under circumstances such as those here, where the commission mistakenly failed to forward the medical evidence prior to the examination.

{¶ 8} Old Dominion counters that it is only in the situation where the employer fails to timely notify the commission of its intent to submit medical evidence that the rule

permits the commission's medical examinations proceed "without delay." To the contrary, here, Old Dominion points out, it complied with Ohio Adm. Code 4123-3-34(C)(4)(b), so the exception that allows the medical examinations to proceed without delay is not applicable.

{¶ 9} Although we agree with Old Dominion that the above-quoted provision in Ohio Adm. Code 4123-3-34(C)(4)(b) specifically applies only when the employer fails to timely notify the commission of its intent to submit medical evidence, we believe it also demonstrates, as a general proposition, that it is not prejudicial for a doctor to be asked to consider additional medical records after the doctor has performed the examination. If the commission's rules specifically permit a doctor to consider additional evidence after the examination when the employer fails to file a timely notice of intent to submit medical records, we see no reason why a doctor should not be permitted to consider supplemental evidence after the examination when the commission, in good faith, fails to timely submit all medical evidence to the doctor prior to the examination. If the rules allow the former without any prejudicial effect, then the rules should also permit the latter without any prejudicial effect.

{¶ 10} Although it would be more efficient for the commission to submit all medical evidence to the medical examiner at the same time prior to the examination, we can find no specific rule prohibiting the commission from submitting supplemental evidence when its failure to do so was due to an honest error on its behalf. In this respect, we note that we are not concluding herein that the commission should make it a practice to submit evidence piecemeal to the medical examiners when the employer has timely filed its notice to submit medical evidence. We agree with the claimant insofar as he contends it is the better practice for the commission to submit all available evidence to the medical examiners prior to the examinations; however, there is simply nothing in Ohio Adm. Code 4123-3-34(C)(4)(b) that requires such. Furthermore, we note that it is common for physicians to issue addendum reports upon receiving additional medical records after their initial examination. *See, e.g., State ex rel. Ellinwood v. Honda of Am. Mfg., Inc.*, 10th Dist. No. 11AP-169, 2012-Ohio-1372, ¶ 28; *State ex rel. Cowley v. Indus. Comm.*, 10th Dist. No. 11AP-4, 2011-Ohio-6663, ¶ 32; *State ex rel. Kish v. Kroger Co.*, 10th Dist. No. 10AP-882, 2011-Ohio-5766, ¶ 22, 28 (multiple addenda). Therefore, we

sustain the commission's first objection, the commission's second objection, and claimant's first objection.

{¶ 11} Having found that it was not prejudicial for the commission to submit the supplemental evidence to its medical doctors until after their initial examinations, we must address claimant's second objection. Claimant argues in his second objection that the magistrate erred when he concluded that the total failure of the commission to submit Dr. Richard Clary's report to Dr. Fitz was prejudicial. Claimant asserts the file review conducted by Dr. Clary, a psychiatrist, was immaterial to and could not have any bearing on Dr. Fitz's independent medical examination, which addressed claimant's physical capabilities and did not address claimant's psychological conditions.

{¶ 12} Ohio Adm. Code 4123-3-34(C)(5) provides, in pertinent part:

(a) Following the date of filing of the permanent and total disability application, the claims examiner shall perform the following activities:

\*\*\*

(ii) Copy all relevant documents as deemed pertinent by the commission including evidence provided under paragraphs (C)(1) and (C)(4) of this rule and submit the same to an examining physician to be selected by the claims examiner.

{¶ 13} Accordingly, pursuant to Ohio Adm. Code 4123-3-34(C)(5)(a)(ii), it is undisputed that the commission should have submitted Dr. Clary's report to Dr. Fitz, and it was error not to do so. The question we must then address is whether the commission's error prejudiced claimant. It is axiomatic that the complaining party must demonstrate that it has been prejudiced by the judgment of the lower tribunal. *State ex rel. Whirlpool Corp. v. Indus. Comm.*, 10th Dist. No. 09AP-380, 2010-Ohio-255, ¶ 10, citing *Haendiges v. Haendiges*, 82 Ohio App.3d 720, 723 (3d Dist.1992).

{¶ 14} Here, we find no prejudice. We agree with claimant that any error was harmless because there is no indication in the record that Dr. Clary's psychological report would have had any effect on Dr. Fitz's medical examination. Dr. Fitz examined claimant with regard to his ability to sustain remunerative employment based upon his allowed physical conditions. There is no indication in the record that Dr. Fitz would have been

competent to render any opinion related to claimant's psychological conditions, and Dr. Clary's report makes no mention of any physical findings that might have impacted Dr. Fitz's report. Thus, we find any error, in this respect, was harmless, and the magistrate erred when he found it prejudicial. Therefore, claimant's second objection is sustained.

{¶ 15} Having found the commission committed prejudicial error, the magistrate did not reach Old Dominion's argument that the commission improperly relied upon the medical reports of Drs. Charles May, Richard Ward, and Lee Howard in evaluating the credibility of Drs. Fitz and Malinky. To afford Old Dominion with the full review available in mandamus, we remand the matter to the magistrate to determine the outstanding arguments that remain.

{¶ 16} After an examination of the magistrate's decision, an independent review of the evidence, pursuant to Civ.R. 53, and due consideration of claimant's and the commission's objections, we sustain the commission's first and second objections and claimant's first and second objections. The matter is remanded to the magistrate for proceedings consistent with the above decision.

*Objections sustained and cause remanded.*

SADLER and FRENCH, JJ., concur.

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**APPENDIX**

**IN THE COURT OF APPEALS OF OHIO**

**TENTH APPELLATE DISTRICT**

State of Ohio ex rel.	:	
Old Dominion Freight Line, Inc.,	:	
Relator,	:	
v.	:	No. 11AP-350
Industrial Commission of Ohio and	:	(REGULAR CALENDAR)
Robert L. Mason,	:	
Respondents.	:	

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**MAGISTRATE'S DECISION**

Rendered on December 16, 2011

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*Eastman & Smith Ltd., Mark A. Shaw, and Garrett M. Cravener, for relator.*

*Michael DeWine, Attorney General, and Eric Tarbox, for respondent Industrial Commission of Ohio.*

*Connor, Evans & Hafenstein, LLP, Nicole E. Rager, and Katie W. Kimmet, for respondent Robert L. Mason.*

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**IN MANDAMUS**

{¶ 17} In this original action, relator, Old Dominion Freight Line, Inc., requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate its order awarding permanent total disability ("PTD") compensation to respondent Robert L. Mason ("claimant"), and to enter an order denying the compensation.

Findings of Fact:

{¶ 18} 1. On January 18, 2005, claimant sustained an industrial injury while employed as a truck driver for relator, a self-insured employer, under Ohio's workers' compensation laws. The industrial claim (No. 05-806440) is allowed for:

Hip fracture; left trochanteric femur fracture; left femoral neck fracture; depressive disorder; left short leg syndrome; lumbar strain; post-traumatic stress disorder.

{¶ 19} 2. On September 25, 2007, treating physician Charles B. May, D.O., wrote to claimant's counsel:

[I]t is my medical opinion that Mr. Mason will not be able to return to his previous employment as a truck driver on a permanent basis as a direct and proximate result of the allowed physical conditions in this claim. Furthermore, it is my medical opinion that Mr. Robert Mason is, in fact, permanently and totally disabled from any form of substantial gainful employment as a direct and proximate result of the allowed physical conditions in this claim. I have completed the physical capacity form that you have enclosed as well as the physician statement of permanent and total disability as you have requested.

{¶ 20} 3. On another document captioned "Statement of Physician Permanent Total Disability" dated September 26, 2007, Dr. May indicated that relator cannot return to his former position of employment and that he is "permanently and totally disabled."

{¶ 21} 4. On January 28, 2008, at claimant's request, claimant was examined by orthopedic surgeon Richard M. Ward, M.D. In a two-page narrative report, Dr. Ward opined:

[I]t is my opinion that as a direct result of the physical allowances from the injury that occurred on 1/18/05, he is not capable of returning to substantial gainful employment and should for this reason be granted permanent total disability.

{¶ 22} 5. On April 1, 2008, at claimant's request, he was examined by psychologist Lee Howard, Ph.D. In his 17-page narrative report, Dr. Howard opines that claimant is "an appropriate candidate for permanent total disability."

{¶ 23} 6. On July 7, 2009, Dr. Howard completed a form captioned "Statement of Physician." On the form, Dr. Howard indicates by his mark that the claimant cannot return to his former position of employment and he is permanently and totally disabled.

{¶ 24} 7. On July 22, 2009, claimant filed an application for PTD compensation. In support, claimant submitted the reports of Dr. May, the reports of Dr. Howard, and the report of Dr. Ward.

{¶ 25} 8. On July 24, 2009, the commission mailed a "Permanent Total Application Acknowledgment Letter" that notified the parties of the July 22, 2009 filing of the PTD application. The acknowledgment letter further stated:

Employers may submit additional medical evidence relating to this issue, including reports from Employer requested examinations. Medical evidence must be submitted by 09/22/2009. Employers must notify the Industrial Commission in writing of their intent to submit medical evidence by 08/07/2009, if the evidence is to be considered by the Industrial Commission specialist(s).

{¶ 26} 9. By letter dated July 28, 2009, relator timely notified the commission of its intent to submit medical evidence.

{¶ 27} 10. On August 31, 2009, at relator's request, claimant was examined by Oscar F. Sterle, M.D. In his ten-page narrative report dated September 8, 2009, Dr. Sterle opined:

As related to the physical allowed conditions in the claim, the only residual impairment under this claim is a short-leg syndrome, which has been addressed with a lift. I find no other physical condition that would preclude Mr. Mason from sustaining remunerative employment.

The remaining allowed conditions in the claim have resolved and are considered to be at maximum medical improvement.

{¶ 28} 11. At relator's request, psychiatrist Richard H. Clary, M.D., conducted a file review. In his two-page narrative report dated September 3, 2009, Dr. Clary states:

Review of medical records indicate that the first physician of record released Mr. Mason to return to work on light duty in January of 2006. He later changed his opinion and said that Mr. Mason could return to sedentary work in March of 2006.

Accepting the objective medical findings in the file, it is my opinion that Mr. Mason is able to perform sedentary work which is appropriate with his allowed physical conditions. In my medical opinion, the allowed psychiatric conditions would not prevent him from working a sedentary job. In my medical opinion, the psychiatric conditions do not cause permanent total disability.

{¶ 29} 12. On September 8, 2009, at relator's request, claimant was examined by psychologist Michael A. Murphy, Ph.D. In his ten-page narrative report, Dr. Murphy opines:

Opinion: The following opinion is based on a reasonable degree of psychological certainty.

Question 1: Based solely on the allowed psychological conditions of "Depressive Disorder" and "Post-Traumatic Stress Disorder," what restrictions, if any, would you place on Mr. Mason's work activities?

In my opinion, this Injured Worker's depression is mild. He has never attempted a psychotropic.

His condition of Post-Traumatic Stress Disorder is of mild severity as well. He denies symptoms of startle responses, psychic numbing, and he does continue to drive. His primary complaints with respect to post-traumatic stress are that of nightmares and flashbacks.

This Injured Worker drives, travels, handles his finances, uses a scooter when shopping, does laundry, cooks one meal a day, and performs light housework.

His appetite is normal, libido is normal, and his energy level is normal (see MCMI-III).

The Injured Worker's cognitive functions are fully intact with no short or long-term impairment.

Recall that his functioning is also reduced by unrelated factors (i.e., obesity, cardiac, sleep apnea, and other factors). In my opinion, his DSM-IV psychological conditions would not preclude his former position.

Question 2: Is Mr. Mason precluded from all sustained remunerative employment as a result of the

residual impairment, from the allowed psychological conditions of "Depressive Disorder" and "Post-Traumatic Stress Disorder"?

In my opinion, the allowed DSM-IV conditions are not work-prohibitive. His conditions are mild and do not require medication. Many of his symptoms fall in the normal range. His cognitive functions are intact, alert, and in the normal limit range. This does not account for the effects of his medications (related/unrelated).

(Emphasis sic.)

{¶ 30} 13. In keeping with the September 22, 2009 deadline for submission of medical evidence as set forth in the commission's acknowledgment letter, on September 22, 2009, relator timely submitted to the commission the reports of Drs. Sterle, Clary, and Murphy.

{¶ 31} 14. On September 23, 2009, the commission mailed a "medical examination referral" letter to William R. Fitz, M.D. The letter informed Dr. Fitz that he was scheduled to perform an examination of the claimant on October 7, 2009. The letter also recites "pertinent medical records are enclosed." Apparently, with the letter, the commission sent copies of claimant's medical records, but not relator's medical records.

{¶ 32} 15. On October 5, 2009, the commission mailed a "medical examination referral" letter to psychiatrist John M. Malinky, M.D. The letter informed Dr. Malinky that he was scheduled to examine claimant on October 21, 2009. The letter also recites "pertinent medical records are enclosed." Apparently, with the referral letter, the commission sent copies of claimant's medical records, but not relator's medical records.

{¶ 33} 16. On October 7, 2009, at the commission's request, claimant was examined by Dr. Fitz. In his three-page narrative report, Dr. Fitz opined that claimant has a "37% impairment to the body as a whole."

{¶ 34} 17. On a physical strength rating form dated October 7, 2009, Dr. Fitz indicated by his mark "[t]his Injured Worker is incapable of work."

{¶ 35} 18. On October 21, 2009, at the commission's request, claimant was examined by Dr. Malinky. In his eight-page narrative report, Dr. Malinky opines:

**ASSESSMENT OF SEVERITY IN TERMS OF  
FUNCTIONAL LIMITATIONS DUE TO MR. MASON'S**

**DEPRESSIVE DISORDER AND POST-TRAUMATIC STRESS DISORDER. (According to AMA Guides, 5th Ed.);**

1. **Activities of daily living**, including cleaning, shopping, cooking, paying bills, maintaining his residence, caring appropriately for his grooming and hygiene, using telephone and directories. **Class 3, moderate impairment.**
2. **Social functioning**, his ability to get along with others; avoid altercations, fear of strangers; avoidance of interpersonal relationships and social isolation. **Class 3, moderate impairment.**
3. **Concentration, persistence, and pace** with respect to completing tasks in a timely manner and being able to concentrate and attend to that to which he is doing. **Class 3, moderate impairment.**
4. **Decompensation in work or work-like settings**; capacity to adapt to stressful circumstances including the ability to make decisions, attend to obligations, make schedules, complete tasks, interact with supervisors and peers. **Class 3, moderate impairment.**

The American Medical Association Guide to Evaluation of Permanent Impairment 5th Edition was utilized. The best estimate of the whole person impairment based only on the allowed Depressive Disorder and Post-Traumatic Stress Disorder is 30%. B.A.

3. Complete the enclosed occupational activity assessment. Based solely on the impairment resulting from the allowed mental and behavioral condition in this claim within my specialty and with no consideration to the injured workers age, education or work training; This injured worker is incapable of work.

The injured worker would not be able to deal with the public. This individual would not be able to handle the stress of a normal workday or workweek. He would have difficulties sustaining and persisting at tasks.

(Emphasis sic.)

{¶ 36} 19. On October 21, 2009, Dr. Malinky completed a form captioned "Occupational Activity Assessment, Mental and Behavioral Examination." On the form, Dr. Malinky indicated by his mark "[t]his injured worker is incapable of work."

{¶ 37} 20. On November 10, 2009, relator moved for leave to take the depositions of Drs. Fitz and Malinky.

{¶ 38} 21. Following a September 17, 2009 hearing, a staff hearing officer ("SHO") issued separate orders denying relator's motions for leave to depose the doctors. One of the orders states:

The Employer has requested to depose to Dr. Malinky, regarding the report written on 10/21/2009.

The Staff Hearing Officer finds that the request is unreasonable, because the reports submitted by the Employer from Drs. Murphy and Clary were not reasonably available to be included in the packet of information sent to Dr. Malinky prior to his examination of the Injured Worker. The lack of citation to all of the Employer's medical evidence is not a basis to grant the request to depose Dr. Malinky, and any potential defect can be remedied by the Employer by other means.

The other order states:

The Employer has requested to depose Dr. Fitz, regarding the report written on 10/07/2009.

The Staff Hearing Officer finds that the request is unreasonable because the Employer's evidence from Dr. Sterle, Murphy and Clary was filed on either 09/22/2009 or 09/23/2009, and the examination with Dr. Fitz was scheduled by letter mailed 09/23/2009. The lack of inclusion of the Employer's medical reports in the evidence cited by Dr. Fitz is not found to be sufficient reason to grant a deposition of Dr. Fitz.

Therefore, the request is denied.

{¶ 39} 22. On February 20, 2010, the commission mailed orders denying relator's requests for reconsideration of the SHO's orders denying leave to depose.

{¶ 40} 23. Relator requested a prehearing conference with the Columbus hearing administrator. Following a February 4, 2010 conference, the hearing administrator issued a compliance letter stating:

The medical reports submitted by the Employer, Dr. Clary's, 9/3/2009 report, Dr. Murphy's 9/8/2009 report and the report of Dr. Sterle, dated 9/8/2009 will be submitted to Dr. Fltz and Dr. Malinky to obtain an addendum to their reports so that they can opine as to whether or not the Employer's medical reports changes their original opinions. After these reports are processed and in file, the claim will be forwarded to docketing to reschedule the hearing on the issue of Injured Worker's application to be declared permanently and totally disabled.

{¶ 41} 24. In response to the compliance letter, the commission mailed two letters, each dated February 4, 2010, to Dr. Malinky. One letter states:

Thank you for your report dated 10/21/2009. The Industrial Commission inadvertently omitted two timely filed reports by Dr. Michael Murphy and Dr. Oscar Sterle for your review and are asking whether or not this changes your original opinion. If there are any changes, please describe below and if not, state as such.

In response, Dr. Malinky wrote in his own hand:

I have reviewed the report of Dr. Murphy dated 9/8/2009 and the report of Dr. Sterle dated 8/31/2009. My opinion remains the same as stated in my report of 10/21/2009.

{¶ 42} 25. The second letter to Dr. Malinky dated February 4, 2010 states:

Thank you for your report dated 10/21/2009. The Industrial Commission inadvertently omitted the timely filed report by Dr. Richard Clary for your review and are asking whether or not this changes your original opinion. If there are any changes, please describe below and if not, state as such.

In response, Dr. Malinky wrote in his own hand:

I have read Dr. Clary's report dated 9/3/2009. My original opinion has not changed.

{¶ 43} 26. In response to the compliance letter, the commission mailed one letter dated February 4, 2010 to Dr. Fitz. The letter states:

Thank you for your report dated 10/7/2009. The Industrial Commission inadvertently omitted two timely filed reports by Dr. Oscar Sterle and Dr. Murphy for your review and are asking whether or not this changes your original opinion. If there are any changes, please describe below and if not, please state as such.

In response, Dr. Fitz wrote in his own hand:

These two reports were reviewed and do not change the opinions expressed in my report.

{¶ 44} 27. Following a March 16, 2010 hearing, an SHO issued an order awarding PTD compensation starting September 25, 2007. The SHO's order explains:

Permanent and total disability compensation is awarded from 09/25/2007 for the reason that this is the date of Dr. May's report supporting the award.

It is the finding of the Staff Hearing Officer that the Injured Worker is permanently and totally disabled as the result of the medical effects of his allowed physical and psychological injuries. The Injured Worker has been prevented from returning to any form of sustained remunerative employment as a consequence of each of these two categories of medical condition. Such a finding mandates an award of permanent total disability compensation without further consideration of the "Stephenson" factors. In reaching this conclusion, the Staff Hearing Officer relies upon the independent medical examinations and evaluations performed at the direction of the Industrial Commission; William R. Fitz, M.D., who examined with respects to the allowed physical injuries, and John M. Malinky, Ph.D., who examined with respects to the allowed psychological conditions. In evaluating the credibility of these reports, the Staff Hearing Officer particularly notes the 01/28/2008 report of Dr. Ward, the two reports of Dr. May of 09/25/2007 and 09/26/2007, and the 07/07/2009 report of Dr. Howard. The Staff Hearing Officer further particularly notes that the Injured Worker has a claim which is allowed for a very serious left hip fracture, and also for psychological conditions, notably post traumatic stress disorder, together with some physical conditions related to the allowed hip fracture.

The Staff Hearing Officer has considered the prior denial of a permanent and total application in early 2007, the medical submitted on behalf of the Employer, and the Employer's arguments with respect to the sufficiency of the evidence submitted in support of the application. Specifically, the Staff Hearing Officer has considered the Employer's argument that the Injured Worker suffers from multiple unallowed medical conditions which have been improperly evaluated by the medical evidence in support of the application, and has further considered the Employer's arguments with respect to alleged inconsistency in these reports.

It is plain that the Injured Worker does suffer from medical conditions over and above his allowed injuries. In particular, the Injured Worker has multi-level spondylosis in the lower back, which may impact the Injured Worker's loss of function in the lower back, when consideration is being properly given to his allowed lumbar strain. In light of the fact that the medical professionals specifically state that they are considering only allowed conditions, there is no direct evidence of any improper consideration of these unallowed conditions affecting the same body part.

The Employer further argues that the reports of Drs. Howard and May improperly consider the Injured Worker's age, education, work experience, and similar disability factors in reaching their conclusions. Reading the reports in context, they are plainly stating that the Injured Worker has lost the ability to engage in any form of sustained remunerative employment. Further, an error in one of Dr. May's reports which appears to state he is considering a right hip fracture, is plainly merely a clerical error as there is no evidence the Injured Worker ever had a right hip fracture. Finally, the argument that the physical evidence supports the conclusion that the Injured Worker could engage, on a physical basis, in part-time sedentary work is not supported by the reports cited. This is an inference drawn argumentatively, but not stated by the reports under consideration.

In light of the fact that the independent examinations both conclude that the Injured Worker is unable to engage in sustained remunerative employment, solely as the result of the allowed conditions, the weight of the evidence strongly supports the conclusion that the physical and psychological conditions taken together do so. Consequently, an award of permanent total disability compensation is made.

{¶ 45} 28. On May 20, 2010, the three-member commission mailed an order denying relator's request for reconsideration.

{¶ 46} 29. On April 7, 2011, relator, Old Dominion Freight Line, Inc., filed this mandamus action.

Conclusions of Law:

{¶ 47} It is the magistrate's decision that this court issue a writ of mandamus, as more fully explained below.

{¶ 48} Ohio Adm.Code 4121-3-34 provides the commission's rules for the adjudication of PTD applications.

{¶ 49} Ohio Adm.Code 4121-3-34(C) sets forth the commission's rules regarding the processing of PTD applications.

{¶ 50} Ohio Adm.Code 4121-3-34(C)(2) provides that the commission shall serve an acknowledgment letter following the filing of a PTD application:

At the time the application for permanent total disability compensation is filed with the industrial commission, the industrial commission shall serve a copy of the application together with copies of supporting documents to the employer's representative (if the employer is represented), or to the employer (if the employer is not represented) along with a letter acknowledging the receipt of the permanent total disability application.

Ohio Adm.Code 4121-3-34(C)(4)(b) provides:

The employer shall be provided fourteen days after the date of the industrial commission acknowledgment letter provided for in paragraph (C)(2) of this rule to notify the commission if the employer intends to submit medical evidence relating to the issue of permanent total disability compensation to the commission. Should the employer make such written notification the employer shall submit such medical evidence to the commission within sixty days after the date of the commission acknowledgment letter unless relief is provided to the employer under paragraph (C)(4)(d) of this rule. Should the employer fail to make such written notification within fourteen days after the date of the commission acknowledgment letter, the employer shall be provided sixty days after the date of the commission acknowledgment letter to submit medical evidence relating

to the issue of permanent total disability compensation to the commission, but the scheduling of the injured worker for appropriate medical examinations by physicians selected by the commission under paragraph (C)(5)(a)(iii) of this rule will proceed without delay.

Ohio Adm. Code 4121-3-34(C)(5) provides:

(a) Following the date of filing of the permanent and total disability application, the claims examiner shall perform the following activities:

\*\*\*

(ii) Copy all documents including medical and hospital reports pertinent to the issue of permanent total disability including relevant evidence provided under division (C)(4) of this rule and submit the same to an examining physician to be selected by the claims examiner.

(iii) Schedule appropriate medical examination(s) by physician(s) to be selected by the commission provided that the scheduling of said exams shall not be delayed where the employer fails to notify the commission within fourteen days after the date of the commission acknowledgment letter that it intends to submit medical evidence to the commission relating to the issue of permanent total disability compensation.

{¶ 51} Here, relator timely notified the commission within the 14-day period that it intended to submit medical evidence relating to the issue of PTD compensation. Then, relator timely submitted its medical evidence within 60 days after the date of the commission's acknowledgment letter.

{¶ 52} Under the rules, relator was given the right to have its medical evidence submitted to the examining physicians selected by the commission under Ohio Adm. Code 4121-3-34(C)(5)(a)(ii).

{¶ 53} Under Ohio Adm. Code 4121-3-34(C)(4)(b), the scheduling of the commission's medical examinations will proceed "without delay" where the employer fails to provide the notice within the 14-day period. However, implicit in the rule is that the scheduling of the commission's medical examinations shall be delayed where the

employer provides the notice within the 14-day period. Where notice is given within the 14-day period, the employer has 60 days to provide its medical evidence, and the scheduling of the commission's medical examinations must be delayed to accommodate the 60-day period.

{¶ 54} Here, the commission failed to follow its own rules when it failed to submit relator's timely filed medical evidence to its examining physicians prior to their examinations. Relator had a clear legal right under the commission's rules to have its medical evidence, namely the reports of Drs. Sterle, Clary, and Murphy, submitted to examining physicians Fitz and Malinky prior to their examinations of the claimant.

{¶ 55} Here, the commission endeavored to remedy its failure to follow its own rules by sending relator's medical evidence to examining physicians Fitz and Malinky after they had examined the claimant and issued their reports. As noted earlier, Drs. Fitz and Malinky responded to the commission's February 4, 2010 letters indicating that their review of relator's medical evidence did not change their opinions rendered in their reports. However, as relator here points out, even the commission's remedy was not complete because Dr. Fitz was never sent a copy of Dr. Clary's report. Rather, Dr. Fitz was only sent copies of the reports of Drs. Sterle and Murphy.

{¶ 56} The commission's rules do not provide for addendum reports of the commission's examining physicians when the commission fails to follow its own rules regarding submission of the employer's medical records to the commission's examining physicians. Thus, the commission fashioned a remedy for this occasion in the hope that the addendum reports would cure the problem. In the magistrate's view, the addendum reports do not cure the problem.

{¶ 57} We do not know, and cannot ever know, to what extent the timely receipt of relator's medical evidence by Drs. Fitz and Malinky prior to their respective examinations would have influenced the medical conclusions drawn by those physicians in their reports. We only know that the employer's medical evidence did not change the medical conclusions of Drs. Fitz and Malinky when those doctors were asked to reconsider their conclusions after reviewing the employer's medical records.

{¶ 58} In the magistrate's view, the commission's failure to follow its own rules was prejudicial to relator's right to challenge claimant's PTD application under the rules. It is

well-settled that the commission must follow its own rules as written. *State ex rel. H.C.F., Inc. v. Ohio Bur. of Workers' Comp.*, 80 Ohio St.3d 642, 647, 1998-Ohio-175.

{¶ 59} Accordingly, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate its SEIO's order of March 16, 2010 awarding PTD compensation, and to conduct further proceedings regarding the PTD application after elimination of the reports of Drs. Fitz and Malinky from further evidentiary consideration. The commission shall schedule new appropriate medical examinations, and, in so doing, shall submit to the newly selected physicians the medical evidence of the employer and the claimant as provided by the commission's rules.

s/s Kenneth W. Macke

KENNETH W. MACKE  
MAGISTRATE

#### NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).

The Industrial Commission of Ohio  
**RECORD OF PROCEEDINGS**

Claim Number: 05-006440      Claims Heard: 05-006440  
                  LT-AGC-SI-COV  
PCN: 2061181    Robert L. Mason

ROBERT L. MASON  
191 S CHESTERFIELD RD  
COLUMBUS OH 43209-1912

Date of Injury: 1/18/2006      Risk Number: 20005302-0

This matter was heard on 02/28/2007, before Staff Hearing Officer R. Miller, pursuant to the provisions of Ohio Revised Code Section 4121.35(B)(1) on:

IC-2 App For Compensation Of Permanent Total Disability filed by Injured Worker on 04/26/2006.  
Issue: 1) Permanent Total Disability

Notices were mailed to the injured worker, the employer, their respective representatives and the Administrator of the Bureau of Workers' Compensation not less than 14 days prior to this date, and the following were present at the hearing:

APPEARANCE FOR THE INJURED WORKER: Injured Worker and Mr. Hafenstein  
APPEARANCE FOR THE EMPLOYER: Mr. Shaw, Mr. Pressler and Court Reporter  
APPEARANCE FOR THE ADMINISTRATOR: N/A

It is the finding of the Staff Hearing Officer that this claim has been allowed for: HIP FRACTURE; LEFT TROCHANTERIC FEMUR FRACTURE; LEFT FEMORAL NECK FRACTURE.

After reviewing all of the evidence on file and considering the testimony of the injured worker and Mr. Pressler, it is the order of the Staff Hearing Officer that the injured worker's application for permanent and total disability, filed on 04/26/2006, is denied.

It is the finding of the Staff Hearing Officer that the injured worker retains the residual physical and intellectual abilities to engage in sustained remunerative employment of the sedentary nature.

In finding that the injured worker is not permanently and totally disabled, the Staff Hearing Officer relies upon the medical reports of Drs. Robert Turner, dated 07/21/2006 and Oscar Sterle, dated 06/23/2006, and the Vocational Assessment report prepared by NV Solutions, Inc.

The injured worker is a 66 year old male who graduated from high school in 1957. The injured worker has the ability to read, write and perform basic math. The injured worker did not attend a vocational school for training but he does have extensive experience as truck driver. The injured worker testified that he acquired the skill of truck driving on the job.

The record reveals that the injured worker has over 43 years experience as a truck driver, local in town delivery and over the road. He worked for various employers over the years as truck driver, Kroger, Coca Cola, and Old Dominion (employer of record).

The injured worker sustained this injury on 01/18/2006 when he slipped on ice while delivering items to a customer. He does not have any other industrial injury claims.

The Industrial Commission of Ohio

RECORD OF PROCEEDINGS

Claim Number: 05-806440

The claim was allowed for left hip fracture, left trochanteric femur fracture, and left femoral neck fracture. The record reveals that the injured worker had surgery to repair which involved a hip nailing and intramedullary device going all the way to the knee. After the surgery, the injured worker had physical therapy and follow up care with Dr. Papp, his attending physician and surgeon. He currently uses a cane to ambulate.

On 07/25/2006, Dr. Turner (orthopedist) examined the injured worker on behalf of the Industrial Commission to determine whether the injured worker retains the residual physical capacity to engage in sustained remunerative employment based upon the allowed conditions in the claim. Dr. Turner opined that based upon the allowed conditions in the claim that the injured worker retains the residual physical capacity to engage in sedentary employment. Dr. Turner found that the injured worker had a whole person impairment of 36 percent with respect to the allowed conditions in this claim. He further opined that the injured worker retains the residual physical capacity to engage in sedentary employment.

MV Solutions prepared an vocational assessment on behalf of the Employer to determine whether the injured worker possess transferable or related employment skills based upon the injured worker medical restrictions, work history, and education.

The vocational consultant opined, based upon the injured worker's education, work history, and physical capacity, that the injured worker was not vocationally unemployable. The consultant opined that the injured worker could consider employment including, but not limited to telephone sales solicitor, dispatcher for motor vehicle, service dispatcher, maintenance service dispatcher, and other positions in the entry-level sedentary positions.

It is the finding of the Staff Hearing Officer that the injured worker is not permanently and totally, disabled based upon the reason set forth in this order. The injured worker has the ability to read, write and perform basic math, he retains the residual physical capacity to perform sedentary employment.

The injured worker has demonstrated that he has the ability to maintain employment relationships by being employed for 43 years as a truck driver.

The Staff Hearing Officer finds that the injured worker has the ability to obtain entry-level employment as a dispatcher of motor vehicle pool, service maintenance and some dispatcher jobs that do not require constant standing. Staff Hearing Officer also finds that the injured worker could perform cashier jobs that only require sitting.

Therefore, the Staff Hearing Officer finds that the injured worker is not permanently and totally disabled.

Typed By: srl  
Date Typed: 04/06/2007  
Date Received: 04/27/2006  
Findings Mailed: 04/12/2007

R. Miller  
Staff Hearing Officer

Electronically signed by  
R. Miller

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The parties and representatives listed below have been sent this record of proceedings. If you are not an authorized representative of either the injured worker or employer, please notify the Industrial Commission.

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The Industrial Commission of Ohio  
**RECORD OF PROCEEDINGS**

Claim Number: 05-806440

05-806440  
Robert L. Mason  
191 S Chesterfield Rd  
Columbus OH 43209-1912

Risk No: 20085302-0  
Old Dominion Freight Line, Inc  
Parker Katrena  
500 Old Dominion Way  
Thomasville NC 27360-8923

ID No: 10467-90  
\*\*\*Daniel D. Connor\*\*\*  
601 S High St  
Columbus OH 43215-5601

ID No: 1649-80  
Eastman & Smith Ltd  
PO Box 10032  
Toledo OH 43699-0032

ID No: 1702-80  
Cambridge Integrated Servi  
PO Box 2305  
Mount Clemens MI 48046-2305

ID No: 4000-05  
\*\*\*BWC - DWR Section\*\*\*  
30 W Spring St  
Columbus OH 43215-2241

BWC, LAW DIRECTOR

PTDDENY

Page 3

sr1/sr1

An Equal Opportunity Employer  
and Payee Provider

000027

The Industrial Commission of Ohio

RECORD OF PROCEEDINGS

Claim Number: 05-806440      Claims Heard: 05-806440  
                  LT-ACC-SI-COV  
PCN: 2093162    Robert L. Mason

ROBERT L. MASON  
191 S CHESTERFIELD RD  
COLUMBUS OH 43209-1912

Date of Injury: 1/18/2006      Risk Number: 20005302-0

This claim has been previously allowed for: HIP FRACTURE; LEFT TROCHANTERIC FEMUR FRACTURE; LEFT FEMORAL NECK FRACTURE; DEPRESSIVE DISORDER; LEFT SHORT LEG SYNDROME; LUMBAR STRAIN; POST-TRAUMATIC STRESS DISORDER.  
DISALLOWED: AGGRAVATION OF PRE-EXISTING SLEEP APNEA.

This matter was heard on 12/17/2009 before Staff Hearing Officer Robert Cromley pursuant to the provisions of R.C. Sections 4121.35(B) and 4123.511(D) on the following:

LETTER filed by Employer on 11/10/2009.  
Issue: 1) Motion To Depose/Interrogatories - DEPOSE WILLIAM R. FITZ, MD

Notices were mailed to the Injured Worker, the Employer, their respective representatives and the Administrator of the Bureau of Workers' Compensation not less than fourteen (14) days prior to this date, and the following were present for the hearing:

APPEARANCE FOR THE INJURED WORKER: Ms. Rager  
APPEARANCE FOR THE EMPLOYER: Mr. Shaw  
APPEARANCE FOR THE ADMINISTRATOR: No Appearance

The Employer has requested to depose Dr. Fitz, regarding the report written on 10/07/2009.

The Staff Hearing Officer finds that the request is unreasonable because the Employer's evidence from Dr. Sterle, Murphy and Clary was filed on either 09/22/2009 or 09/23/2009, and the examination with Dr. Fitz was scheduled by letter mailed 09/23/2009. The lack of inclusion of the Employer's medical reports in the evidence cited by Dr. Fitz is not found to be sufficient reason to grant a deposition of Dr. Fitz.

Therefore, the request is denied. The processing of all pending issues is to resume.

Typed By: Js  
Date Typed: 12/17/2009  
Findings Mailed: 12/19/2009

Robert Cromley  
Staff Hearing Officer  
Electronically signed by  
Robert Cromley

The Industrial Commission of Ohio

## RECORD OF PROCEEDINGS

Claim Number: 05-806440

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The parties and representatives listed below have been sent this record of proceedings. If you are not an authorized representative of one of the parties, please notify the Industrial Commission.

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05-806440  
Robert L. Mason  
191 S Chesterfield Rd  
Columbus OH 43209-1912

ID No: 10467-90  
\*\*\*Connor, Evans & Hafenstein LLP\*\*  
601 S High St  
Columbus OH 43215-5601

Risk No: 20006302-0  
Old Dominion Freight Line, Inc  
600 Old Dominion Way  
Thomasville NC 27360-9923

ID No: 1649-80  
Eastman & Smith Ltd  
PO Box 10032  
Toledo OH 43699-0032

ID No: 1702-80  
Cambridge Integrated Servl  
300 W Wilson Bridge Rd Ste 200  
Worthington OH 43085-2286

BWC, LAW DIRECTOR

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NOTE: INJURED WORKERS, EMPLOYERS, AND THEIR AUTHORIZED REPRESENTATIVES MAY REVIEW THEIR ACTIVE CLAIMS INFORMATION THROUGH THE INDUSTRIAL COMMISSION WEB SITE AT [www.ohioic.com](http://www.ohioic.com). ONCE ON THE HOME PAGE OF THE WEB SITE, PLEASE CLICK I.C.O.N. AND FOLLOW THE INSTRUCTIONS FOR OBTAINING A PASSWORD. ONCE YOU HAVE OBTAINED A PASSWORD, YOU SHOULD BE ABLE TO ACCESS YOUR ACTIVE CLAIM(S).

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The Industrial Commission of Ohio  
**RECORD OF PROCEEDINGS**

Claim Number: 05-806440      Claims Heard: 05-806440  
                  LT-ACC-SI-COV  
PCN: 2093161    Robert L. Mason

ROBERT L. MASON  
191 S CHESTERFIELD RD  
COLUMBUS OH 43209-1912

Date of Injury: 1/18/2005      Risk Number: 20005302-0

This claim has been previously allowed for: HIP FRACTURE; LEFT TROCHANTERIC FEMUR FRACTURE; LEFT FEMORAL NECK FRACTURE; DEPRESSIVE DISORDER; LEFT SHORT LEG SYNDROME; LUMBAR STRAIN; POST-TRAUMATIC STRESS DISORDER.  
DISALLOWED: AGGRAVATION OF PRE-EXISTING SLEEP APNEA.

This matter was heard on 12/17/2009 before Staff Hearing Officer Robert Cromley pursuant to the provisions of Ohio Revised Code Sections 4121.35(B) and 4123.511(D) on the following:

LETTER filed by Employer on 11/10/2009,  
Issue: 1) Motion To Depose/Interrogatories - DEPOSE JOHN M. MALINKY, PHD

Notices were mailed to the Injured Worker, the Employer, their respective representatives and the Administrator of the Bureau of Workers' Compensation not less than fourteen (14) days prior to this date, and the following were present for the hearing:

APPEARANCE FOR THE INJURED WORKER: Ms. Rager  
APPEARANCE FOR THE EMPLOYER: Mr. Shaw  
APPEARANCE FOR THE ADMINISTRATOR: No Appearance

The Employer has requested to depose to Dr. Malinky, regarding the report written on 10/21/2009.

The Staff Hearing Officer finds that the request is unreasonable, because the reports submitted by the Employer from Drs. Murphy and Clary were not reasonably available to be included in the packet of information sent to Dr. Malinky prior to his examination of the Injured Worker. The lack of citation to all of the Employer's medical evidence is not a basis to grant the request to depose Dr. Malinky, and any potential defect can be remedied by the Employer by other means.

Therefore, the request is denied. The processing of all pending issues is to resume.

Typed By: eh  
Date Typed: 12/17/2009  
Findings Mailed: 12/19/2009

Robert Cromley  
Staff Hearing Officer

Electronically signed by  
Robert Cromley

The Industrial Commission of Ohio  
**RECORD OF PROCEEDINGS**

Claim Number: 05-806440

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The parties and representatives listed below have been sent this record of proceedings. If you are not an authorized representative of one of the parties, please notify the Industrial Commission.

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05-806440  
Robert L. Mason  
191 S Chesterfield Rd  
Columbus OH 43209-1912

ID No: 10467-90  
\*\*\*Connor, Evans & Hafenstein LLP\*\*  
501 S High St  
Columbus OH 43215-5601

Risk No: 20005302-0  
Old Dominion Freight Line, Inc  
500 Old Dominion Way  
Thomasville NC 27360-8923

ID No: 1649-80  
Eastman & Smith Ltd  
PO Box 19032  
Toledo OH 43699-0032

ID No: 1702-80  
Cambridge Integrated Servf  
300 W Wilson Bridge Rd Ste 200  
Worthington OH 43085-2286

BWC, LAW DIRECTOR

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NOTE: INJURED WORKERS, EMPLOYERS, AND THEIR AUTHORIZED REPRESENTATIVES MAY REVIEW THEIR ACTIVE CLAIMS INFORMATION THROUGH THE INDUSTRIAL COMMISSION WEB SITE AT [www.ohioic.com](http://www.ohioic.com). ONCE ON THE HOME PAGE OF THE WEB SITE, PLEASE CLICK I.C.O.N. AND FOLLOW THE INSTRUCTIONS FOR OBTAINING A PASSWORD. ONCE YOU HAVE OBTAINED A PASSWORD, YOU SHOULD BE ABLE TO ACCESS YOUR ACTIVE CLAIM(S).

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The Industrial Commission of Ohio  
**RECORD OF PROCEEDINGS**

Claim Number: 05-806440 Claims Heard: 05-806440  
LT-ACC-SI-COV  
PCN: 2092051 Robert L. Mason

ROBERT L. MASON  
191 S CHESTERFIELD RD  
COLUMBUS OH 43209-1912

Date of Injury: 1/18/2005 Risk Number: 20005302-0

This claim has been previously allowed for: HIP FRACTURE; LEFT  
TROCANTERIC FEMUR FRACTURE; LEFT FEMORAL NECK FRACTURE; DEPRESSIVE  
DISORDER; LEFT SHORT LEG SYNDROME; LUMBAR STRAIN; POST-TRAUMATIC STRESS  
DISORDER,  
DISALLOWED: AGGRAVATION OF PRE-EXISTING SLEEP APNEA.

This matter was heard on 03/16/2010 before Staff Hearing Officer David R.  
Packer pursuant to the provisions of R.C. Sections 4121.35(B) and  
4123.511(D) on the following:

IC-2 App For Compensation Of Permanent Total Disability filed by Injured  
Worker on 07/22/2009  
Issue: 1) Permanent Total Disability

Notices were mailed to the Injured Worker, the Employer, their respective  
representatives and the Administrator of the Bureau of Workers'  
Compensation not less than fourteen (14) days prior to this date, and the  
following were present for the hearing:

APPEARANCE FOR THE INJURED WORKER: Rager, Court Reporter, Mr. & Mrs.  
Mason, Kimmet  
APPEARANCE FOR THE EMPLOYER: Shaw, Pressler  
APPEARANCE FOR THE ADMINISTRATOR: No Appearance

**INTERLOCUTORY ADVISEMENT ORDER**

The Injured Worker's Application for Permanent and Total Disability  
Compensation is taken under advisement because the matter requires further  
study and consideration.

The Self-Insuring Employer is hereby ordered to comply with the above  
findings.

This order is interlocutory in nature and not subject to appeal pursuant to  
the Ohio Adm.Code 4121-3-09,

Typed By: keJ  
Date Typed: 03/16/2010  
Findings Mailed: 03/19/2010

David R. Packer  
Staff Hearing Officer

The Industrial Commission of Ohio  
**RECORD OF PROCEEDINGS**

Claim Number: 05-806440

Electronically signed by  
David R. Packer

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The parties and representatives listed below have been sent this record of proceedings. If you are not an authorized representative of one of the parties, please notify the Industrial Commission.

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05-806440  
Robert L. Mason  
191 S Chesterfield Rd  
Columbus OH 43209-1912

ID No: 10467-90  
\*\*\*Connor, Evans & Hafenstein LLP\*\*  
601 S High St  
Columbus OH 43215-5601

Risk No: 20005302-0  
Old Dominion Freight Line, Inc  
500 Old Dominion Way  
Thomasville NC 27360-8923

ID No: 1649-80  
Eastman & Smith Ltd  
PO Box 10032  
Toledo OH 43699-0032

ID No: 217985-80  
Cambridge Integrated Services  
300 W Wilson Bridga Rd  
Worthington OH 43085-2279

ID No: 4000-05  
\*\*\*BWC - DWRP Section\*\*\*  
30 W Spring St  
Columbus OH 43215-2264

BWC, LAW DIRECTOR

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The Industrial Commission of Ohio  
**RECORD OF PROCEEDINGS**

Claim Number: 05-806440      Claims Heard: 05-806440  
                  LY-ACC-ST-COV  
PCN: 2092051    Robert L. Mason

ROBERT L. MASON  
191 S CHESTERFIELD RD  
COLUMBUS OH 43209-1912

Date of Injury: 1/18/2005      Risk Number: 20005302-0

This matter was heard on 03/16/2010, before Staff Hearing Officer David R. Packer, pursuant to the provisions of R.C. 4121.35(B)(1) on:

IC-2 App For Compensation Of Permanent Total Disability filed by Injured Worker on 07/22/2009.  
Issue: 1) Permanent Total Disability

Notices were mailed to the Injured Worker, the Employer, their respective representatives and the Administrator of the Bureau of Workers' Compensation not less than fourteen (14) days prior to this date, and the following were present at the hearing:

APPEARANCE FOR THE INJURED WORKER: Rager, Court Reporter, Mr. Mason and Spouse, Kimmet  
APPEARANCE FOR THE EMPLOYER: Shaw, Presslor  
APPEARANCE FOR THE ADMINISTRATOR: No Appearance

It is the finding of the Staff Hearing Officer that this claim has been allowed for: HIP FRACTURE; LEFT TROCHANTERIC FEMUR FRACTURE; LEFT FEMORAL NECK FRACTURE; DEPRESSIVE DISORDER; LEFT SHORT LEG SYNDROME; LUMBAR STRAIN; POST-TRAUMATIC STRESS DISORDER.

DISALLOWED: AGGRAVATION OF PRE-EXISTING SLEEP APNEA.

After full consideration of the issue it is the order of the Staff Hearing Officer that the Injured Worker's IC-2 Application for Permanent Total Disability Compensation is granted. Permanent total disability compensation is awarded from 09/25/2007 (less any compensation that previously may have been awarded over the same period), and to continue without suspension unless future facts or circumstances should warrant the stopping of the award. Such payments are to be made in accordance with R.C. 4123.58(A).

Permanent and total disability compensation is awarded from 09/25/2007 for the reason that this is the date of Dr. May's report supporting the award.

It is the finding of the Staff Hearing Officer that the Injured Worker is permanently and totally disabled as the result of the medical effects of his allowed physical and psychological injuries. The Injured Worker has been prevented from returning to any form of sustained remunerative employment as a consequence of each of these two categories of medical condition. Such a finding mandates an award of permanent total disability compensation without further consideration of the "Stephenson" factors. In reaching this conclusion, the Staff Hearing Officer relies upon the independent medical examinations and evaluations performed at the direct of the Industrial Commission: William R. Pitz, M.D., who examined with respects to the allowed physical injuries, and John M. Malinky, Ph.D., who examined with respects to the allowed psychological conditions. In evaluating the credibility of those reports, the Staff Hearing Officer particularly notes the 01/28/2008 report of Dr. Ward, the two reports of

The Industrial Commission of Ohio

RECORD OF PROCEEDINGS

Claim Number: 05-806440

Dr. May of 08/25/2007 and 09/26/2007, and the 07/07/2009 report of Dr. Howard. The Staff Hearing Officer further particularly notes that the Injured Worker has a claim which is allowed for a very serious left hip fracture, and also for psychological conditions, notably post traumatic stress disorder, together with some physical conditions related to the allowed hip fracture.

The Staff Hearing Officer has considered the prior denial of a permanent and total application in early 2007, the medical submitted on behalf of the Employer, and the Employer's arguments with respect to the sufficiency of the evidence submitted in support of the application. Specifically, the Staff Hearing Officer has considered the Employer's argument that the Injured Worker suffers from multiple unallowed medical conditions which have been improperly evaluated by the medical evidence in support of the application, and has further considered the Employer's arguments with respect to alleged inconsistency in these reports.

It is plain that the Injured Worker does suffer from medical conditions over and above his allowed injuries. In particular, the Injured Worker has multi-level spondylosis in the lower back, which may impact the Injured Worker's loss of function in the lower back, when consideration is being properly given to his allowed lumbar strain. In light of the fact that the medical professionals specifically state that they are considering only allowed conditions, there is no direct evidence of any improper consideration of these unallowed conditions affecting the same body part.

The Employer further argues that the reports of Drs. Howard and May improperly consider the Injured Worker's age, education, work experience, and similar disability factors in reaching their conclusions. Reading the reports in context, they are plainly stating that the Injured Worker has lost the ability to engage in any form of sustained remunerative employment. Further, an error in one of Dr. May's reports which appears to state he is considering a right hip fracture, is plainly merely a clerical error as there is no evidence the Injured Worker ever had a right hip fracture. Finally, the argument that the physical evidence supports the conclusion that the Injured Worker could engage, on a physical basis, in part-time sedentary work is not supported by the reports cited. This is an inference drawn argumentatively, but not stated by the reports under consideration.

In light of the fact that the independent examinations both conclude that the Injured Worker is unable to engage in sustained remunerative employment, solely as the result of the allowed conditions, the weight of the evidence strongly supports the conclusion that the physical and psychological conditions taken together do so. Consequently, an award of permanent total disability compensation is made.

Typed By: kd  
Date Typed: 03/26/2010  
Date Received: 07/22/2009  
Findings Mailed: 03/31/2010

\_\_\_\_\_  
David R. Packer  
Staff Hearing Officer

Electronically signed by  
David R. Packer

\_\_\_\_\_  
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The Industrial Commission of Ohio

## RECORD OF PROCEEDINGS

Claim Number: 05-806440

05-806440  
Robert L. Mason  
191 S Chesterfield Rd  
Columbus OH 43209-1912

Risk No: 20005302-0  
Old Dominion Freight Line, Inc  
600 Old Dominion Way  
Thomasville NC 27360-8923

ID No: 10467-90  
\*\*\*Connor, Evans & Hafenstein LLP\*\*  
501 S High St  
Columbus OH 43215-5601

ID No: 1649-80  
Eastman & Smith Ltd  
PO Box 10032  
Toledo OH 43699-0032

ID No: 217985-80  
Cambridge Integrated Services  
300 W Wilson Bridge Rd  
Worthington OH 43085-2279

ID No: 4000-05  
\*\*\*DWC - DWRP Section\*\*\*  
30 W Spring St  
Columbus OH 43215-2264

DWC, LAW DIRECTOR

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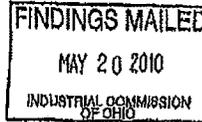
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Ohio Industrial Commission  
**RECORD OF PROCEEDINGS**

Claim Number: 05-806440  
LT-ACC-BY-COV  
PCN: 2101101 Robert L. Mason

Claims Heard: 05-806440

ROBERT L. MASON  
191 S CHESTERFIELD RD  
COLUMBUS OH 43209-1912



Date of Injury: 1/30/2005

Risk Number: 20065302-0

Request for Reconsideration filed by Employer on 04/16/2010.  
Issue: 1) Continuing Jurisdiction Pursuant to R.C. 4123.52  
2) Permanent Total Disability

The Employer's request for reconsideration, filed 04/16/2010, from the order issued 03/31/2010, is denied for the reason that the request fails to meet the criteria of Industrial Commission Resolution R08-1-01 dated 11/01/2008.

Typed By: KS/lwg  
Date Typed: 05/07/2010

The above findings and order was approved and confirmed by the majority of the members.

Gary M. DiCeglie YRS  
Chairperson

Jodie M. Taylor YRS  
Commissioner

Kevin R. Abrams YRS  
Commissioner

ATTESTED TO BY:  
  
Executive Director

Findings Mailed:

The parties and representatives listed below have been sent this record of proceedings. If you are not an authorized representative of one of the parties, please notify the Industrial Commission.

Ohio Industrial Commission  
**RECORD OF PROCEEDINGS**

Claim Number: 05-006440

05-006440  
Robert D. Mason  
191 S Chestnutfield Rd  
Columbus OH 43209-1912

Risk No: 20008302-0  
Old Dominion Freight Line, Inc  
500 Old Dominion Way  
Thomasville NC 27360-8923

ID No: 4000-05  
\*\*\*BHQ - DWRP Section\*\*\*  
30 W Spring St  
Columbus OH 43215-2264

ID No: 9994-05  
\*\*\*BHQ, Law - Columbus\*\*\*  
Attn: Director Of Legal Operations  
30 W Spring St # L-26  
Columbus OH 43215-2216

ID No: 10467-90  
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801 S High St  
Columbus OH 43215-6601

ID No: 1649-80  
Eastman & Smith Ltd  
PO Box 18032  
Toledo OH 43699-0032

ID No: 217985-80  
Cambridge Integrated Services  
300 W Wilson Bridge Rd  
Worthington OH 43085-2279

BHQ, LAW DIRECTOR

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## **4121-3-34 Permanent total disability.**

### **(A) Purpose**

The purpose of this rule is to ensure that applications for compensation for permanent total disability are processed and adjudicated in a fair and timely manner. This rule applies to the adjudication of all applications for compensation for permanent and total disability filed on or after the effective date of this rule.

### **(B) Definitions**

The following definitions shall apply to the adjudication of all applications for permanent and total disability:

(1) "Permanent total disability" means the inability to perform sustained remunerative employment due to the allowed conditions in the claim.

The purpose of permanent and total disability benefits is to compensate an injured worker for impairment of earning capacity.

The term "permanent" as applied to disability under the workers' compensation law does not mean that such disability must necessarily continue for the life of the injured worker but that it will, within reasonable probability, continue for an indefinite period of time without any present indication of recovery therefrom.

#### **(2) Classification of physical demands of work:**

(a) "Sedentary work" means exerting up to ten pounds of force occasionally (occasionally: activity or condition exists up to one-third of the time) and/or a negligible amount of force frequently (frequently: activity or condition exists from one-third to two-thirds of the time) to lift, carry, push, pull, or otherwise move objects. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met.

(b) "Light work" means exerting up to twenty pounds of force occasionally, and/or up to ten pounds of force frequently, and/or a negligible amount of force constantly (constantly: activity or condition exists two-thirds or more of the time) to move objects. Physical demand may be only a negligible amount, a job should be rated light work: (1) when it requires walking or standing to a significant degree; or (2) when it requires sitting most of the time but entails pushing and/or pulling or arm or leg controls; and/or (3) when the job requires working at a production rate pace entailing the constant pushing and/or pulling of materials even though the weight of those materials is negligible.

(c) "Medium work" means exerting twenty to fifty pounds of force occasionally, and/or ten to twenty-five pounds of force frequently, and/or greater than negligible up to ten pounds of force constantly to move objects. Physical demand requirements are in excess of those for light work.

(d) "Heavy work" means exerting fifty to one hundred pounds of force occasionally, and/or twenty to fifty pounds of force frequently and/or ten to twenty pounds of force constantly to move objects. Physical demand requirements are in excess of those for medium work.

(e) "Very heavy work" means exerting in excess of one hundred pounds of force occasionally, and/or in excess of fifty pounds of force frequently, and/or in excess of twenty pounds of force constantly to move objects. Physical demand requirements are in excess of those for heavy work.

(3) Vocational factors:

(a) "Age" shall be determined at time of the adjudication of the application for permanent and total disability. In general, age refers to one's chronological age and the extent to which one's age affects the ability to adapt to a new work situation and to do work in competition with others.

(b) "Education" is primarily used to mean formal schooling or other training which contributes to the ability to meet vocational requirements. The numerical grade level may not represent one's actual educational abilities. If there is no other evidence to contradict it, the numerical grade level will be used to determine educational abilities.

(i) "Illiteracy" is the inability to read or write. An injured worker is considered illiterate if the injured worker can not read or write a simple message, such as instructions or an inventory list, even though the person can sign his or her name.

(ii) "Marginal education" means sixth grade level or less. An injured worker will have ability in reasoning, arithmetic, and language skills which are needed to do simple unskilled types of work. Generally, formal schooling at sixth grade level or less is marginal education.

(iii) "Limited education" means seventh grade level through eleventh grade level. Limited education means ability in reasoning, arithmetic and language skills but not enough to allow an injured worker with these educational qualifications to do most of the more complex job duties needed in semi-skilled or skilled jobs. Generally, seventh grade through eleventh grade formal education is limited education.

(iv) "High school education or above" means twelfth grade level or above. The G.E.D. is equivalent to high school education. High school education or above means ability in reasoning, arithmetic, and language skills acquired through formal schooling at twelfth grade education or above. Generally an individual with these educational abilities can perform semi-skilled through skilled work.

(c) "Work experience" :

(i) "Unskilled work" is work which needs little or no judgment to do simple duties that can be learned on the job in a short period of time. The job may or may not require considerable strength. Jobs are unskilled if the primary work duties are handling, feeding, and off bearing (placing or removing materials from machines which are automatic or operated by others), or machine tending and a person can usually learn to do the job in thirty days and little specific vocational preparation and judgment are needed.

(ii) "Semi-skilled work" is work which needs some skills but does not require doing the more complex work duties. Semi-skilled jobs may require close attention to watching machine processes or inspecting, testing, or otherwise looking for irregularities or tending or guarding equipment, property, material, or persons against loss, damage, or injury and other types of activities which are similarly less complex than skilled work but more complex than unskilled work. A job may be classified as semi-skilled where coordination and dexterity are necessary, as when hands or feet must be moved quickly in a repetitive task.

(iii) "Skilled work" is work which requires qualifications in which a person uses judgment or involves dealing with people, factors or figures or substantial ideas at a high level of complexity. Skilled work may require qualifications in which a person uses judgment to determine the machine and manual operations to be performed in order to obtain the proper form, quality, or quantity to be produced. Skilled work may require laying out work, estimating quality, determine the suitability and needed quantities of materials, making precise measurements, reading blue prints or other specifications, or making necessary computations or mechanical adjustments or control or regulate the work.

(iv) "Transferability of skills" are skills which can be used in other work activities. Transferability will depend upon the similarity of occupational work activities that have been performed by the injured worker. Skills which an individual has obtained through working at past relevant work may qualify individuals for some other type of employment.

(v) "Previous work experience" is to include the injured worker's usual occupation, other past occupations, and the skills and abilities acquired through past employment which demonstrate the type of work the injured worker may be able to perform. Evidence may show that an injured worker has the training or past work experience which enables the injured worker to engage in sustained remunerative employment in another occupation. The relevance and transferability of previous work skills are to be addressed by the adjudicator.

(4) "Residual functional capacity" means the maximum degree to which the injured worker has the capacity for sustained performance of the physical-mental requirements of jobs as these relate to the allowed conditions in the claim(s).

(5) "Maximum medical improvement" is a treatment plateau (static or well-stabilized) at which no fundamental functional or physiological change can be expected within reasonable medical probability in spite of continuing medical or rehabilitative procedures. An injured worker may need supportive treatment to maintain this level of function.

(C) Processing of applications for permanent total disability

The following procedures shall apply to applications for permanent total disability that are filed on or after the effective date of this rule.

(1) Each application for permanent total disability shall be accompanied by medical evidence from a physician, or a psychologist or a psychiatric specialist in a claim that has been allowed for a psychiatric or psychological condition, that supports an application for permanent and total disability compensation. The medical examination upon which the report is based must be performed within twenty-four months prior to the date of filing of the application for permanent and total disability compensation. The medical evidence used to support an application for permanent total disability compensation is to provide an opinion that addresses the injured worker's physical and/or mental limitations resulting from the allowed conditions in the claim(s). Medical evidence which provides an opinion addressing such limitations, but which also contains a conclusion as to whether an injured worker is permanently and totally disabled, may be considered by a hearing officer. A vocational expert's opinion, by itself, is insufficient to support an application for permanent total disability compensation. If the application for permanent total disability is filed without the required medical evidence, it shall be dismissed without hearing.

(2) At the time the application for permanent total disability compensation is filed with the Industrial Commission, the Industrial Commission shall serve a copy of the application together with copies of

supporting documents to the employer's representative (if the employer is represented), or to the employer (if the employer is not represented) along with a letter acknowledging the receipt of the permanent total disability application.

(3) A claims examiner shall initially review the application for permanent and total disability.

(a) If it is determined there is a written agreement to award permanent total disability compensation entered into between the injured worker, the employer, and the administrator in claims involving state fund employers, the application shall be adjudicated, and an order issued, without a hearing.

(b) If it is determined that the injured worker is requesting a finding of permanent total disability compensation under division (C) of section 4123.58 of the Revised Code (statutory permanent and total disability), the application shall be adjudicated in accordance with paragraph (E) of this rule.

(c) If a motion requesting recognition of additional conditions is filed on or prior to the date of filing for permanent total disability compensation, such motion(s) shall be processed prior to the processing of the application for permanent total disability compensation. However, if a motion for recognition of an additional condition is filed subsequent to the date of filing of the application of permanent total disability, the motions shall be processed subsequent to the determination of the application for permanent total disability compensation.

(4)

(a) The injured worker shall ensure that copies of medical records, information, and reports that the injured worker intends to introduce and rely on that are relevant to the adjudication of the application for permanent total disability compensation from physicians who treated or consulted the injured worker that may or may not have been previously filed in the workers' compensation claim files, are contained within the file at the time of filing an application for permanent total disability.

(b) The employer shall be provided fourteen days after the date of the industrial commission acknowledgment letter provided for in paragraph (C)(2) of this rule to notify the commission if the employer intends to submit medical evidence relating to the issue of permanent total disability compensation to the commission. Should the employer make such written notification the employer shall submit such medical evidence to the commission within sixty days after the date of the commission acknowledgment letter unless relief is provided to the employer under paragraph (C)(4)(d) of this rule. Should the employer fail to make such written notification within fourteen days after the date of the commission acknowledgment letter, the employer shall be provided sixty days after the date of the commission acknowledgement letter to submit medical evidence relating to the issue of permanent total disability compensation to the commission, but the scheduling of the injured worker for appropriate medical examinations by physicians selected by the commission under paragraph (C)(5)(a)(iii) of this rule will proceed without delay.

(c) If the injured worker or the employer has made a good faith effort to obtain medical evidence described in paragraph (C)(4)(a) or (C)(4)(b) of this rule and has been unable to obtain such evidence, the injured worker or the employer may request that the hearing administrator issue a subpoena to obtain such evidence. Prior to the issuance of a subpoena, the hearing administrator shall review the evidence submitted by the injured worker or the employer that demonstrates the good faith effort to obtain medical evidence. Should a subpoena be issued, it shall be served by the party requesting the issuance of a subpoena.

(d) Upon the request of either the injured worker or the employer and upon good cause shown, the hearing administrator may provide an extension of time, to obtain the medical evidence described in paragraphs (C)(4)(a) and (C)(4)(b) of this rule. Thereafter, no further medical evidence will be admissible other than additional medical evidence approved by a hearing administrator that is found to be newly discovered medical evidence that is relevant to the issue of permanent total disability and which, by due diligence, could not have been obtained under paragraph (C)(4)(a) or (C)(4)(b) of this rule.

(5)

(a) Following the date of filing of the permanent and total disability application, the claims examiner shall perform the following activities:

(i) Obtain all the claim files identified by the injured worker on the permanent total disability application and any additional claim files involving the same body part(s) as those claims identified on the permanent total disability application.

(ii) Copy all relevant documents as deemed pertinent by the commission including evidence provided under paragraphs (C)(1) and (C)(4) of this rule and submit the same to an examining physician to be selected by the claims examiner.

(iii) Schedule appropriate medical examination(s) by physician(s) to be selected by the commission provided that the scheduling of said exams shall not be delayed where the employer fails to notify the commission within fourteen days after the date of the commission acknowledgment letter that it intends to submit medical evidence to the commission relating to the issue of permanent total disability compensation.

(iv) Prepare a statement of facts. A copy of the statement of facts shall be mailed to the parties and their representatives by the commission.

(6)

(a) After the reports of the commission medical examinations have been received, the hearing administrator may refer the claim to an adjudicator to consider the issuance of a tentative order, without a hearing.

(i) Within fourteen days of the receipt of the tentative order adjudicating the merits of an application for compensation for permanent and total disability, a party may file a written objection to the order. Unless the party notifies the commission in writing of the objection to the tentative order within fourteen days after the date of receipt of notice of the findings of the tentative order, the tentative order shall become final.

(ii) In the event a party makes written notification to the Industrial commission of an objection within fourteen days of the date of the receipt of the notice of findings of the tentative order, the application for compensation for permanent and total disability shall be set for hearing and adjudicated on its merits.

(b) If the hearing administrator determines that the case should not be referred for consideration of issuance of a tentative order by an adjudicator, the hearing administrator shall notify the parties to the claim that a party has fourteen days from the date that copies of reports of the commission medical examinations are submitted to the parties within which to make written notification to the commission

of a party's intent to submit additional vocational information to the commission that is relevant to the adjudication of the application for permanent total disability compensation.

(I) Unless a party notifies the commission within the aforementioned fourteen-day period of the party's intent to submit additional vocational information to the commission, a party will be deemed to have waived its ability to submit additional vocational information to the commission that is relevant to the adjudication of the application for permanent total disability.

(II) Should a party provide timely notification to the commission of its intent to submit additional vocational information, the additional vocational information shall be submitted to the commission within forty-five days from the date the copies of the reports of commission medical examinations are submitted to the parties. Upon expiration of the forty-five day period no further vocational information will be accepted without prior approval from the hearing administrator.

(7) If the employer or the injured worker request, for good cause shown, that a pre-hearing conference be scheduled, a pre-hearing conference shall be set. The request for a pre-hearing conference shall include the identification of the issues that the requesting party desires to be considered at the pre-hearing conference. The hearing administrator may also schedule a pre-hearing conference when deemed necessary on any matter concerning the processing of an application for permanent and total disability, including but not limited to, motions that are filed subsequent to the filing of the application for permanent and total disability.

Notice of a pre-hearing conference is to be provided to the parties and their representatives no less than fourteen days prior to the pre-hearing conference. The pre-hearing conference may be by telephone conference call, or in-person at the discretion of the hearing administrator and is to be conducted by a hearing administrator.

The failure of a party to request a pre-hearing conference or to raise an issue at a pre-hearing conference held under paragraph (C)(8) of this rule, does not act to waive any assertion, argument, or defense that may be raised at a hearing held under paragraphs (D) and (E) of this rule.

(8) Should a pre-hearing conference be held, the hearing administrator is not limited to the consideration of the issues set forth in paragraphs (C)(8)(a) to (C)(8)(l) of this rule, but may also address any other matter concerning the processing of an application for permanent total disability. At a pre-hearing conference the parties should be prepared to discuss the following issues:

- (a) Evidence of retirement issues.
- (b) Evidence of refusal to work or evidence of refusal or failure to respond to written job offers of sustained remunerative employment.
- (c) Evidence of job description.
- (d) Evidence of rehabilitation efforts.
- (e) Exchange of accurate medical history, including surgical history.
- (f) Agreement as to allowed condition(s) in the claim.
- (g) Scheduling of additional medical examinations, if necessary.

(h) Ensure that deposition requests that have been granted pursuant to Industrial commission rules are completed and transcripts submitted.

(i) Settlement status.

(9) At the conclusion of the pre-hearing conference, a date for hearing before a staff hearing officer shall be scheduled no earlier than fourteen days subsequent to the date of a pre-hearing conference. After the pre-hearing conference, unless authorized by the hearing administrator, no additional evidence on the issue of permanent and total disability shall be submitted to the claim file. If the parties attempt to submit additional evidence on the issue of permanent and total disability, the evidence will not be admissible on the adjudication of permanent total disability compensation.

(10) The time frames established herein in paragraph (C) of this rule can be waived by mutual agreement of the parties by motion to a hearing administrator, except where otherwise specified.

(11) The applicant may dismiss the application for permanent and total disability any time up to the determination of the hearing on the merits of the application. Should a party dismiss an application prior to its adjudication, the commission's medical evidence obtained will be valid twenty-four months from the date of dismissal.

(D) Guidelines for adjudication of applications for permanent total disability The following guidelines shall be followed by the adjudicator in the sequential evaluation of applications for permanent total disability compensation:

(1)

(a) If the adjudicator finds that the injured worker meets the definition of statutory permanent and total disability pursuant to division (C) of section 4123.58 of the Revised Code, due to the loss or loss of use of both hands or both arms, or both feet or both legs, or both eyes, or any two thereof, the injured worker shall be found permanently and totally disabled, and a tentative order shall be issued.

Should an objection be filed from a tentative order, a hearing shall be scheduled. (Reference paragraph (E) of this rule).

(b) If, after hearing, the adjudicator finds that the injured worker is engaged in sustained remunerative employment, the injured worker's application for permanent and total disability shall be denied, unless an injured worker qualifies for an award under division (C) of section 4123.58 of the Revised Code.

(c) If, after hearing, the adjudicator finds that the injured worker is medically able to return to the former position of employment, the injured worker shall be found not to be permanently and totally disabled.

(d) If, after hearing, the adjudicator finds that the injured worker voluntarily removed himself from the work force, the injured worker shall be found not to be permanently and totally disabled. If evidence of voluntary removal or retirement is brought into issue, the adjudicator shall consider evidence that is submitted of the injured worker's medical condition at or near the time of removal/retirement.

(e) If, after hearing, the adjudicator finds that the injured worker is offered and refuses and/or fails to accept a bona fide offer of sustained remunerative employment that is made prior to the pre-hearing conference described in paragraph (C)(9) of this rule where there is a written job offer detailing the

specific physical/mental requirements and duties of the job that are within the physical/mental capabilities of the injured worker, the injured worker shall be found not to be permanently and totally disabled.

(f) If, after hearing, the adjudicator finds that the injured worker's allowed medical condition(s) is temporary and has not reached maximum medical improvement, the injured worker shall be found not to be permanently and totally disabled because the condition remains temporary. In claims involving state fund employers, the claim shall be referred to the administrator to consider the issuance of an order on the question of entitlement to temporary total disability compensation. In claims involving self-insured employers, the self-insured employer shall be notified to consider the question of the injured worker's entitlement to temporary total disability compensation.

(g) If, after hearing, the adjudicator determines that there is appropriate evidence which indicates the injured worker's age is the sole cause or primary obstacle which serves as a significant impediment to reemployment, permanent total disability compensation shall be denied. However, a decision based upon age must always involve a case-by-case analysis. The injured worker's age should also be considered in conjunction with other relevant and appropriate aspects of the injured worker's nonmedical profile.

(h) If, after hearing, the adjudicator finds that the allowed condition(s) is the proximate cause of the injured worker's inability to perform sustained remunerative employment, the adjudicator is to proceed in the sequential evaluation of the application for permanent and total disability compensation in accordance with the provisions of paragraph (D) of this rule. However, should the adjudicator find that non-allowed conditions are the proximate cause of the injured worker's inability to perform sustained remunerative employment, the injured worker shall be found not to be permanently and totally disabled.

(i) If, after hearing, the adjudicator finds that injured worker's inability to perform sustained remunerative employment is the result of a pre-existing condition(s) allowed by aggravation, the adjudicator is to continue in the sequential evaluation of the application for permanent total disability compensation in accordance with the provisions of paragraph (D) of this rule. However, should the adjudicator find that the non-allowed pre-existing condition(s) are the proximate cause of the injured worker's inability to perform sustained remunerative employment, the injured worker shall be found not to be permanently and totally disabled.

(2)

(a) If, after hearing, the adjudicator finds that the medical impairment resulting from the allowed condition(s) in the claim(s) prohibits the injured worker's return to the former position of employment as well as prohibits the injured worker from performing any sustained remunerative employment, the injured worker shall be found to be permanently and totally disabled, without reference to the vocational factors listed in paragraph (B)(3) of this rule.

(b) If, after hearing, the adjudicator finds that the injured worker, based on the medical impairment resulting from the allowed conditions is unable to return to the former position of employment but may be able to engage in sustained remunerative employment, the non-medical factors shall be considered by the adjudicator.

The non-medical factors that are to be reviewed are the injured worker's age, education, work record, and all other factors, such as physical, psychological, and sociological, that are contained within the

record that might be important to the determination as to whether the injured worker may return to the job market by using past employment skills or those skills which may be reasonably developed. (Vocational factors are defined in paragraph (B) of this rule).

(c) If, after hearing and review of relevant vocational evidence and non-medical disability factors, as described in paragraph (D)(2)(b) of this rule the adjudicator finds that the injured worker can return to sustained remunerative employment by using past employment skills or those skills which may be reasonably developed through retraining or through rehabilitation, the injured worker shall be found not to be permanently and totally disabled.

(3) Factors considered in the adjudication of all applications for permanent and total disability:

(a) The burden of proof shall be on the injured worker to establish a case of permanent and total disability. The burden of proof is by preponderance of the evidence. The injured worker must establish that the disability is permanent and that the inability to work is causally related to the allowed conditions.

(b) In adjudicating an application for permanent and total disability, the adjudicator must determine that the disability is permanent, the inability to work is due to the allowed conditions in the claim, and the injured worker is not capable of sustained remunerative employment.

(c) The industrial commission has the exclusive authority to determine disputed facts, the weight of the evidence, and credibility.

(d) All medical evidence of impairment shall be based on objective findings reasonably demonstrable and medical reports that are submitted shall be in conformity with the industrial commission medical examination manual.

(e) If the adjudicator concludes from evidence that there is no proximate causal relationship between the industrial injury and the inability to work, the order shall clearly explain the reasoning and basis for the decision.

(f) The adjudicator shall not consider the injured worker's percentage of permanent partial impairment as the sole basis for adjudicating an application for permanent and total disability.

(g) The adjudicator is to review all relevant factors in the record that may affect the injured worker's ability to work.

(h) The adjudicator shall prepare orders on a case by case basis which are fact specific and which contain the reasons explaining the decision. The orders must specifically state what evidence has been relied upon in reaching the conclusion and explain the basis for the decision. In orders that are issued under paragraphs (D)(2)(b) and (D)(2)(c) of this rule the adjudicator is to specifically list the non-medical disability factors within the order and state how such factors interact with the medical impairment resulting from the allowed injuries in the claim in reaching the decision.

(i) In claims in which a psychiatric condition has been allowed and the injured worker retains the physical ability to engage in some sustained remunerative employment, the adjudicator shall consider whether the allowed psychiatric condition in combination with the allowed physical condition prevents the injured worker from engaging in sustained remunerative employment.

(E) Statutory permanent total disability

Division (C) of section 4123.58 of the Revised Code provides that the loss or loss of use of both hands or both arms, or both feet or both legs, or both eyes, or any two thereof, constitutes total and permanent disability.

(1) In all claims where the evidence on file clearly demonstrates actual physical loss, or the permanent and total loss of use occurring at the time of injury secondary to a traumatic spinal cord injury or head injury, of both hands or both arms, or both feet or both legs, or both eyes, or any two thereof, the claim shall be referred to be reviewed by a staff hearing officer of the commission. Subsequent to review, the staff hearing officer shall, without hearing, enter a tentative order finding the injured worker to be entitled to compensation for permanent and total disability under division (C) of section 4123.58 of the Revised Code. If an objection is made, the claim shall be scheduled for hearing.

(a) Within thirty days of the receipt of the tentative order adjudicating the merits of an application for compensation for permanent and total disability, a party may file a written objection to the order. Unless the party notifies the Industrial commission in writing of the objection to the tentative order within thirty days after the date of receipt of notice of the findings of the tentative order, the tentative order shall become final.

(b) In the event a party makes written notification to the industrial commission of an objection within thirty days of the date of the receipt of the notice of findings of the tentative order, the application for compensation for permanent and total disability shall be set for hearing and adjudicated on its merits.

(2) In all other cases filed under division (C) of section 4123.58 of the Revised Code, if the staff hearing officer finds that the injured worker meets the definition of statutory permanent and total disability pursuant to division (C) of section 4123.58 of the Revised Code, due to the loss of use of both hands or both arms, or both feet or both legs, or both eyes, or any two thereof, the staff hearing officer, without a hearing, is to issue a tentative order finding the injured worker to be permanently and totally disabled under division (C) of section 4123.58 of the Revised Code. An objection to the tentative order may be made pursuant to paragraphs (E)(1)(a) and (E)(1)(b) of this rule.

Effective: 06/01/2008

R.C. 119.032 review dates: 02/11/2008 and 02/01/2012

Promulgated Under: 119.03

Statutory Authority: 4121.30, 4123.58, 4121.32

Rule Amplifies: 4121.35, 4123.36

Prior Effective Dates: 6/1/95, 9/15/95, 1/1/97, 4/1/04

4121-3-34

**Permanent total disability.****(A) Purpose**

The purpose of this rule is to ensure that applications for compensation for permanent total disability are processed and adjudicated in a fair and timely manner. This rule applies to the adjudication of all applications for compensation for permanent and total disability filed on or after the effective date of this rule.

**(B) Definitions**

The following definitions shall apply to the adjudication of all applications for permanent and total disability:

- (1) "Permanent total disability" means the inability to perform sustained remunerative employment due to the allowed conditions in the claim.

The purpose of permanent and total disability benefits is to compensate a ~~claimant~~ an injured worker for impairment of earning capacity.

The term "permanent" as applied to disability under the workers' compensation law does not mean that such disability must necessarily continue for the life of the ~~claimant~~ injured worker but that it will, within reasonable probability, continue for an indefinite period of time without any present indication of recovery therefrom.

(2) Classification of physical demands of work:

- (a) "Sedentary work" means exerting up to ten pounds of force occasionally (occasionally: activity or condition exists up to one-third of the time) and/or a negligible amount of force frequently (frequently: activity or condition exists from one-third to two-thirds of the time) to lift, carry, push, pull, or otherwise move objects. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met.

- (b) "Light work" means exerting up to twenty pounds of force occasionally, and/or up to ten pounds of force frequently, and/or a negligible amount of force constantly (constantly: activity or condition exists two-thirds or more of the time) to move objects. Physical demand may be only a negligible amount, a job should be rated light work: (1) when it requires walking or standing to a significant degree; or (2) when it requires sitting most of the time but entails pushing and/or pulling or arm or leg controls; and/or (3) when the job requires working at a production rate

pace entailing the constant pushing and/or pulling of materials even though the weight of those materials is negligible.

- (c) "Medium work" means exerting twenty to fifty pounds of force occasionally, and/or ten to twenty-five pounds of force frequently, and/or greater than negligible up to ten pounds of force constantly to move objects. Physical demand requirements are in excess of those for light work.
- (d) "Heavy work" means exerting fifty to one hundred pounds of force occasionally, and/or twenty to fifty pounds of force frequently and/or ten to twenty pounds of force constantly to move objects. Physical demand requirements are in excess of those for medium work.
- (e) "Very heavy work" means exerting in excess of one hundred pounds of force occasionally, and/or in excess of fifty pounds of force frequently, and/or in excess of twenty pounds of force constantly to move objects. Physical demand requirements are in excess of those for heavy work.

(3) Vocational factors:

- (a) "Age" shall be determined at time of the adjudication of the application for permanent and total disability. In general, age refers to one's chronological age and the extent to which one's age affects the ability to adapt to a new work situation and to do work in competition with others.
  - (i) ~~Younger person: under fifty years of age.~~
  - (ii) ~~Person of middle age: fifty years of age through fifty-nine years of age.~~
  - (iii) ~~Person closely approaching advanced age: sixty years of age through sixty-nine years of age.~~
  - (iv) ~~Person of advanced age: seventy years of age or older.~~
- (b) "Education" is primarily used to mean formal schooling or other training which contributes to the ability to meet vocational requirements. The numerical grade level may not represent one's actual educational abilities. If there is no other evidence to contradict it, the numerical grade level will be used to determine educational abilities.

- (i) "Illiteracy" is the inability to read or write. ~~A claimant~~ An injured worker is considered illiterate if the ~~claimant~~ injured worker can not read or write a simple message, such as instructions or an inventory list, even though the person can sign his or her name.
- (ii) "Marginal education" means sixth grade level or less. ~~A claimant~~ An injured worker will have ability in reasoning, arithmetic, and language skills which are needed to do simple unskilled types of work. Generally, formal schooling at sixth grade level or less is marginal education.
- (iii) "Limited education" means seventh grade level through eleventh grade level. Limited education means ability in reasoning, arithmetic and language skills but not enough to allow ~~a claimant~~ an injured worker with these educational qualifications to do most of the more complex job duties needed in semi-skilled or skilled jobs. Generally, seventh grade through eleventh grade formal education is limited education.
- (iv) "High school education or above" means twelfth grade level or above. The G.E.D. is equivalent to high school education. High school education or above means ability in reasoning, arithmetic, and language skills acquired through formal schooling at twelfth grade education or above. Generally an individual with these educational abilities can perform semi-skilled through skilled work.
- (c) "Work experience":
- (i) "Unskilled work" is work which needs little or no judgment to do simple duties that can be learned on the job in a short period of time. The job may or may not require considerable strength. Jobs are unskilled if the primary work duties are handling, feeding, and off bearing (placing or removing materials from machines which are automatic or operated by others), or machine tending and a person can usually learn to do the job in thirty days and little specific vocational preparation and judgment are needed.
- (ii) "Semi-skilled work" is work which needs some skills but does not require doing the more complex work duties. Semi-skilled jobs may require close attention to watching machine processes or inspecting, testing, or otherwise looking for irregularities or

tending or guarding equipment, property, material, or persons against loss, damage, or injury and other types of activities which are similarly less complex than skilled work but more complex than unskilled work. A job may be classified as semi-skilled where coordination and dexterity are necessary, as when hands or feet must be moved quickly in a repetitive task.

- (iii) "Skilled work" is work which requires qualifications in which a person uses judgment or involves dealing with people, factors or figures or substantial ideas at a high level of complexity. Skilled work may require qualifications in which a person uses judgment to determine the machine and manual operations to be performed in order to obtain the proper form, quality, or quantity to be produced. Skilled work may require laying out work, estimating quality, determine the suitability and needed quantities of materials, making precise measurements, reading blue prints or other specifications, or making necessary computations or mechanical adjustments or control or regulate the work.
  - (iv) "Transferability of skills" are skills which can be used in other work activities. Transferability will depend upon the similarity of occupational work activities that have been performed by the claimant injured worker. Skills which an individual has obtained through working at past relevant work may qualify individuals for some other type of employment.
  - (v) "Previous work experience" is to include the claimant's injured worker's usual occupation, other past occupations, and the skills and abilities acquired through past employment which demonstrate the type of work the claimant injured worker may be able to perform. Evidence may show that a claimant an injured worker has the training or past work experience which enables the claimant injured worker to engage in sustained remunerative employment in another occupation. The relevance and transferability of previous work skills are to be addressed by the adjudicator.
- (4) "Residual functional capacity" means the maximum degree to which the claimant injured worker has the capacity for sustained performance of the physical-mental requirements of jobs as these relate to the allowed conditions in the claim(s).
- (5) "Maximum medical improvement" is a treatment plateau (static or well-stabilized) at which no fundamental functional or physiological change

can be expected within reasonable medical probability in spite of continuing medical or rehabilitative procedures. ~~A claimant~~ An injured worker may need supportive treatment to maintain this level of function.

(C) Processing of applications for permanent total disability

The following procedures shall apply to applications for permanent total disability that are filed on or after the effective date of this rule.

- (1) Each application for permanent total disability shall be accompanied by medical evidence from a physician, or a psychologist or a psychiatric specialist in a claim that has been allowed for a psychiatric or psychological condition, that supports an application for permanent and total disability compensation. The medical examination upon which the report is based must be performed within ~~fifteen~~ twenty-four months prior to the date of filing of the application for permanent and total disability compensation. The medical evidence used to support an application for permanent total disability compensation is to provide an opinion that addresses the ~~claimant's inability to work (for example, the claimant will never be able to return to his former position of employment, or will never return to work)~~ injured worker's physical and/or mental limitations resulting from the allowed conditions in the claim(s). Medical evidence which provides an opinion addressing such limitations, but which also contains a conclusion as to whether an injured worker is permanently and totally disabled, may be considered by a hearing officer. A vocational expert's opinion, by itself, is insufficient to support an application for permanent total disability compensation. If the application for permanent total disability is filed without the required medical evidence, it shall be dismissed without hearing.
- (2) At the time the application for permanent total disability compensation is filed with the industrial commission, the industrial commission shall serve a copy of the application together with copies of supporting documents to the employer's representative (if the employer is represented), or to the employer (if the employer is not represented) along with a letter acknowledging the receipt of the permanent total disability application.  
  
~~Each claimant who applies for permanent total disability shall complete a vocational questionnaire. Should a claimant refuse or otherwise fail to complete the vocational questionnaire, the claim for compensation shall be suspended, without hearing, during the pendency of such refusal or failure.~~
- (3) A claims examiner shall initially review the application for permanent and total disability.

- (a) If it is determined there is a written agreement to award permanent total disability compensation entered into between the claimant injured worker, and the employer, and the administrator in claims involving state fund employers, the application ~~may~~ shall be adjudicated, and an order issued, without a hearing.
- (b) If it is determined that the claimant injured worker is requesting a finding of permanent total disability compensation under division (C) of section 4123.58 of the Revised Code (statutory permanent and total disability), the application shall be adjudicated in accordance with paragraph (E) of this rule.
- (c) If a motion requesting recognition of additional conditions ~~or other motion~~ is filed on or prior to the date of filing for permanent total disability compensation, such motion(s) shall be processed prior to the processing of the application for permanent total disability compensation. However, if a motion for recognition of an additional condition ~~or other motions are~~ is filed subsequent to the date of filing of the application of permanent total disability, the motions shall be processed subsequent to the determination of the application for permanent total disability compensation.

(4)

- (a) The claimant injured worker shall ensure that copies of medical records, information, and reports that the claimant injured worker intends to introduce and rely on that are relevant to the adjudication of the application for permanent total disability compensation from physicians who treated or consulted the claimant injured worker within five years from date of filing of the application for permanent total disability compensation, that may or may not have been previously filed in the workers' compensation claim files, are contained within the file at the time of filing an application for permanent total disability.
- (b) The employer shall be provided ~~sixty~~ fourteen days after the date of the industrial commission acknowledgment letter provided for in paragraph (C)(2) of this rule to ~~submit medical evidence relating to the issue of permanent total disability compensation to the commission~~ notify the commission if the employer intends to submit medical evidence relating to the issue of permanent total disability compensation to the commission. Should the employer make such written notification the employer shall submit such medical evidence to the commission within sixty days after the date of the commission acknowledgment letter

unless relief is provided to the employer under paragraph (C)(4)(d) of this rule. Should the employer fail to make such written notification within fourteen days after the date of the commission acknowledgment letter, the employer shall be provided sixty days after the date of the commission acknowledgement letter to submit medical evidence relating to the issue of permanent total disability compensation to the commission, but the scheduling of the injured worker for appropriate medical examinations by physicians selected by the commission under paragraph (C)(5)(iii) of this rule will proceed without delay.

- (c) If the claimant injured worker or the employer has made a good faith effort to obtain medical ~~records~~ evidence described in paragraph ~~(B)~~ (C)(4)(a) or ~~(B)~~ (C)(4)(b) of this rule and has been unable to obtain such ~~records~~ evidence, the claimant injured worker or the employer may request that the hearing administrator issue a subpoena to obtain such ~~records~~ evidence. Prior to the issuance of a subpoena, the hearing administrator shall review the evidence submitted by the claimant injured worker or the employer that demonstrates the good faith effort to obtain medical ~~records~~ evidence. Should a subpoena be issued, it shall be served by the party requesting the issuance of a subpoena.
- (d) Upon the request of either the claimant injured worker or the employer and upon good cause shown, the hearing administrator may provide an extension of time, ~~not to exceed thirty days,~~ to obtain the ~~records~~ medical evidence described in paragraphs ~~(B)~~ (C)(4)(a) and ~~(B)~~ (C)(4)(b) of this rule. Thereafter, no further medical evidence will be admissible ~~without prior approval by a hearing administrator, other than~~ additional medical evidence approved by a hearing administrator that is found to be newly discovered medical evidence that is relevant to the issue of permanent total disability and which, by due diligence, could not have been obtained under paragraph (C)(4)(a) or (C)(4)(b) of this rule, but said medical evidence shall not be submitted for the purpose of rebuttal of a medical opinion submitted on the issue of permanent total disability.

(5)

- (a) ~~During the sixty days following~~ Following the date of filing of the permanent and total disability application, the claims examiner shall perform the following activities:
- (i) Obtain all the claim files identified by the claimant injured worker on the permanent total disability application and any additional claim files involving the same body part(s) as those claims

identified on the permanent total disability application.

(ii) Copy all ~~pertinent~~ documents including medical and hospital reports pertinent to the issue of permanent ~~and~~ total disability including relevant evidence provided under division (C)(4) of this rule and submit the same to an examining physician to be selected by the claims examiner.

(iii) Schedule appropriate medical examination(s) by physician(s) to be selected by the ~~industrial~~ commission provided that the scheduling of said exams shall not be delayed where the employer fails to notify the commission within fourteen days after the date of the commission acknowledgment letter that it intends to submit medical evidence to the commission relating to the issue of permanent total disability compensation.

(iv) Prepare a statement of facts. A copy of the statement of facts shall be mailed to the parties and their representatives by the commission.

(6)

(a) After the reports of the commission medical examinations have been received, the hearing administrator may refer the claim to an adjudicator to consider the issuance of a tentative order, without a hearing.

(i) Within ~~thirty~~ fourteen days of the receipt of the tentative order adjudicating the merits of an application for compensation for permanent and total disability, a party may file a written objection to the order. Unless the party notifies the ~~industrial~~ commission in writing of the objection to the tentative order within ~~thirty~~ fourteen days after the date of receipt of notice of the findings of the tentative order, the tentative order shall become final.

(ii) In the event a party makes written notification to the industrial commission of an objection within ~~thirty~~ fourteen days of the date of the receipt of the notice of findings of the tentative order, the application for compensation for permanent and total disability shall be set for hearing and adjudicated on its merits.

(b) If the hearing administrator determines that the case should not be referred

for consideration of issuance of a tentative order by an adjudicator, the hearing administrator shall ~~ensure that the appropriate evidence within the file is obtained for review, opinion, and report from a vocational expert to be selected by the industrial commission.~~ notify the parties to the claim that a party has fourteen days from the date that copies of reports of the commission medical examinations are submitted to the parties within which to make written notification to the commission of a party's intent to submit additional vocational information to the commission that is relevant to the adjudication of the application for permanent total disability compensation.

(i) Unless a party notifies the commission within the aforementioned fourteen-day period of the party's intent to submit additional vocational information to the commission, a party will be deemed to have waived its ability to submit additional vocational information to the commission that is relevant to the adjudication of the application for permanent total disability.

(ii) Should a party provide timely notification to the commission of its intent to submit additional vocational information, the additional vocational information shall be submitted to the commission within forty-five days from the date the copies of the reports of commission medical examinations are submitted to the parties. Upon expiration of the forty-five day period no further vocational information will be accepted without prior approval from the hearing administrator.

~~(e) At the time that the claim file documents are referred to a vocational expert to be selected by the industrial commission, the hearing administrator shall notify the parties to a claim that they have forty five days within which to submit additional vocational information to the commission, request a pre-hearing conference, or notify the commission of the desire to settle the claim. Upon expiration of the forty five day period, no further vocational information or evidence will be accepted without prior approval from a hearing administrator. Payment of fee bills for the reports of vocational experts selected by the industrial commission shall be charged to the employer's experience claims where the employer contributes to the state insurance fund. For claims of a self-insuring employer, the fee bill of the vocational expert shall be sent to the self-insuring employer for payment within thirty days of the employer's receipt of the fee bill.~~

(7) If the employer or the claimant injured worker request, for good cause shown, that a pre-hearing conference be scheduled, the request shall be decided by the hearing administrator a pre-hearing conference shall be set. The request

for a pre-hearing conference shall include the identification of the issues that the requesting party desires to be considered at the pre-hearing conference. The hearing administrator may also schedule a pre-hearing conference when deemed necessary on any matter concerning the processing of an application for permanent and total disability, including but not limited to, motions that are filed subsequent to the filing of the application for permanent and total disability.

~~If the hearing administrator decides that a pre-hearing conference is warranted,~~ notice Notice of the a pre-hearing conference is to be provided to the parties and their representatives no less than fourteen days prior to the pre-hearing conference. The pre-hearing conference may be by telephone conference call, or in-person at the discretion of the hearing administrator and is to be conducted by a hearing administrator.

- (8) Should a pre-hearing conference be held, the hearing administrator is not limited to the consideration of the issues set forth in paragraph (C)(8)(a) through (C)(8)(i) of this rule, but may also address any other matter concerning the processing of an application for permanent total disability. ~~Should~~ At a pre-hearing conference be held, the parties should be prepared to discuss the following issues:

- (a) Evidence of retirement issues.
- (b) Evidence of refusal to work or evidence of refusal or failure to respond to written job offers of sustained remunerative employment.
- (c) Evidence of job description.
- (d) Evidence of rehabilitation efforts.
- (e) Exchange of accurate medical history, including surgical history.
- (f) Agreement as to allowed condition(s) in the claim.
- (g) Scheduling of additional medical examinations, if necessary.
- (h) Ensure that deposition requests that have been granted pursuant to industrial commission rules are completed and transcripts submitted.
- (i) Settlement status.

- (9) At the conclusion of the pre-hearing conference, a date for hearing before a staff hearing officer ~~will~~ shall be scheduled ~~that will be~~ no earlier than fourteen days subsequent to the date of a pre-hearing conference. After the pre-hearing conference, unless authorized by the hearing administrator, no additional evidence on the issue of permanent and total disability shall be submitted to the claim file. If the parties attempt to submit additional evidence on the issue of permanent and total disability, the evidence will not be admissible on the adjudication of permanent total disability compensation.
- (10) The time frames established herein in paragraph (C) of this rule can be waived by mutual agreement of the parties by motion to a hearing administrator, except where otherwise specified.
- (11) The applicant may dismiss the application for permanent and total disability any time up to the determination of the hearing on the merits of the application. Should a party dismiss an application prior to its adjudication, the commission's medical evidence obtained will be valid fifteen months from the date of dismissal.

(D) Guidelines for adjudication of applications for permanent total disability

The following guidelines shall be followed by the adjudicator in the sequential evaluation of applications for permanent total disability compensation:

- (1)
- (a) If the adjudicator finds that the ~~claimant~~ injured worker meets the definition of statutory permanent and total disability pursuant to division (C) of section 4123.58 of the Revised Code, due to the loss or loss of use of both hands or both arms, or both feet or both legs, or both eyes, or any two thereof, the ~~claimant~~ injured worker shall be found permanently and totally disabled, and a tentative order shall be issued.
- Should an objection be filed from a tentative order, a hearing shall be scheduled. (Reference paragraph (E) of this rule).
- (b) If, after hearing, the adjudicator finds that the ~~claimant~~ injured worker is engaged in sustained remunerative employment, the ~~claimant's~~ injured worker's application for permanent and total disability shall be denied, unless a ~~claimant~~ injured worker qualifies for an award under division (C) of section 4123.58 of the Revised Code.

- (c) If, after hearing, the adjudicator finds that the claimant injured worker is medically able to return to the former position of employment, the claimant injured worker shall be found not to be permanently and totally disabled.
- (d) If, after hearing, the adjudicator finds that the claimant injured worker voluntarily removed himself from the work force, the claimant injured worker shall be found not to be permanently and totally disabled. If evidence of voluntary removal or retirement is brought into issue, the adjudicator shall consider evidence that is submitted of the claimant's injured worker's medical condition at or near the time of removal/retirement.
- (e) If, after hearing, the adjudicator finds that the claimant injured worker is offered and refuses and/or fails to accept a bona fide offer of sustained remunerative employment that is made prior to the pre-hearing conference described in paragraph (C)(9) of this rule where there is a written job offer detailing the specific physical/mental requirements and duties of the job that are within the physical/mental capabilities of the claimant injured worker, the claimant injured worker shall be found not to be permanently and totally disabled.
- (f) If, after hearing, the adjudicator finds that the claimant's injured worker's allowed medical condition(s) is temporary and has not reached maximum medical improvement, the claimant injured worker shall be found not to be permanently and totally disabled because the condition remains temporary. In claims involving state fund employers, the claim shall be referred to the administrator to consider the issuance of an order on the question of entitlement to temporary total disability compensation. In claims involving self-insured employers, the self-insured employer shall be notified to consider the question of the claimant's injured worker's entitlement to temporary total disability compensation.
- (g) If, after hearing, the adjudicator determines that there is appropriate evidence which indicates the claimant's injured worker's advanced age is the sole cause or primary obstacle which serves as a significant impediment to reemployment, permanent total disability compensation shall be denied. However, a decision based upon age must always involve a case-by-case analysis. The claimant's injured worker's age should also be considered in conjunction with other relevant and appropriate aspects of the claimant's injured worker's nonmedical profile.

- (h) If, after hearing, the adjudicator finds that the allowed condition(s) is the proximate cause of the ~~claimant's~~ injured worker's inability to perform sustained remunerative employment, the adjudicator is to proceed in the sequential evaluation of the application for permanent and total disability compensation in accordance with the provisions of paragraph (D) of this rule. However, should the adjudicator find that non-allowed conditions are the proximate cause of the ~~claimant's~~ injured worker's inability to perform sustained remunerative employment, the ~~claimant~~ injured worker shall be found not to be permanently and totally disabled.
- (i) If, after hearing, the adjudicator finds that ~~claimant's~~ injured worker's inability to perform sustained remunerative employment is the result of a pre-existing condition(s) allowed by aggravation, the adjudicator is to continue in the sequential evaluation of the application for permanent total disability compensation in accordance with the provisions of paragraph (D) of this rule. However, should the adjudicator find that the non-allowed pre-existing condition(s) are the proximate cause of the ~~claimant's~~ injured worker's inability to perform sustained remunerative employment, the ~~claimant~~ injured worker shall be found not to be permanently and totally disabled.

(2)

- (a) If, after hearing, the adjudicator finds that the medical impairment resulting from the allowed condition(s) in the claim(s) prohibits the ~~claimant's~~ injured worker's return to ~~his~~ the former position of employment as well as prohibits the ~~claimant~~ injured worker from performing any sustained remunerative employment, the ~~claimant~~ injured worker shall be found to be permanently and totally disabled, without reference to the vocational factors listed in paragraph (B)(3) of this rule.
- (b) If, after hearing, the adjudicator finds that the ~~claimant~~ injured worker, based on the medical impairment resulting from the allowed conditions is unable to return to the former position of employment but may be able to engage in sustained remunerative employment, the non-medical factors ~~need~~ shall be considered by the adjudicator.

The non-medical factors that are to be reviewed are the ~~claimant's~~ injured worker's age, education, work record, and all other factors, such as physical, psychological, and sociological, that are contained within the record that might be important to the determination as to whether

the ~~claimant~~ injured worker may return to the job market by using past employment skills or those skills which may be reasonably developed. (Vocational factors are defined in paragraph (B) of this rule).

(c) If, after hearing and review of relevant vocational evidence and non-medical disability factors, as described in paragraph (D)(2)(b) of this rule the adjudicator finds that the ~~claimant~~ injured worker can return to sustained remunerative employment by using past employment skills or those skills which may be reasonably developed through retraining or through rehabilitation, the ~~claimant~~ injured worker shall be found not to be permanently and totally disabled.

(3) Factors considered in the adjudication of all applications for permanent and total disability:

(a) The burden of proof shall be on the ~~claimant~~ injured worker to establish a case of permanent and total disability. The burden of proof is by preponderance of the evidence. The ~~claimant~~ injured worker must establish that the disability is permanent and that the inability to work is causally related to the allowed conditions.

(b) In adjudicating an application for permanent and total disability, the adjudicator must determine that the disability is permanent, the inability to work is due to the allowed conditions in the claim, and the ~~claimant~~ injured worker is not capable of sustained remunerative employment.

(c) The industrial commission has the exclusive authority to determine disputed facts, the weight of the evidence, and credibility.

(d) All medical evidence of impairment shall be based on objective findings reasonably demonstrable and medical reports that are submitted shall be in conformity with the industrial commission medical examination manual.

(e) If the adjudicator concludes from evidence that there is no proximate causal relationship between the industrial injury and the inability to work, the order shall clearly explain the reasoning and basis for the decision.

(f) The adjudicator shall not consider the ~~claimant's~~ injured worker's percentage of permanent partial impairment as the sole basis for adjudicating an application for permanent and total disability.

- (g) The adjudicator is to review all relevant factors in the record that may affect the ~~claimant's~~ injured worker's ability to work.
- (h) The adjudicator shall prepare orders on a case by case basis which are fact specific and which contain the reasons explaining the decision. The orders must specifically state what evidence has been relied upon in reaching the conclusion and explain the basis for the decision. In orders that are issued under paragraphs (D)(2)(b) and (D)(2)(c) of this rule the adjudicator is to specifically list the non-medical disability factors within the order and state how such factors interact with the medical impairment resulting from the allowed injuries in the claim in reaching the decision.
- (i) In claims in which a psychiatric condition has been allowed and the injured worker retains the physical ability to engage in some sustained remunerative employment, the adjudicator shall consider whether the allowed psychiatric condition in combination with the allowed physical condition prevents the injured worker from engaging in sustained remunerative employment.

(E) Statutory permanent total disability

Division (C) of section 4123.58 of the Revised Code provides that the loss or loss of use of both hands or both arms, or both feet or both legs, or both eyes, or any two thereof, constitutes total and permanent disability.

- (1) In all claims where the evidence on file clearly demonstrates actual physical loss, or the permanent and total loss of use occurring at the time of injury secondary to a traumatic spinal cord injury or head injury, of both hands or both arms, or both feet or both legs, or both eyes, or any two thereof, the claim shall be referred to be reviewed by a staff hearing officer of the commission. Subsequent to review, the staff hearing officer shall, without hearing, enter a tentative order finding the ~~claimant~~ injured worker to be entitled to compensation for permanent and total disability under division (C) of section 4123.58 of the Revised Code. If an objection is made, the claim shall be scheduled for hearing.
  - (a) Within thirty days of the receipt of the tentative order adjudicating the merits of an application for compensation for permanent and total disability, a party may file a written objection to the order. Unless the party notifies the industrial commission in writing of the objection to the tentative order within thirty days after the date of receipt of notice of the findings of the tentative order, the tentative order shall become

final.

- (b) In the event a party makes written notification to the industrial commission of an objection within thirty days of the date of the receipt of the notice of findings of the tentative order, the application for compensation for permanent and total disability shall be set for hearing and adjudicated on its merits.
- (2) In all other cases filed under division (C) of section 4123.58 of the Revised Code, if the staff hearing officer finds that the ~~claimant~~ injured worker meets the definition of statutory permanent and total disability pursuant to division (C) of section 4123.58 of the Revised Code, due to the loss of use of both hands or both arms, or both feet or both legs, or both eyes, or any two thereof, the staff hearing officer, without a hearing, is to issue a tentative order finding the ~~claimant~~ injured worker to be permanently and totally disabled under division (C) of section 4123.58 of the Revised Code. An objection to the tentative order may be made pursuant to paragraphs (E)(1)(a) and (E)(1)(b) of this rule.