IN THE SUPREME COURT OF OHIO

ORIGINAL

State of Ohio, ex rel., **Old Dominion Freight Line, Inc.,** **Appellant,** **v.** **The Industrial Commission of Ohio,** **and** **Robert L. Mason** **Appellees.**	:	**Case No 2012-1193** **On Appeal from the Franklin County Court of Appeals, Tenth Appellate District** **Court of Appeals Case No. 11AP-350**

MERIT BRIEF OF APPELLEE, ROBERT L. MASON

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FILED
DEC 14 2012
CLERK OF COURT
SUPREME COURT OF OHIO

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STATEMENT OF THE ISSUE

The issue presented before this Court is whether the Tenth District Court of Appeals was correct in denying Appellant's, Old Dominion Freight Line, Inc.'s, petition for a writ of mandamus, and finding that Appellee, Industrial Commission of Ohio, did not abuse its discretion when it issued an order granting Appellee's, Robert L. Mason's, application for permanent total disability compensation. The Commission's order is supported by "some evidence" that Appellee, Robert L. Mason, cannot perform sustained remunerative employment. Thus, Appellant cannot prove an abuse of discretion by the Commission, and Appellant's request for a writ of mandamus must be denied.

STATEMENT OF THE CASE

This matter is currently before the Court on the "Notice of Appeal" filed by Appellant, Old Dominion Freight Line Inc., on July 16, 2012.

By way of procedural history, Appellee, Robert L. Mason, filed an Application for Permanent and Total Disability Compensation on July 22, 2009. The issue was heard before a Staff Hearing Officer (hereinafter "SHO") on March 16, 2012. Following the hearing an Order was issued by the SHO granting Appellee's, Robert L. Mason's, Application for Permanent and Total Disability Compensation.

Subsequent to the receipt of the SHO order, Appellant, sought reconsideration of the SHO Order. This request was ultimately denied per another SHO Order mailed May 20, 2010.

Appellant then filed an action in the Franklin County Court of Appeals requesting a writ of mandamus directing the Commission to vacate said Orders. On December 16, 2011, Magistrate Kenneth W. Macke issued a decision recommending that Appellant's request for a writ of mandamus be granted. Appellees Robert L. Mason and the Industrial Commission of Ohio timely filed objections to the Magistrate's decision. The Tenth District Court of Appeals sustained Appellee's, Robert L. Mason's, first and second objections as well as Appellee's, Industrial Commission of Ohio's, first and second objections. Consequently, Appellant then filed its Notice of Appeal with this Court on July 16, 2012.

FACTS

On January 18, 2005, Respondent, Robert L. Mason (hereinafter "Mr. Mason") was injured in the course of his employment as a truck driver with Appellant, Old Dominion Freight Line, Inc. (hereinafter "Appellant"). Specifically, Mr. Mason was injured when he slipped and

fell on the ice. As a result of the slip and fall, Mr. Mason sustained a significant injury to his left hip as well as sustained an injury to his lower back. Mr. Mason was taken by emergency squad to the Doctors Hospital OhioHealth where he was admitted and underwent surgery three days later on January 21, 2005, for his left hip fracture. Specifically, Dr. Gerard Papp performed an open reduction, internal fixation of the left proximal femur. The pre and post-operative diagnoses were Left Femoral Neck Fracture and Left Intertrochanteric Femur Fracture. Subsequent to the surgery Mr. Mason underwent approximately 12 to 15 weeks of formal physical therapy and also participated in home exercises. As a result of this injury, Mr. Mason never returned to work.

In fact, Mr. Mason's surgeon, Dr. Gerard Papp, opined as early as March of 2006 that he felt Mr. Mason was permanently and total disabled. As a result of his medical opinion, Mr. Mason filed his initial application for permanent total disability compensation on April 26, 2006. A hearing took place before Respondent, Industrial Commission of Ohio (hereinafter "the Commission"), on February 28, 2007. At that time it was determined that Mr. Mason retained the ability to engage in sustained remunerative employment of the sedentary nature.

Subsequent to the hearing on February 28, 2007, Mr. Mason's claim was additionally allowed for not only more physical conditions but also several psychological conditions. Specifically, Mr. Mason's claim was amended to include the conditions of Depressive Disorder, Short Leg Syndrome and Lumbar Sprain per the Staff Hearing Officer's Order dated October 5, 2007. The second psychological condition, Post Traumatic Stress Disorder, was formally recognized in the claim after a Staff Hearing took place before the Commission on September 23, 2008.

On July 22, 2009, Mr. Mason filed a new IC-12 Application for Compensation for Permanent and Total Disability. This application was supported by the reports of Drs. May, Ward and Howard. Subsequent to the filing of the permanent total disability application, the Industrial Commission had Mr. Mason examined by their own physicians, Drs. Fitz and Malinky. Dr. Fitz examined on the physical conditions and Dr. Malinky examined on the psychological conditions. Both doctors, independently, supported a finding that Mr. Mason was permanently and totally disabled.

Prior to proceeding to a hearing on the merits of permanent total disability, Appellant sent two letters to the Commission requesting that they be allowed to take the oral deposition of the Commission physicians, Drs. Fitz and Malinky. The request was based on the fact that Appellant's medical reports were not initially sent to the Commission physicians prior to their examinations of Mr. Mason. In response, Mr. Mason sent two separate letters to the Commission, both dated November 17, 2009, formally objecting to the request to depose Drs. Fitz and Malinky. As a result, a hearing was then conducted before the Commission on December 17, 2009. The Staff Hearing Officer denied Appellant's request to depose both Dr. Fitz and Dr. Malinky, finding that the request was unreasonable. Appellant then attempted to have their requests to depose reconsidered by the Commission pursuant to a letter sent January 4, 2010. This request was ultimately denied as well pursuant to the Commission Record of Proceedings mailed February 20, 2010.

In the interim, a pre-hearing conference took place on February 4, 2010, on the issue of rehabilitation effort and scheduling of additional medical examinations as necessary. Pursuant to the Compliance Letter, which was generated as a result of the pre-hearing conference, the Hearing Administrator instructed that Appellant's medical reports would be sent to Dr. Fitz and

to Dr. Malinky in order to obtain an addendum to their reports so that they could opine on whether Appellant's medical reports changed their original opinions. In fact, the addendum requests, along with 's medical reports, were faxed to Dr. Fitz and Dr. Malinky on that same day, February 4, 2010. Dr. Malinky responded on February 4, 2010, that he reviewed 's medical reports and that his medical opinion that Mr. Mason is permanently and totally disabled did not change. Dr. Fitz responded on February 8, 2010, that he reviewed 's medical reports and that his medical opinion that Mr. Mason is permanently and totally disabled did not change.

The merit hearing addressing Mr. Mason's application for permanent total disability compensation took place on March 16, 2010. In findings mailed March 31, 2010, the Commission granted Mr. Mason's application for permanent total disability compensation based upon the reports of Drs. Fitz, Malinky, May, Ward and Howard and made a finding that Mr. Mason was unable to engage in sustained remunerative employment. Following this decision, sought reconsideration, which was denied. then filed a complaint for writ of mandamus with this Court on April 7, 2011.

ARGUMENT

I. STANDARD OF REVIEW

In order for this Court to issue a writ of mandamus as a remedy from a determination of the Industrial Commission, Appellant, Old Dominion Freight Lines, Inc. (hereinafter "Appellant") must show a clear legal right to the relief sought and that the Commission has a clear legal duty to provide such relief. *State ex rel. Pressley v. Indus. Comm.* (1967) 11 Ohio St.2d 141. A clear legal right to a writ of mandamus exists where Appellant shows that the Commission abused its discretion by entering an order which is not supported by any evidence in the record. *State ex rel. Elliott v. Indus. Comm.* (1986) 26 Ohio St.3d 76. It has been established, however, that where the record shows "some evidence" to support the Commission's findings, there has been no abuse of discretion and mandamus is not appropriate. *State ex rel. General Motors Corp., v. Indus. Comm.* (1975), 42 Ohio St.2d 278; *State ex rel. Cox, v. Indus. Comm.* (1981), 67 Ohio St.2d 235, 241.

II. PROPOSITION OF LAW NO. 1: The Commission did not abuse its discretion by obtaining addendum reports from its doctors who performed independent medical exams, as there is no specific rule that prohibits the submission of supplemental evidence, and Ohio Admin. Code 4121-3-34(C)(4)(b) does not require that all evidence be submitted *prior to* the examinations

Appellant's entire argument in this case comes down to the allegation that the Commission abused its discretion by not initially sending the reports of Drs. Sterle, Clary and Murphy to the Commission's doctors, Drs. Fitz and Malinky, who were to perform independent medical examinations of Mr. Mason on the issue of permanent and total disability. Yet this argument blatantly ignores the fact that there is no specific rule prohibiting the Commission from submitting supplemental evidence and that it is actually common practice for physicians to issue addendum reports upon receiving additional medical records after their initial examinations.

The rules pertaining to permanent total disability compensation are identified within Ohio Adm.Code 4121-3-34. According to those rules, the Commission was required to 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 the rule and submit the same to an examining physician to be selected by the claims examiner. There is no mention in the rule whatsoever, that the submission of the medical reports must be prior to the date of the Commission's examinations. All the rule requires is that the claims examiner copy all documents, including relevant evidence provided under (C)(4) and submit the same to the Commission's examining physician.

Here, Appellant wants the Courts to impermissibly insert language into the Ohio Administrative Code that simply is not there. Specifically, Appellant makes the argument that *implicit* in the rule is that the scheduling of the Commission's medical examinations *shall* be delayed where the employer provides notice within the 14-day period (emphasis added). The Appellant essentially is asking the Courts to add a mandatory requirement to the Code that the Commission's examinations cannot and shall not take place until such time that all potentially relevant medical is available to be sent. Yet, had the General Assembly intended for such language or such requirement to be a part of the Code, it would have included the qualifying language itself. It is not within the Court's providence to add language to defeat the intent of the General Assembly.

In this particular case, there is no doubt that Dr. Malinky, examining Mr. Mason on behalf of the Commission in regards to the allowed psychological conditions, received and had access to all of the relevant medical evidence when rendering his medical opinion as to whether Mr. Mason is PTD from a psychological standpoint. Dr. Malinky very clearly opined, after explicitly

stating that he reviewed the report of Dr. Clary, that his medical opinion as to whether Respondent, Robert L. Mason was PTD for the allowed psych conditions, remained unchanged and that he was in fact permanently and totally disabled. The fact that Dr. Malinky received the report of Dr. Clary subsequent to Mr. Mason's examination does not negate the fact that he conducted his own independent medical examination of the claimant. The whole purpose of the Commission setting injured workers up for Independent Medical Examinations (IMEs) is to get an independent, unbiased and certainly un-prejudicial opinion from doctors of the Commission's choosing. The fact of the matter is, Dr. Malinky did a thorough psychological examination of his own, and determined that Mr. Mason was PTD from a psychological standpoint. A submission of a medical report from Dr. Clary subsequent to that independent examination does not invalidate Dr. Malinky's medical opinion.

As a result of the Commission's inadvertent omission, Appellant then further alleges that the Commission abused its discretion by not allowing them to take the oral depositions of both Dr. Fitz and Dr. Malinky. However, Appellant's allegations in this case do not rise to the level of an abuse of discretion and any potential defect was appropriately remedied by the Commission prior to the merit hearing on the issue of permanent total disability.

The Ohio Administrative Code makes it very clear that the appropriate standard to be applied in determining whether to grant a request to take the oral deposition of a Commission physician is whether the deposition request "is a reasonable one." Specifically, Ohio Admin. Code 4121-3-09(A)(7)(d), states that:

> ***[W]hen determining the reasonableness of the request for deposition or interrogatories the hearing administrator shall consider whether the alleged defect or potential problem raised by the applicant can be adequately addressed or resolved by the claims examiner, hearing administrator, or hearing officer through the adjudicatory process within the Commission or the claims process within the Bureau of Workers' Compensation."

In other words, pursuant to Ohio Admin. Code 4121-3-09(A)(7)(d), where there is an equally reasonable option for resolution of the alleged defect by the claims examiner, hearing administrator, or hearing officer, the deposition of a Commission physician will not be deemed "reasonable." *State ex rel. Cox v. Greyhound Food Mgt., Inc.* 95 Ohio St.3d 353, 355, 2002-Ohio-2335.

Here, Appellant's separate requests to depose Dr. Fitz and Dr. Malinky were appropriately denied pursuant to the Staff Hearing Officer's orders dated December 17, 2009 and mailed December 19, 2009. The basis for the Staff Hearing Officer's decisions was that the requests were unreasonable. Specifically, the Staff Hearing Officer stated that the lack of inclusion of 's medical reports in the evidence cited by Dr. Fitz was not found to be a sufficient reason to grant a deposition of Dr. Fitz. By way of a separate order, the Staff Hearing Officer stated that the lack of citation to all of 's medical evidence was not a basis to grant the request to depose Dr. Malinky either, as any potential defect could be remedied by other means. The Commissioners then rejected 's request for reconsideration on this issue pursuant to the Record of Proceedings mailed February 20, 2010.

Unhappy with the Hearing Officer's decision not to allow the oral depositions of Drs. Fitz and Malinky, Appellant then requested a pre-hearing conference to be held on the issue of rehabilitation efforts and also on the issue of scheduling of additional medical examinations, if necessary. At the pre-hearing conference conducted on February 4, 2010, the Hearing Administrator addressedAppellant's concerns, explicitly stating in the Compliance Letter, that Appellant's medical reports would in fact be sent to the Commission doctors, Drs. Fitz and Malinky, in order to obtain addendum opinions.

Ultimately, the alleged defect in this case was adequately addressed and resolved by a Staff Hearing Officer and by the Hearing Administrator as authorized by Ohio Admin. Code 4121-3-09(A)(7)(d). The Staff Hearing Officer and the Hearing Administrator remedied the alleged error by asking Drs. Fitz and Malinky for addendum reports after having them specifically review Appellant's inadvertently omitted medical reports. Specifically, in letters dated February 4, 2010, the Hearing Administrator asked both Dr. Fitz and Dr. Malinky to please review the reports of Drs. Sterle and Murphy and then opine on whether their original medical opinion had changed. Both physicians responded that Appellant's medical reports were reviewed and that their medical opinions did not change and that they felt Mr. Mason was in fact permanently and totally disabled.

Therefore, in this case, all relevant evidence and reports submitted by Appellant were sent to the appropriate Commission examining doctors. Appellant's report from Dr. Sterle, who examined on the physical conditions, was sent to Dr. Fitz, who did the physical examination on behalf of the Commission. Likewise, Appellant's report from Dr. Murphy, who examined on the psychological conditions, was sent to Dr. Malinky, who did the psychological examination on behalf of the Commission. Dr. Clary's report, a file review, conducted on behalf of Appellant, was also appropriately sent to the examining Commission psychologist, Dr. Malinky. The fact that Dr. Clary's report was not sent to Dr. Fitz, who examined on behalf of the Commission in regards to the allowed physical conditions, is irrelevant and tantamount to harmless error. Dr. Fitz was not examining on any of the allowed psychological conditions as he is not a psychiatrist or psychologist and not permitted to do so. In fact, Dr. Fitz's medical opinion as to whether the claimant can engage is sustained remunerative employment is limited to solely the allowed physical conditions recognized within Respondent's claim. He is not qualified to be rendering

any sort of opinion as to permanent total disability in regards to psychological conditions. Therefore, whether he had the file review from Dr. Clary, a psychiatrist, prior to issuing his medical opinion on Mr. Mason's *physical capabilities*, is irrelevant and immaterial. The opinions expressed within the file review of Dr. Clary would not and could not have had any bearing on the outcome of Dr. Fitz's Independent Medical Examination.

In the end, once Appellant's medical reports were sent to Drs. Fitz and Malinky and once those doctors authored their addendum opinions, any alleged defect was cured. At that point, any remaining issue would solely be a matter of credibility to be addressed by the Staff Hearing Officer at the permanent total disability merit hearing.

III. PROPOSITION OF LAW NO. 2: The Industrial Commission did not abuse its discretion by considering the reports of Drs. May, Ward, Howard, Fitz and Malinky, as the Commission is the exclusive evaluator of evidentiary weight.

"[Q]uestions of credibility and the weight to be given evidence are clearly within the Commission's discretionary powers of fact-finding." *State ex rel. Treece v. Indus. Comm.* (1981), 68 Ohio St.2d 165, 167. The Supreme Court of Ohio has consistently declined to reevaluate and reweigh the evidence before the Commission, holding that the Commission is the "exclusive evaluator of disability." *State ex rel. Moss v. Indus. Comm.* (1996), 75 Ohio St.3d 414.

It is also undisputed that "reviewing courts must not micromanage the Commission as it carries out the business of compensating for industrial/occupational injuries and illness. The Commission is the exclusive evaluator of evidentiary weight and disability." *State ex rel. Mobley v. Indus. Comm.*, 78 Ohio St.3d 579, 584. "A Court may not usurp the discretionary function vested in the Commission, where the Commission has exercised its discretion soundly

and within legal bounds." *State ex rel. Goodyear Tire and Rubber Co. v. Indus. Comm.* (1974), 38 Ohio St.2d 57. Moreover, the Commission does not abuse its discretion when "some evidence" supports its decision and when it explains the basis of, and reasoning behind, the decision. *State ex rel. Pass v. C.S.T. Extraction Co.* (1996), 74 Ohio St.3d 373; *State ex rel. Noll* (1991), 57 Ohio St.3d 203, 205. Additionally, the determination of disputed facts is within the final jurisdiction of the Commission. *State ex rel. Allerton v. Indus. Comm.* (1982), 69 Ohio St.3d 96. The Commission may accept all, none, or any portion of an expert's report and is not required to give special weight to any particular medical report. *State ex rel. Ellis v. McGraw Edison Co.* (1993), 66 Ohio St.3d 92. This Court is not to evaluate and judge the credibility of evidence that was before the Commission, such that it undertakes the role of "super Commission." *State ex rel. Burley v. Coil Packaging, Inc.* (1987), 31 Ohio St.3d 18, 20.

Here, the Commission did not abuse its discretion in weighing the medical evidence on file and concluding that Mr. Mason was permanently and totally disabled. The medical evidence from Drs. Fitz and Malinky, relied upon by the Commission, reveal that Mr. Mason is unable to engage in sustained remunerative employment as a result of the medical effects of his injuries alone. Such a finding by the Staff Hearing Officer mandates a finding of permanent total disability compensation without further consideration of the "*Stephenson*" factors.

Appellant's argument that the Commission improperly relied upon the medical reports of Drs. Ward, May and Howard is unfounded. The Commission did not rely upon the reports of Drs. May, Ward, and Howard, but rather, merely considered them when assessing the credibility of Drs. Fitz and Malinky. The Staff Hearing Officer made it very clear that the reports relied upon to grant Mr. Mason's permanent total disability were the independent medical reports of Drs. Fitz and Malinky. Those two doctors were the ones specifically enumerated by the Hearing

Officer. Regardless of Appellant's dissatisfaction with the Commission's decision to rely upon Drs. Fitz and Malinky and grant Mr. Mason's permanent and total disability application, Appellant cannot circumvent the fact that the Commission, pursuant to the referenced case law, is the "exclusive evaluator of evidentiary weight and disability." *Mobley*, supra.

The Commission's decision to give weight and credibility to the reports of Drs. Fitz and Malinky should not be disturbed. On behalf of the Commission, Dr. Fitz conducted a thorough independent medical examination of Mr. Mason and authored his report dated October 7, 2009. Dr. Fitz, from a physical standpoint, found that Mr. Mason was incapable of work. His findings and conclusion are in line with both Dr. May and Dr. Ward.

The Commission's independent medical examination in regards to the allowed psychological conditions was conducted by Dr. Malinky. Dr. Malinky's report is dated October 21, 2009. According to Dr. Malinky, Mr. Mason has moderate impairment of his activities of daily living, social function, concentration, persistence, and pace and he found a moderate impairment in Mr. Mason's work-like settings and in his ability to adapt to stressful circumstances, including the ability to make decisions, attend obligation, schedules, and interact with supervisors and peers. Dr. Malinky ultimately concluded that Mr. Mason is incapable of work solely from a psychological perspective.

Additionally, Appellant alleges that Drs. May, Ward and Howard relied upon non-medical factors in evaluating Mr. Mason's ability to engage in sustained remunerative employment. However, the Staff Hearing Officer did address this argument in his Oder and then went one step further to correctly categorize Appellant's allegation as an argumentative inference unfounded by a reading of the actual reports and case where Appellant is substituting its own judgment for that of the medical experts.

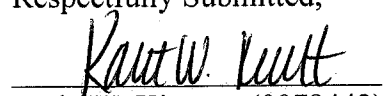
In the end, all of the arguments presented in Appellant's Brief, as to the credibility of the above referenced doctors reports, were previously considered, weighed and rejected by the Staff Hearing Officer prior to rendering his decision as reflected in the Transcript of Proceedings. In other words, Appellant is very clearly doing nothing more than asking this Court to reweigh the evidence because they are unhappy with the decision.

Given the evidence in this case, the Commission's decision to rely upon Drs. Fitz and Malinky to grant permanent total disability compensation was not an abuse of discretion. The Commission acted within its authority when it weighed the evidence before it. Accordingly, the Commission's determination of evidentiary weight should be upheld because the reports of Drs. Fitz and Malinky constitute "some evidence" upon which the Commission could rely.

CONCLUSION

There was no abuse of discretion as the Commission's order granting Respondent, Robert L. Mason's, permanent total disability application is supported by some evidence in the record. The reports of Drs. Fitz and Malinky were not deficient as they had access to and did consider all of Appellant's submitted and relevant medical evidence. The doctors examining on Respondent, Robert L. Mason's physical capabilities had access to all other physicians' reports who examined on physical capabilities, including Appellant's report from Dr. Sterle. Additionally all the doctors examining on respondent, Robert L. Mason's psychological capabilities had access to all other psychologists' reports who examined on psychological capabilities, including Appellant's reports from Drs. Murphy and Clary. These reports and their addendums (also cited to and relied upon by the Commission in grating PTD), therefore, constitute some evidence on which the Commission could rely to supports its decision. Any alleged failure on the part of the Commission to follow its own rules is unfounded, as all of Appellant's submitted medical reports were in fact submitted to the appropriate examining Commission doctors therefore curing any alleged defect. Given the evidence in this case, the Commission's decision to rely upon the reports of Drs. Fitz, and Malinky, to grant permanent total disability compensation was not an abuse of discretion. The Commission acted within its authority. Accordingly, the Court should affirm the decision of the Tenth District Court of Appeals and deny Appellant's prayer for a writ of mandamus.

Respectfully Submitted,



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APPENDIX

4121-3-09 Conduct of hearings before the commission and its staff and district hearing officers.

(A) Proof and discovery.

(1) In every instance the proof shall be of sufficient quantum and probative value to establish the jurisdiction of the commission to consider the claim and determine the rights of the injured worker to an award. Proof may be presented by affidavit, deposition, oral testimony, written statement, document, or other forms of evidence.

(a) The parties or their representatives shall provide to each other, as soon as available and prior to hearing, a copy of the evidence the parties intend to submit at a commission proceeding.

(b) In the event a party fails to comply with paragraph (A)(1)(a) of this rule, the hearing officer has the discretion to continue the claim to the end of the hearing docket, or to a future date with instructions to the parties or their representatives to comply with the rule.

(2) The free pre-hearing exchange of information relevant to a claim is encouraged to facilitate thorough and adequate preparation for commission proceedings. If a dispute arises between the parties regarding the exchange of information, the hearing administrator, pursuant to paragraph (B) of this rule may conduct a pre-hearing conference to consider the dispute. At the conclusion of the pre-hearing conference, the hearing administrator may issue a compliance letter, which becomes part of the claim file and which shall be adhered to by the parties.

(3) The injured worker must provide, when requested, a current signed medical release as required by division (B) of section 4123.651 of the Revised Code. Should an injured worker refuse to provide a current signed medical release as requested, then the claim shall be referred to the hearing administrator so that an order suspending the claim may be placed pursuant to division (C) of section 4123.651 of the Revised Code. Medical releases are to be executed on forms provided by the bureau of workers' compensation, the commission, or on substantially similar forms.

(4) The commission may, at any point in the processing of an application for benefits, require the injured worker to submit to a physical examination or may refer a claim for investigation.

(5) The employer may require a medical examination of the injured worker as provided in section 4123.651 of the Revised Code under the following circumstances:

(a) In no event will the injured worker be examined more than one time at the request of the employer on any issue that is asserted by the injured worker or which is to be considered by the commission, during the time that the specific matter asserted or that is in controversy remains pending final adjudication before the bureau or commission.

The exercise of this right of an examination shall not be allowed to delay the timely payment of benefits or scheduled hearings nor be used to cause undue hardship on the injured worker. The cost of any examination initiated by employer shall be paid by the employer including any fee required by the physician, and the payment of all of the injured worker's traveling and meal expenses, in a manner and at the rates as established by the administrator from time to time. If employed, the injured worker will also be compensated for any loss of wages arising from the scheduling of an examination. All reasonable expenses shall be paid by the employer immediately upon receipt of the billing, and the employer shall provide the injured worker at the time that the employer notifies the injured worker of

the time and place of the examination with a proper form to be completed by the injured worker for reimbursement of such expenses. The employer shall reimburse the injured worker for lost wages within thirty days of the submission of proof of lost wages.

The employer shall promptly inform the commission, as well as the injured worker's representative, as to the time and place of the examination, and the questions and information provided to the doctor. A copy of the examination report shall be submitted to the commission and to the injured worker's representative upon the employer's receipt of the report from the doctor.

The procedure set forth in paragraph (A)(5)(a) of this rule shall be applicable to claims where the date of injury or the date of disability in occupational disease claims occur on or after August 22, 1986.

Emergency treatment does not constitute examination for the purpose of this rule. Treatment by a company doctor does not constitute an examination for this rule. However, if following an examination the company doctor renders an opinion as to causation, extent of disability, or other medical opinion on a workers' compensation matter that is asserted by the injured worker, or which is to be considered by the commission, then that examination does constitute an examination for purposes of this rule.

(b) If after a medical examination of the injured worker under paragraph (A)(5)(a) of this rule on an issue that remains in controversy and has not been finally adjudicated, an employer asserts that an additional medical examination by a doctor of the employer's choice is essential in the defense of the claim by the employer, written request for such an examination shall be submitted to the hearing administrator only in cases where there is a dispute as to the request for additional examination. Written request for such an examination in a claim which has been set for a hearing with notice must be filed immediately upon the receipt of the notice or within such time as will be adequate for notification of the parties of the continuance of the hearing. The request shall state the date of the last examination of the injured worker by a doctor of employer's choice on the question pending and the reasoning for such additional examination.

All reasonable expenses of such examination, including any travel expense shall be paid by the employer within thirty days of the receipt of the billing. Payment for traveling expenses shall not require an order of the bureau or commission, unless there is a dispute. The employer shall provide the injured worker with a proper form to be completed by the claimant for reimbursement for traveling expenses. The employer shall reimburse the injured worker for lost wages within thirty days of the submission of proof of lost wages.

(6)

(a) If an injured worker without good cause refuses to attend a medical examination scheduled under paragraph (A)(5) of this rule, or refuses to provide or execute a current signed medical release as required by section 4123.651 of the Revised Code, the right to have the injured worker's claim for compensation or benefits considered, if the claim is pending before the commission, the administrator or district or staff hearing officer or to receive any payment of compensation or benefits previously granted is suspended during the period of refusal.

(b)

(i) The employer or the administrator asserting the suspension in paragraph (A)(6)(a) of this rule shall, within three business days of the assertion, provide the hearing administrator and the injured worker

or in claims where the injured worker is represented the injured worker's representative notice of the assertion. The notice shall include the reason for the assertion that there was not good cause shown for the refusal to attend a medical examination scheduled under paragraph (A)(5) of this rule or the refusal to provide or execute a current signed medical release as required by section 4123.651 of the Revised Code. Upon receipt of such notification, the hearing administrator shall contact the parties to the claim and determine whether there is a dispute concerning the asserted suspension. Promptly thereafter, a compliance letter shall be issued as set forth in paragraphs (A)(6)(c) and (A)(6)(d) of this rule.

(ii) Should the injured worker make the assertion that the medical examination scheduled pursuant to paragraph (A)(5) of this rule is being used to cause undue hardship, the injured worker will within three business days of making the assertion, provide the hearing administrator and the employer, or in cases where the employer is represented, the employer's representative, notice of the assertion. The notice shall set forth the reason for the assertion.

(c) If it is found that there was good cause for the refusal to attend a medical examination scheduled under paragraph (A)(5) of this rule and/or for the refusal to provide or execute a current signed medical release as requested under section 4123.651 of the Revised Code, a compliance letter shall issue finding that the claim is not suspended. If the compliance letter finds that payment of compensation or benefits was terminated by the administrator or by self-insuring employer without having good cause for the suspension, payments of compensation and/or benefits shall be made within fourteen days of the compliance letter.

(d) If it is found that there was not good cause for the refusal to attend a medical examination scheduled under paragraph (A)(5) of this rule, and/or for the refusal to provide or execute a current signed medical release as required by section 4123.651 of the Revised Code, a compliance letter shall issue finding that the injured worker's right to have the claim for compensation or benefits considered if the claim is pending before the administrator, commission, or district or staff hearing officer, or to receive any payment of compensation or benefits previously granted is suspended during the period of refusal.

(e) A party that is dissatisfied with a compliance letter issued under paragraph (A)(6)(c) or (A)(6)(d) of this rule may file an objection within fourteen days of the receipt of the compliance letter issued under paragraph (A)(6)(c) or (A)(6)(d) of this rule. If a party files a timely written objection to the compliance letter that is issued under paragraph (A)(6)(c) or (A)(6)(d) of this rule an expedited hearing will be held by a staff hearing officer within three business days of the commission's receipt of the objection.

(7) Procedure for obtaining the oral deposition of, or submitting interrogatories to, an industrial commission or bureau physician.

(a) A request to take the oral deposition of or submit interrogatories to an industrial commission or bureau physician who has examined an injured or disabled worker or reviewed the claim file and issued an opinion shall be submitted in writing to the hearing administrator within ten days from the receipt of the examining or reviewing physician's report and the applicant shall simultaneously mail a copy of the request to all parties, or if represented, to the representatives of the parties.

(b) The request must set out the reasons for the request and affirm that the applicant will pay all costs of the deposition or interrogatories including the payment of a reasonable fee, as defined below, to the physician and will furnish a copy of the deposition or the interrogatory to the opposing party

and to the file.

(c) If the hearing administrator finds that the request is a reasonable one, the hearing administrator shall issue a compliance letter that will set forth the responsibilities of the party that makes the request. The following items shall be set forth in the compliance letter:

(i) A statement of the responsibility of the party that requests the taking of deposition or answering of interrogatories concerning payment to the physician of a reasonable fee as established from time to time by commission resolution. Additionally, should a party cancel a deposition within two days of the scheduled time, a minimum cancellation fee will be charged as set by the industrial commission.

(ii) A statement of the responsibility of the party that makes the request to provide written notice of the date and time of the deposition to be provided by the requesting party to all opposing parties and their representatives, the bureau of workers' compensation and the industrial commission.

(iii) A statement setting forth a date by which the transcript of the deposition or the answers to the interrogatories is to be submitted to the industrial commission for inclusion within the claim file folder and to be served upon opposing parties.

(d) Except as may be provided pursuant to rule 4121-3-15(D) of the Administrative Code, when determining the reasonableness of the request for deposition or interrogatories the hearing administrator shall consider whether the alleged defect or potential problem raised by the applicant can be adequately addressed or resolved by the claims examiner, hearing administrator, or hearing officer through the adjudicatory process within the commission or the claims process within the bureau of workers' compensation.

(e) The party seeking the deposition may request that the hearing administrator issue a subpoena to secure the attendance of the physician. If the hearing administrator issues a subpoena to secure the attendance of the physician, the hearing administrator shall notify the physician that is to be deposed to bring copies of existing office notes and records concerning the medical examination or medical review to the deposition.

If a witness who has been issued a subpoena fails to appear, the hearing administrator shall certify this fact to the office of the attorney general who shall take appropriate action to compel the witness to obey the subpoena.

(f) The applicant shall furnish the opposing party and the industrial commission with a copy of the deposition or the completed interrogatories. The applicant shall also furnish the industrial commission with proof of payment of the court reporter and the physician.

(B) Prehearing conferences.

(1) At any time prior to the hearing the hearing administrator may, for good cause, hold a prehearing conference to consider matters that would tend to expedite the proceeding.

(2) At the conclusion of a prehearing conference, the hearing administrator shall prepare a compliance letter listing the subjects considered and the agreements reached at the prehearing conference. The compliance letter shall be made part of the claim file to be reviewed by the adjudicator and also be provided to the parties in attendance at the pre-hearing conference. The parties must adhere to the provisions of the compliance letter.

(3) A prehearing conference may be held by telephone conference call or in person, as determined by

the hearing administrator.

(C) Hearings before the industrial commission, its staff hearing officers, and the district hearing officers, and the rendering of their decision.

(1) Contested claims matters, disputed issues or claims, and appeals under section 4123.511 of the Revised Code shall be set for hearing before the district hearing officers, staff hearing officers or the industrial commission. Contested claim matters shall be assigned to hearing officers through a system which ensures that each hearing officer hears a representative sample of the issues under contest, dispute, or appeal. Hearing officers shall review all claim files prior to hearing.

(2) Notice of the date, time and place of such hearings shall be given to the injured worker and the employer, and their respective representatives of record by mail, and to the administrator by inter-office mail, in advance of the hearing date. The mailing of the notice, unless it is an emergency hearing, shall precede the hearing date by a period of time which will reasonably afford the parties opportunity to be present and participate in the hearing. This shall not be less than fourteen days following the date of the mailing of the notice.

(3) Representation of injured workers and employers before the bureau and the commission is a matter of individual free choice. This includes hearings before the designated hearing officers. The commission does not require representation nor does it prohibit it. No employee of the commission shall in any way make statements tending to limit such free choice. No one, other than an attorney at law, authorized to practice in the state of Ohio, shall be permitted to represent injured workers for a fee before the commission.

(4) If no appearance is made at a hearing, with notice, the claim will be heard and disposed of upon the proof on file, if such proof is sufficient for that purpose. If such proof is insufficient, the hearing may be continued to a specific date for the attendance of the parties or for the purpose of obtaining additional proof or for any other justifiable reason.

(5) At hearings with notice, consideration shall be confined to the issues presented in the adjudication of the claim and the parties shall be prepared to fully present their respective positions in regard to such issues.

(6) In claims where a hearing with notice is required, parties may waive notice of hearing in writing, or by appearance and oral motion at the hearing, if such waiver is presented in advance of the hearing.

(7) Hearing officers of the commission and the commission itself, insofar as is practicable, shall announce the decision on the issues presented in the hearing at its conclusion. Upon announcement of the decision or upon the hearing officer taking the issues under advisement, where that is required, the hearing shall be concluded.

(8) Hearings with notice before the district hearing officers on contested claims matters, disputed issues or claims, and appeals from a decision of the administrator shall be conducted in the industrial commission service office that is closest to the injured worker's residence, unless all parties agree that the hearing is to be held in another commission service office. Hearings for out-of-state injured workers who live more than one hundred-fifty miles from an industrial commission service office will be in Columbus, unless otherwise determined by agreement of the parties. If within one hundred-fifty miles, then the hearing will be at the nearest industrial commission service office. Other hearings before the commission or its deputies, shall be at the places designated by the commission in the notices of hearing.

(9) Continuances.

(a)

(i) Requests for continuances shall be addressed to the hearing administrator. The party that requests a continuance must state the reason for the request. The requesting party must also state that the other parties' representatives or, if there is no representative, the opposing parties, have been informed prior to filing the request with the commission that the request is being made and the reason therefore. Requests for continuances shall be in writing except in extraordinary circumstances where time does not permit a written request, and should be submitted on the "request for continuance" form available from the commission.

(ii) In the absence of a hearing administrator, due to extended illness or vacancy, the regional manager or the regional manager's designee shall be assigned the responsibility placed on the hearing administrator for granting or denying requests for continuances.

(b)

(i) If a representative of a party requests a continuance, the representative shall certify that the representative has informed representative's client of the time frames set forth within section 4123.511 of the Revised Code and that representative's client has agreed to waive the time frames for hearing and issuance of an order set forth in section 4123.511 of the Revised Code.

(ii) Requests for continuance filed more than five calendar days prior to the date of hearing shall be processed by the hearing administrator, resulting in the issuance of a compliance letter either granting or denying the requested continuance based on the standard of good cause. Where a request for continuance is received within five calendar days of the scheduled hearing, the hearing administrator shall address the requested continuance based on the presence of extraordinary circumstances that could not have been foreseen by the requesting party. Where a request for continuance is granted and the parties had mutually agreed to the continuance and the parties and/or their representatives have certified that the parties have agreed to waive the time frames set forth within section 4123.511 of the Revised Code, the case will not be identified as a claim that has not met the time limits set forth within section 4123.511 of the Revised Code in the reports required to be prepared pursuant to division (H)(2)(a) of section 4121.36 of the Revised Code.

(iii) Guidelines may be provided by the commission for hearing administrators and hearing officers in determining whether the standard of good cause, or the standard of extraordinary circumstances that could not have been foreseen, is established.

(iv) If a request for continuance is received on the day of the scheduled hearing, the adjudicator assigned to hold the hearing shall publish an order either granting or denying the request for continuance based on the presence of extraordinary circumstances that could not have been foreseen by the requesting party. If the adjudicator determines to grant the continuance, the order shall list the party that requested the continuance and set forth the unforeseen extraordinary circumstances that justify the continuance. If a request for continuance was made through the hearing administrator, and it was found that the party making the request had not met the requisite standard to grant the request for continuance, similar reasons asserted at the hearing to justify the request will not be found to be sufficient by the adjudicator. If the adjudicator grants a request for continuance, the order shall be interlocutory in nature and is not subject to appeal. Such claims shall remain subject to the reporting provisions under division (H)(2)(a) of section 4121.36 of the Revised

Code, as well as the requirement of the timely hearing and issuance of an order under section 4123.511 of the Revised Code.

(v) If the adjudicator denies the requested continuance, the hearing shall proceed on the merits and the adjudicator shall reference in the order on the merits that the continuance was denied along with the reasons therefore.

(c) No hearing will be continued for purposes of discovery unless the requisite standard for granting the continuance has been met and the requesting party demonstrates that it has exercised due diligence in attempting to complete discovery prior to hearing.

(d) In cases where the hearing is to be scheduled before the members of the industrial commission, requests for continuances will be considered and determined by a majority of the members of the industrial commission.

(10) All final decisions of the district hearing officers, staff hearing officers or commission upon hearing with notice shall be reduced to writing and copies mailed to the parties and to all authorized representatives of record of each party, and to the administrator.

Written decisions, shall be signed by the adjudicator(s) who conducted the hearing. When schedules or traveling do not permit a hearing officer to sign his orders, another hearing officer will be designated to sign the order. The designated signer should ensure that the order conforms to the hearing worksheet of the hearing officer that made the decision. If a designated signer has a question regarding the contents of the order, the order must be returned to the hearing officer that made the decision prior to its publication.

(11) All hearings before a district hearing officer, staff hearing officer and the industrial commission shall be public.

(12) The hearing administrator, hearing officer, or industrial commission may compel the attendance or testimony of witnesses on their own motion or at the request of any party.

(13) The assignment of a staff hearing officer or district hearing officer to a hearing shall be made by the regional manager.

(D) Final decisions of the district hearing officer, staff hearing officer or the industrial commission shall be in writing and shall include:

(1) Description of the part of the body and the nature of the disability recognized in the claim.

(2) A concise statement of the order or award.

(3) A notation as to the notice furnished and as to the appearances of the parties.

(4) Signatures of each commissioner participating in the hearing, shall be affixed to the original order verifying each commissioner's vote.

(5) Signatures of each hearing officer participating in the hearing shall be affixed to the original order verifying the hearing officer's vote, which will be made part of the claim file.

(E) All matters which at the request of one of the parties or on the initiative of the administrator and any commissioner are to be expedited, shall require at least forty-eight hours notice of a public hearing and a statement of such order of the circumstances that justified such expeditious hearing.

(F) All original memoranda, orders and decisions of the commission shall be compiled in a journal to be made available to the public with sufficient indexing to allow orderly review of documents. The journal shall indicate the vote of each commissioner.

(G) All orders, rules, memoranda and decisions of the commission shall contain the signature of two of the three commissioners and shall state whether adopted at a meeting of the commission or by circulation to individual commissioners. Any facsimile or secretarial signature, initials of commissioners and delegated hearing officers and any printed record of "yes" and "no" vote of a district or staff hearing officer, or commission member is invalid.

(H) Claim inquiries.

(1) The industrial commission shall maintain a public information section, which will be charged with the responsibility of handling claim inquiries by or on behalf of injured workers, employers and their respective representatives.

(2) Requests, whether in writing, in person, or by telephone, concerning the status of a claim and/or any action necessary to maintain the claim shall be directed to the public information section.

(3) The public information section shall promptly answer such request(s) or may refer the matter for response to the office or section before which the matter is currently pending. If the matter is so referred, the public information section shall follow-up the inquiry to ensure that it has been expeditiously answered.

(4) Should the filing of a supplemental application, affidavit or other form(s) be necessary, it shall be forwarded by the office answering the inquiry.

(5) The public information section shall maintain a record of all inquiries received in order that statistics be developed to indicate problem areas and to serve as a basis for appropriate measures.

(I) Processing claims in an orderly, uniform and timely fashion.

(1) Each section of the industrial commission shall perform the tasks necessary to discharge its responsibilities for the processing of claims in accordance with the procedures adopted by such section and approved by the industrial commission.

(2) The discharge of these responsibilities, whether involving claims pertaining to state fund, self-insured or other employers shall be accomplished within the reasonable time parameters as set forth by the procedures of each section.

(3) It shall be the responsibility of the regional manager and hearing administrator to monitor the performance of tasks being carried on within their jurisdiction and to ensure that such assigned tasks are being performed in an orderly, uniform and timely manner, as established by the procedures of that section.

(4) Should it be determined that the assigned tasks were not being performed according to the adopted procedures, it shall be the responsibility of the regional manager and hearing administrator to adopt such corrective measures as may be indicated under the circumstances.

(J) In the absence of the hearing administrator, due to extended illness or vacancy, the regional manager or the regional manager's designee shall assume the responsibilities placed on the hearing administrator by this rule.

Effective: 06/01/2008

R.C. 119.032 review dates: 02/1 1/2008 and 02/01/2012

Promulgated Under: 119.03

Statutory Authority: 4121.30, 4121.36, 4121.31

Rule Amplifies: 4123.651, 4121.36

Prior Effective Dates: 1/1/65, 10/9/76, 1/10/78, 12/11/78, 11/26/79, 8/22/86 (Emer.), 11/17/86 (Emer.), 2/16/87, 7/3/95, 9/23/96 (Emer.), 1/17/97, 4/1/04,