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ARGUMENT

A. **Proposition of Law No. 1: Ohio Adm. Code 4121-3-34(C)(4)(b) requires the submission of an employer's timely-submitted medical evidence prior to the physicians' medical examinations when such employer timely notified the Industrial Commission of Ohio of its intent to submit medical evidence.**

When a statute or regulation is ambiguous, rules of construction may be applied to determine the meaning of the statute or regulation. *See Columbus & Franklin County Metro. Park Dist. v. Shank*, 65 Ohio St. 3d 86, 103, 600 N.E.2d 1042 (1992), fn. 17 (“[W]here uncertainty exists regarding legislative or administrative intent in the drafting of a statute or regulation, all rules of construction are available to assist a reviewing court.”). When interpreting the meaning of a statute or regulation, courts cannot give selective effect to the words contained within the statute or regulation. *Dailey v. Trimble*, 10th Dist. No. 95APE07-951, 1995 Ohio App. LEXIS 6120 at *20 (Dec. 29, 1995) (“A court must give meaning to the words used and not delete words used or insert words not used.”), citing *Cline v. Ohio Bur. of Motor Vehicles*, 61 Ohio St.3d 93, 97, 573 N.E.2d 77 (1991).

Here, Appellees Robert Mason (“Mason”) and Industrial Commission of Ohio (“Industrial Commission”) assert that no specific language within Ohio Adm. Code 4121-3-34(C)(4)(b) requires the Industrial Commission to submit the employer’s medical evidence prior to the date of the physicians’ medical examinations. (Brief of Robert L. Mason, hereafter “Mason Brief,” at p. 6; Brief of Industrial Commission, hereafter “Industrial Commission Brief,” at p. 7). Contrary to Appellees’ assertions, however, a reading of Ohio Adm. Code 4121-3-34(C)(4)(b) in its entirety reveals that an employer’s timely-submitted medical evidence must be forwarded to the examining physicians prior to their examinations when the employer notifies the Industrial Commission of its intent to submit medical evidence within 14 days of the date of

the Industrial Commission acknowledgement letter. Ohio Adm. Code 4121-3-34(C)(4)(b) provides the following:

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.

For the purposes of processing permanent total disability (“PTD”) applications, Ohio Adm. Code 4121-3-34(C)(4)(b) creates two categories of employers: (1) employers who submit a letter notifying the Industrial Commission of their intent to submit medical evidence within 14 days of the acknowledgement letter; and (2) employers who fail to submit a letter notifying the Industrial Commission of their intent to submit medical evidence within 14 days of the acknowledgement letter.

Selective effect would be given to the words contained within Ohio Adm. Code 4121-3-34(C)(4)(b) if the Court were to accept and follow Appellees’ argument that the regulation contains no requirement for the Industrial Commission to submit the employer’s medical evidence prior to the date of the physicians’ examinations. More specifically, the 14-day notice requirement would have to be rendered entirely meaningless if one were to accept and follow Appellees’ argument. Essentially, by ignoring the 14-day notice requirement, the two categories of employers illustrated above would be treated the same. For the second category of employers

listed above (i.e., those who did not notify the Industrial Commission of their intent to submit medical evidence within 14 days of the date of the Industrial Commission acknowledgment letter), Ohio Adm. Code 4121-3-34(C)(4)(b) orders the scheduling of the medical examination “without delay.” Ohio Adm. Code 4121-3-34(C)(4)(b). No language regarding the scheduling “without delay” exists for the first category of employers. By accepting Appellees’ argument, the scheduling of a medical examination could occur “without delay,” even when an employer notifies the Industrial Commission of its intent to submit medical evidence within 14 days of the date of the acknowledgement letter. Such an interpretation is wholly inconsistent with the language of the rule.

Moreover, Appellees’ interpretation violates the canon of statutory construction “expressio unius est exclusion alterius,” which “tells us that the express inclusion of one thing implies the exclusion of the other.” *State ex rel. Butler Twp. Bd. of Trs. v. Montgomery County Bd. of Comm'rs*, 124 Ohio St.3d 390, 2010-Ohio-169, 922 N.E.2d 945, ¶ 21, quoting *Crawford-Cole v. Lucas Cty. Dept. of Job & Family Servs.*, 121 Ohio St.3d 560, 2009-Ohio-1355, 906 N.E.2d 409, ¶ 42, quoting *Myers v. Toledo*, 110 Ohio St.3d 218, 2006-Ohio-4353, 852 N.E.2d 1176, ¶ 24. The requirement to schedule medical examinations “without delay” was included only for the situation where the employer fails to notify the Industrial Commission of its intent to submit medical evidence within 14 days of the date of the acknowledgement letter. The Industrial Commission, within its rule-making authority, could have included the “without delay” language to apply to both categories of employers within Ohio Adm. Code 4121-3-34(C)(4)(b) but did not do so.¹ Therefore, according to the canon of expressio unius est

¹ As explained in appellant Old Dominion’s Merit Brief at pp.11-13, prior to April 1, 2004, Ohio Adm. Code 4121-3-34(C)(4)(b), did not include a 14 day notice provision for employers, nor any language regarding whether or not medical examinations by the Industrial Commission were to occur “without delay.” After the 2004 amendment, the rule now contains specific language regarding this situation and must be interpreted as having significance between

exclusion alterius, the scheduling of medical examinations should not proceed “without delay” where an employer notifies the Industrial Commission of its intent to submit medical evidence within 14 days of the date of the Industrial Commission acknowledgement letter. Once an employer does provide such timely notice, it must be assured that its medical evidence will be provided to the Industrial Commission medical examiner prior to the examination.

Appellees assert, without pointing to any provision within Ohio Adm. Code 4121-3-34, that the Industrial Commission medical examiners will receive and review all medical reports obtained by an employer, even in situations where the employer fails to provide its 14 day notice. (Mason Brief, p. 7; Industrial Commission Brief, p. 9). This assertion, however, completely ignores the provision of the rule that indicates that in such situations, the Industrial Commission medical examinations shall proceed “without delay.” The Industrial Commission medical examination would be scheduled and completed before the employer submits its medical evidence within the 60 day time limit. Therefore, when an employer does in fact provide timely notice of its intent to submit medical evidence in defense of the PTD application, the rule must be read to assure the employer that its medical evidence will be provided and reviewed by the Industrial Commission medical examiner prior to such examination. Otherwise, the rule has no meaning.

Appellant Old Dominion Freight Line, Inc. (“Old Dominion”) timely notified the Industrial Commission of its intent to submit medical evidence. (Supp. 374). Additionally, Old Dominion obtained medical evidence and submitted the same to the Industrial Commission within 60 days after the date of the Industrial Commission acknowledgment letter as required by Ohio Adm. Code 4121-3-34(C)(4)(b). (Supp. 391-400, 387-388, 401-410). Therefore, the

situations where employers timely provide notice of intent to submit medical evidence and those situations where employers do not provide timely notice.

Industrial Commission erred by failing to forward Old Dominion's medical evidence (i.e., the medical reports by Drs. Clary, Sterle, and Murphy) to Drs. Fitz and Malinky (the Industrial Commission medical specialists) prior to their respective examinations of Mr. Mason.

Contrary to Appellees' assertions, Old Dominion is not adding 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 evidence is sent." (Mason Brief, p. 7). To the contrary, Old Dominion is simply asking the Court to read Ohio Adm. Code 4121-3-34(C)(4)(b) in its entirety, which, as illustrated above, shows that a mandatory requirement to forward the employer's timely-submitted evidence to the physicians prior to their examinations is not being added to the rule, but is already contained within the rule.

The Industrial Commission expressly acknowledged its mistake of failing to forward Old Dominion's medical evidence to Drs. Fitz and Malinky prior to their respective examinations. (Industrial Commission Brief, p. 2). Old Dominion strictly complied with the requirements set forth within Ohio Adm. Code 4121-3-34(C)(4)(b) by timely notifying the Industrial Commission of its intent to submit medical evidence and submitting its evidence within 60 days after the date of the Industrial Commission acknowledgment letter. Therefore, Old Dominion is entitled to mandamus relief.

B. Proposition of Law No. 2: A party does not waive the ability to assign as error on appeal any legal arguments which were never addressed by the Magistrate.

Appellee Industrial Commission cites Civ.R. 53(D)(3)(b)(iv) to argue Old Dominion is prohibited from entertaining any argument with regard to the Industrial Commission's refusal to grant Old Dominion's requests to depose Drs. Fitz and Malinky because Old Dominion failed to object to the Magistrate's decision and his conclusions of law. (Industrial Commission Brief, p. 9, 10). Civ.R. 53(D)(3)(b)(iv) provides the following: "[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 has objected to that finding or conclusion as required by Civ. R. 53(D)(3)(b)."

Old Dominion did not object to the Magistrate's decision because the decision granted Old Dominion's request for mandamus relief. Furthermore, the Magistrate never addressed Old Dominion's arguments with regard to the Industrial Commission's denial of its requests to depose Drs. Fitz and Malinky. (*See* Appx. 11-24). Therefore, no conclusion of law existed for which Old Dominion could have appealed. Accordingly, Old Dominion was permitted to address the Industrial Commission's refusals to grant Old Dominion's requests to depose Drs. Fitz and Malinky.

C. **Proposition of Law No. 3: A request to depose Industrial Commission specialist physicians is a reasonable one where such physicians were not provided a complete medical record prior to their examinations.**

A party is permitted to depose an Industrial Commission specialist physician when the request to conduct the deposition is considered a reasonable one. R.C. 4123.09. Ohio Adm. Code 4121-3-09(A)(7). On November 10, 2009, Old Dominion submitted written requests to depose Drs. Fitz and Malinky. (Supp. 433-435, 436-437). Old Dominion's requests to depose Drs. Fitz and Malinky was heard before a staff hearing officer on December 17, 2009, who refused to grant the requests. (Supp. 451-452, 453-454) (Appx. 28-29, 30-31). An Industrial Commission Hearing Administrator later requested Drs. Fitz and Malinky to prepare clarifications which stated whether their opinions had changed after reviewing the medical evidence submitted by Old Dominion. (Supp. 467, 468-469, 470).

Appellee Mason argues the clarifications by Drs. Fitz and Malinky were an "equally reasonable option" for resolution of the Industrial Commission's failure to submit Old

Dominion's timely-submitted medical evidence to the physicians prior to their examinations. (Mason Brief, p. 9; *see also* Industrial Commission Brief, p. 10). The clarifications were not an equally reasonable option as deposing Drs. Fitz and Malinky because the bases for the doctors' opinions could not be explored. The responses issued by Drs. Fitz and Malinky in their clarification reports were simple one or two sentence answers without any explanation for why their opinions had not changed. (Supp. 467, 468-469, 470). Such clarifications failed to provide any insight into the rationale behind the ultimate opinions of Drs. Fitz and Malinky.

Appellee Mason further argues the Industrial Commission did not abuse its discretion by relying upon the reports of Drs. Fitz and Malinky; however, such reports were fatally flawed and were never given the opportunity to be cured by way of deposition. The lack of an opportunity to depose Drs. Fitz and Malinky effectively created speculation as to whether the physicians' opinions would have been any different if they were provided Old Dominion's medical evidence prior to their examinations. *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 150, S.Ct. 2557 (2006). A determination of "what might have been" was improper without a further explanation for the rationale behind the physicians' ultimate opinions.

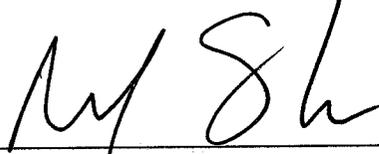
CONCLUSION

Appellant Old Dominion complied with the requirements of Ohio Adm. Code 4121-3-34(A). Therefore, Old Dominion's medical evidence should have been submitted to the Industrial Commission examining physicians prior to their examinations of Mr. Mason. The regulation does not allow the Industrial Commission to schedule examinations "without delay" where an employer timely notifies the Industrial Commission of its intent to submit medical evidence.

The Industrial Commission should follow its own rules as written, and because it did not do so in this instance, 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,

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CERTIFICATE OF SERVICE

The foregoing **Reply Brief of Appellant Old Dominion Freight Line, Inc.** has been sent by ordinary U.S. Mail this 28th day of January, 2013 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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