

STATE OF INDIANA
BEFORE THE FIRE PREVENTION
AND BUILDING SAFETY COMMISSION

IN RE:) ADMINISTRATIVE CAUSE
) NO. 14-12-FPBSC
L.M. ZELLER, Individually, and d/b/a)
ZELLER ELEVATOR COMPANY,)
LEO MARK ZELLER, ANDREW M.)
BOEGLIN, and LOUIS M. ZELLER III,)
)
Petitioners.)
(Elevator/Amusements Safety Section)

**PETITIONERS’ OBJECTION TO NOTICE OF INTENT TO REVIEW;
OR, ALTERNATIVELY, REQUEST TO CLARIFY NATURE OF REVIEW,
AND REQUEST FOR ORAL ARGUMENT**

Petitioners, L.M. Zeller, individually, and d/b/a Zeller Elevator Company, Leo Mark Zeller, Andrew M. Boeglin, and Louis M. Zeller III (collectively, “Petitioners”), by counsel, Douglas K. Briody of the **LAW OFFICE OF DOUG BRIODY**, respectfully object to the Notice of Intent to Review the Non-Final Order of the Administrative Law Judge in the above-referenced matter, and, in support thereof, state as follows:

1. On June 3, 2015, the Honorable Justin P. Forkner, Administrative Law Judge, Indiana Department of Homeland Security (“ALJ”), issued the ALJ’s Findings of Fact, Conclusions, and Non-Final Order (collectively, “Non-Final Order”), resolving the above-referenced matter in Petitioners’ favor.
2. The Non-Final Order consisted of twenty (20) pages of extensive, detailed factual findings, thorough and precise legal analysis and conclusions, and a clear and concise Decision and Order requiring the Elevator/Amusements Safety Section (“Agency”) to take action and issue wrongfully withheld elevator mechanic’s licenses to three (3) of the employees of Zeller Elevator Company who had been without such licenses since April of 2014.

3. Neither party, the Petitioners nor the Agency, filed any objections to the Non-Final Order within the fifteen (15)-day period allowed by Ind. Code § 4-21.5-3-29(d).

4. The Non-Final Order came before the Indiana Fire Prevention and Building Safety Commission (“Commission”) at its regularly scheduled monthly meeting on July 7, 2015, at which time the Commission apparently voted to review the Non-Final Order.

5. On July 15, 2015, Beth Sutor, Secretary to the Commission, mailed to the Petitioners’ undersigned counsel, a purported Notice of Intent to Review concerning the Non-Final Order (“Notice”). A true and complete copy of said Notice is attached hereto and incorporated by reference herein as Exhibit “A.”

6. Ind. Code § 4-21.5-3-29(e) provides as follows:

Without an objection under subsection (d), the ultimate authority or its designee may serve written notice of its intent to review any issue related to the order. The notice shall be served on all parties and all other persons described by section 5(d) of this chapter. ***The notice must identify the issues that the ultimate authority or its designee intends to review.***

Id. (emphasis added).

7. Indiana’s courts have long held that “[t]he term ‘must’ is mandatory language.” *Groce v. State ex rel. Newman*, 757 N.E.2d 694, 698-99 (Ind. Ct. App. 2001); *see also Barker v. State*, 440 N.E.2d 664, 670-71 (Ind. 1982) (noting “use of the mandatory word ‘must’”). “The term ‘must’ carries the same meaning as ‘shall.’ *See* ROGET’S II THE NEW THESAURUS 623 (1980); WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1492 (1981). Consequently, in a statutory clause the word ‘must’ has a mandatory, rather than a discretionary meaning. *See Bielski v. Zorn*, 627 N.E.2d 880, 885 (Ind. Tax Ct. 1994).” *Huntington Cnty. Cmty. Sch. Corp. v. Indiana State Bd. of Tax Comm’rs*, 757 N.E.2d 235, 240 (Ind. Tax Ct. 2001). Absent compliance with the clearly unambiguous statutory requirement, the Commission’s purported action “is invalid.” *Id.*

8. I.C. 4-21.5-3-29(e) plainly mandates the Commission to set forth in its notice any and all issues that it intends to review. No such issues whatsoever are set forth in the Notice issued on July 15, 2015.

9. For this reason, Petitioners respectfully object to the Notice issued by the Commission on July 15, 2015, as being statutorily deficient and, therefore, invalid.

10. Ind. Code § 4-21.5-3-29(c) further provides: “In the absence of an objection or notice under subsection (d) or (e), the ultimate authority or its designee *shall affirm the order.*” *Id.* (emphasis added). Again, this statutory language mandates certain action by the Commission. *E.g., Groce*, 757 N.E.2d at 698-99; *Barker*, 440 N.E.2d at 670-71; *Huntington Cnty. Cmty. Sch. Corp.*, 757 N.E.2d at 240.

11. Accordingly, Petitioners respectfully request the Commission to fulfill its statutory obligation and mandatory duty in this case and affirm the Non-Final Order of the ALJ, issued on June 3, 2015, in full, at its next regular meeting of August 4, 2015.

12. Should the Commission nonetheless neglect its obligation under I.C. 4-21.5-3-29(c), Petitioners would then, alternatively, request the Commission to comply with the language of I.C. 4-21.5-3-29(e), at its next regular meeting of August 4, 2015, and specifically identify which issue(s) within the ALJ’s Non-Final Order it intends to review, such that the parties may tailor their briefing to the resolution of such issue(s); Petitioners, furthermore, request that written notice of all such issues be transmitted to Petitioners’ counsel, *via* email or fax transmission, in addition to United States Mail, as soon as practicable following the conclusion of the Commission’s meeting, so that counsel will have adequate time in advance of the briefing deadline of August 17, 2015, to timely complete and submit Petitioners’ Hearing Brief for review at the Commission’s regular meeting of September 1, 2015.

13. Finally, Petitioners respectfully request that the Commission “afford each party an opportunity to present oral argument” in connection with any review of the ALJ’s Non-Final Order at the Commission’s regular meeting of September 1, 2015, in accordance with Ind. Code § 4-21.5-3-28(e)(1).

WHEREFORE, Petitioners, by counsel, respectfully **OBJECT** to the Commission’s review of the Non-Final Order of the ALJ, issued on June 3, 2015, and **REQUEST** that said Non-Final Order be affirmed, in full, by the Commission, at its next regular meeting of August 4, 2015, as required by the provisions of I.C. 4-21.5-3-29(e) and I.C. 4-21.5-3-29(c). Failing that, Petitioners, alternatively, request the Commission to specifically identify which issue(s) within the ALJ’s Non-Final Order it intends to review, to transmit written notice of all such issues to Petitioners’ counsel expeditiously and electronically, and to afford each of the parties an opportunity to present oral argument in connection therewith at the Commission’s regular meeting of September 1, 2015.

Respectfully submitted,

LAW OFFICE OF DOUG BRIODY

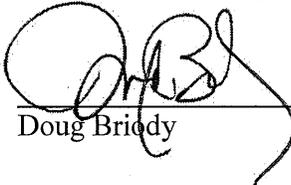


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Attorney for Petitioners

CERTIFICATION OF COMPLIANCE WITH IND. TRIAL RULE 5(G)

I hereby certify that the foregoing pleading or paper complies with the requirements of Ind. Trial Rule 5(G) with regard to information to be excluded from public access under Ind. Administrative Rule 9(G).



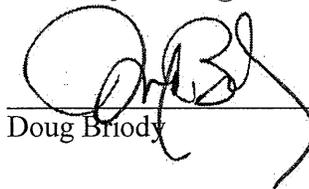
Doug Briody

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading or paper has been served on the following person(s), by First-Class United States Mail, and by electronic mail, as directed by the Administrative Law Judge and agreed between counsel for the parties, on this 28th day of July, 2015:

Pamela M. Walters, Esq.
Indiana Department of Homeland Security
302 W. Washington St.
Indiana Government Center South, Rm W246
Indianapolis, IN 46204
E-mail: PWalters@dhs.in.gov

Hon. Justin P. Forkner
Administrative Law Judge
Indiana Department of Homeland Security
302 W. Washington Street, Rm W246
Indiana Government Center South
Indianapolis, IN 46204
E-mail: jforkner@dhs.in.gov



Doug Briody



MICHAEL R. PENCE, Governor
STATE OF INDIANA

INDIANA DEPARTMENT OF HOMELAND SECURITY
302 West Washington Street
Indianapolis, IN 46204

July 15, 2015

Doug Briody
Law Office of Doug Briody
839 Stahl Court
Evansville, IN 47715

RE: L. M. Zeller et al
Administrative Cause No. 14-12
Notice of non-final Order

Dear Mr. Briody;

On July 7, 2015, at the regularly scheduled meeting of the Fire Prevention and Building Safety Commission, the commission voted to review the Notice of Non-Final Order.

If you desire to file a brief, it must be submitted to the Fire Prevention and Building Safety Commission not later than August 17, 2015, at the following address:

Fire Prevention and Building Safety Commission
302 W. Washington Street Room W246
Indianapolis, IN 46204

Sincerely,

Beth Sutor, Secretary
Fire Prevention and Building Safety Commission
302 W. Washington Street, Rm W246
Indianapolis, IN 46204

CC: Justin Forkner, Administrative Law Judge
Pamela M. Walters, Agency Counsel
File



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EXHIBIT "A"