

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' HEARING BRIEF IN SUPPORT OF  
ADMINISTRATIVE LAW JUDGE'S FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND NON-FINAL ORDER**

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 submit their Hearing Brief in Support of the Findings of Fact, Conclusions of Law, and Non-Final Order (collectively, "Non-Final Order"), issued herein by the Honorable Justin P. Forkner, Administrative Law Judge, Indiana Department of Homeland Security ("ALJ"), on June 3, 2015, and respectfully request the Indiana Fire Prevention and Building Safety Commission ("Commission") to **AFFIRM** the ALJ's Non-Final Order, in all respects, as and for the Final Order of the Commission herein, in accordance with Ind. Code § 4-21.5-3-29.

**Continuing Objection to Further Commission Review Resulting in  
Any Decision Other than Affirmance of the ALJ's Non-Final Order**

As a preliminary matter, Petitioners continue to object to further review of the ALJ's Non-Final Order by the Commission, resulting in any modification or dissolution of the same, for the reasons set forth in Petitioners' Objection to Notice of Intent to Review; or, Alternatively, Request to Clarify Nature of Review, and Request for Oral Argument ("Objection to Notice"). As detailed therein, neither party objected to the Non-Final Order within the fifteen (15)-day period allowed by I.C. 4-21.5-3-29(d), and the Commission failed to serve an appropriate Notice of Intent to Review concerning the Non-Final Order ("Notice") in compliance with I.C. 4-21.5-3-29(e). Specifically, the Commission neglected to heed the latter provision's mandate that any

such “notice must identify the issues that the ultimate authority or its designee intends to review.” *Id.*<sup>1</sup>

For these reasons, Petitioners continue to object to the Notice issued by the Commission on July 15, 2015, and the intended review proceedings, as being statutorily deficient and, therefore, invalid. In the absence of a proper objection by a party and a proper notice by the Commission, I.C. 4-21.5-3-29(c) compels the Commission to “*affirm* the order.” *Id.* (emphasis added). Were the Commission to do anything other than so affirm the ALJ’s Non-Final Order in these proceedings, the result would be wholly reversible, under the judicial review provisions of the Administrative Orders and Procedures Act (“AOPA”), as being “not in accordance with law; . . . in excess of statutory jurisdiction, authority, or limitations[]; . . . without observance of procedure required by law; [and/]or . . . unsupported by substantial evidence.” Ind. Code § 4-21.5-5-14(d).

#### **Commission’s Belatedly Stated Intentions**

In response to the Petitioners’ Objection to Notice, the Commission, at its regular monthly meeting of August 4, 2015, declined Petitioners’ request to affirm outright the ALJ’s Non-Final Order, in wanton disregard of I.C. 4-21.5-3-29(c), and refused Petitioners’ request for “an opportunity to present oral argument” at the Commission’s meeting of September 1, 2015, under Ind. Code § 4-21.5-3-28(e)(1).

On August 7, 2015, the Commission, through its Secretary, Beth Sutor, issued an item of correspondence confirming the Commission’s actions set forth in the preceding paragraph and further stating, in a belated attempt to respond to the mandate of I.C. 4-21.5-3-29(e), that:

Their intentions are to fully understand the timeline of reciprocity presented, and to determine, if possible, if the granting of reciprocity in lieu of meeting the continuing education requirements is a singular event based upon this unique timeline, or if affirmation of the Non-Final Order creates a perpetual loophole whereby a licensed mechanic in multiple states could be continually licensed through alternating reciprocity claims without ever satisfying any continuing education requirements for Indiana.

A true and complete copy of the Commission’s correspondence of August 7, 2015, is attached hereto and incorporated by reference herein as Exhibit “A.”

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<sup>1</sup> As will be further discussed in the next section, the Commission’s correspondence of August 7, 2015, (*see* Ex. “A” attached hereto), still fails to identify any issue pertinent to the adjudication of Petitioners’ case before the ALJ which would permit of any result by the Commission other than outright affirmance of the ALJ’s Non-Final Order. Petitioners, therefore, object to any further effort by the Commission to comply with the terms of I.C. 4-21.5-3-29(e), as being outside the time frame contemplated by I.C. 4-21.5-3-29, or other reasonable period for the agency to take proper action thereon.

Any legitimate concerns the Commission may have as to the hypothetical, future impact of the ALJ's Non-Final Order on any prospective parties other than the Petitioners are matters of public policy properly addressed to the Indiana General Assembly, in connection with a request for the Legislature to amend, or add to, the current statutory scheme concerning Regulated Lifting Devices set forth in Ind. Code §§ 22-15-5-1 through -16. Alternatively, such concerns might be addressed through appropriate rulemaking processes, resulting in the adoption by the Commission of a regulation, in accordance with Ind. Code 4-22-2, which "implements, interprets, or prescribes: (A) law or policy; or (B) the organization, procedure, or practice requirements of an agency[,]" insofar as the Commission is expressly permitted to do, by the terms of Ind. Code § 22-13-2-13 ("The commission may adopt rules under IC 4-22-2 to implement this article, IC 22-12, IC 22-14, and IC 22-15.").

Such concerns, however, are not now before the Commission, in an adjudicatory proceeding such as Petitioners' case before the ALJ. "The proceedings before an administrative law judge are *de novo*." Ind. Code § 4-21.5-3-14(d). The ALJ is designated by the AOPA as the "finder of fact" for the case. *Indiana Dep't of Natural Res. v. United Refuse Co., Inc.*, 615 N.E.2d 100, 104 (Ind. 1993) (citing Ind. Code § 4-21.5-3-27(b)). In that role, "the ALJ performs a duty similar to that of a trial judge sitting without a jury[,]" weighing the evidence presented at the hearing, to determine what the facts of the case are, based solely upon that evidentiary record. *United Refuse Co., Inc.*, 615 N.E.2d at 104. Any further review, whether by the Commission, as the ultimate administrative authority, or an Indiana trial court, sitting in judicial review of the agency's final order, is limited to the evidentiary record compiled at the administrative hearing before the ALJ. I.C. 4-21.5-3-27(d); Ind. Code § 4-21.5-3-28; Ind. Code § 4-21.5-5-11.

In essence, the ALJ, and, by extension, the Commission, is strictly limited in an adjudicatory proceeding like this one, much as a trial court is in a judicial proceeding, to deciding the actual case or controversy before it, and it is not permitted to pronounce a rule of general applicability addressing what it may see as a potential "loophole" for some unknown applicant or disputant at some indeterminate time in the future. The Indiana Court of Appeals has stated this distinction in a very straightforward manner:

The rulemaking function is distinguished from the adjudicatory function in that the former [*i.e.*, rulemaking] embraces an element of generality, operating upon a class of individuals or situations whereas an adjudication operates upon a particular individual or circumstance. In addition, the exercise of administrative

rulemaking power looks to the future, whereas an adjudication operates retrospectively upon events which occurred in the past.

*Blinzinger v. Americana Healthcare Corp.*, 466 N.E.2d 1371, 1375 (Ind. Ct. App. 1984) (supporting citations omitted).

In other words, an “order” is “an agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one (1) or more specific persons.” Ind. Code § 4-21.5-1-9. Moreover, that term is specifically defined such that it “includes . . . a license.” I.C. 4-21.5-1-9(1). A “rule,” on the other hand, means “an agency statement of general applicability that: (1) has or is designed to have the effect of law; and (2) implements, interprets, or prescribes: (A) law or policy; or (B) the organization, procedure, or practice requirements of an agency.” Ind. Code § 4-21.5-1-14.

In this proceeding, the Commission is limited, by I.C. 4-21.5-3-28 and I.C. 4-21.5-3-29, to issuing a “final order” concerning the *new* elevator mechanic’s “license[s]” sought by Petitioners, pursuant to Ind. Code § 22-15-5-12(b)(1), to which the ALJ has appropriately determined they are justly entitled. (*See generally* Non-Final Order, pp. 7-20; *see id.*, p. 20.)<sup>2</sup> It is neither the proper time, nor the proper forum, for the Commission to attempt to seek closure of any “perpetual loophole” for other, unknown, future applicants which might be occasioned by the ALJ’s Non-Final Order or the Commission’s Final Order in this case; such resolution must, instead, await legislative action or the proper promulgation of a rule by the Commission. Neither such event, however, can serve to retroactively invalidate Petitioners’ entitlement to receive and hold reciprocal licenses issued by the Indiana Department of Homeland Security (“Department”) and its Division of Fire & Building Safety (“Division”) on the basis of the evidentiary record compiled at the hearing before the ALJ.<sup>3</sup>

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<sup>2</sup> No issue was raised by either party, or by the ALJ, as to what is or may be required for the *renewal* of reciprocal licenses. Those matters are specifically addressed by the provisions of I.C. 22-15-5-12(d) and Ind. Code §22-15-5-15, and are far afield from the matters at issue here. The operative provision at issue in this case is I.C. 22-15-5-12(b)(1), dealing exclusively with *new* licenses based on reciprocity. There is no requirement for the completion of any CE hours in advance of seeking or obtaining any *new* mechanic’s license in accordance with I.C. 22-15-5-12(b)(1), (2), (3), or (4); such requirements apply *only* to *renewals* of existing licenses, under I.C. 22-15-5-12(d). The Commission has previously determined, in a separate case, that Petitioners Mark Zeller, Mike Zeller III, and Andrew Boeglin, had no existing licenses to be renewed after December 31, 2010. *See In re: L.M. Zeller, Mark Zeller, and Andrew Boeglin, et al.*, Administrative Cause Nos. 13-27 and 14-01 (Consolidated Cases).

<sup>3</sup> Moreover, had the Commissioners truly desired “to fully understand the timeline of reciprocity presented,” (*see* Ex. A), their best opportunity to have done so would have been to permit Petitioners and

### **Propriety of ALJ's Findings, Conclusions, and Non-Final Order**

Petitioners now turn to a brief overview of the ALJ's findings of fact, conclusions of law, and decision and order set forth in the Non-Final Order and recap of the merits of the same.

With respect to the timeline of events leading to this case, the ALJ's findings of fact are rather straightforward, and all are based upon "evidence that is substantial and reliable[.]" in accordance with I.C. 4-21.5-3-27(d). (*See* Non-Final Order, p. 2.) The evidence adduced at the hearing established that:

Each of the individual Petitioners has had at least two decades of experience in the elevator trade; Petitioner L.M. Zeller ("Mike Zeller") has more than five decades of such experience. (Findings 1-3.) All of the individual Petitioners were employed by Zeller Elevator Company ("Zeller Elevator"), which Mike Zeller has owned and operated since 1967. (*Id.*) In 2003, each of the Petitioners was grandfathered in to the new licensing scheme for Indiana elevator contractors and mechanics enacted in 2002, and each received licenses good through the end of 2005. (Findings 4-5.) In 2005, all of the Petitioners met all requirements to renew their respective mechanic's licenses (as well as Mike Zeller's contractor's license) through the end of 2007, including the requirement that each receive eight (8) hours of continuing education (CE) training. (Findings 6-7.)

The Petitioners' license renewals for the next two-year period, however, were declined, due to questions concerning their CE requirements for the year 2007. (Finding 8.) An administrative review proceeding ensued; during the course of that proceeding, it was suggested the Petitioners could obtain new licenses by passing a test designated by the Department. In late 2008, each of them did pass the specified test, and new mechanic's licenses (and, for Mike Zeller, a new contractor's license) were issued, covering them through the end of 2010. (Findings 9-10.) In 2011, Mike Zeller's contractor's and mechanic's licenses were renewed, but the mechanic's licenses for Leo Mark Zeller ("Mark Zeller"), Louis M. Zeller III ("Mike Zeller III"), and Andrew Boeglin were not. (Finding 11.)

In 2011, the Commonwealth of Kentucky enacted a new statutory licensing scheme for elevator contractors and mechanics operating in that state. (Finding 12; *see also* Conclusion 5.) It also contained a grandfathering provision, nearly identical to Indiana's, and each of the

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their counsel, who have lived through that "timeline," to address the Commission, orally, at its upcoming regular meeting.

Petitioners obtained Kentucky licenses to work as an elevator mechanic (and, Mike Zeller, as a contractor, under the name of Zeller Elevator), on or about June 28, 2012. (Findings 12-13.)

In early 2014, during an evidentiary hearing before the current ALJ's predecessor, on the earlier denial of the requested renewal of mechanic's licenses for Mark Zeller, Mike Zeller III, and Andrew Boeglin after 2010, it was announced that the Department had begun issuing reciprocity-based elevator mechanic's licenses, under I.C. 22-15-5-12(b)(1), and that Kentucky was one such state from which the Department had begun approving reciprocal licenses. (Finding 14.) Applications for such licenses were promptly submitted by Mark Zeller, Mike Zeller III, and Andrew Boeglin, based on their Kentucky licensure. (Finding 15.) On June 5, 2014, however, those applications were denied, solely upon the grounds that "[t]heir Kentucky License was issue[d] before the testing requirements were integrated as of July 1, 2012" and "[t]he licenses issued by the State of Kentucky prior to that date were not based on a licensing program that was at least equivalent to Indiana['s] licensing program." (Finding 17.) In other words, the respective Petitioners' new reciprocal licenses were denied solely because they had grandfathered in to Kentucky's licensing system, rather than testing in to it.

It was this denial which led to the initiation of the present administrative proceeding and to the evidentiary hearing before the ALJ.

At the hearing, evidence presented by Petitioners, in the form of the Department's packets for reciprocal mechanic's license applications submitted in 2014 by Steven Zavislak ("Zavislak") and Arthur Mullarkey ("Mullarkey"), both Kentucky license-holders, appeared to suggest that Zavislak and Mullarkey had also grandfathered, and not tested, in to Kentucky's licensing scheme. (Findings 19-23.) Further documentation on Zavislak's and Mullarkey's Kentucky licenses, produced by the Commonwealth of Kentucky, Public Protection Cabinet, Department of Housing, Buildings & Construction, Division of Building Codes Enforcement (the "Kentucky Agency"), after the hearing, and approved for submission to the ALJ in connection with Petitioners' Verified Request to Supplement Record of Case, in fact, confirmed that to be the case. (Findings 19-23; *see also* Petitioners' Hearing Exhibits 25 through 29.) In neither situation, however, did the Department inquire into whether Zavislak or Mullarkey had ever completed an elevator test substantially equivalent to the Indiana test required by the Department. (Findings 20, 21, and 23.) Each of the Petitioners, however, had previously passed the test required by the Department, though that fact was not acknowledged in connection with

the Department's consideration of Petitioners' applications for reciprocal licenses. (Findings 9, 10, and 18.)

As previously noted, all of these findings of fact are based upon and supported by substantial evidence of record presented to the ALJ at the evidentiary hearing of April 2, 2015. There can be no legitimate basis of record to challenge any of the ALJ's foregoing findings, and the agency's staff counsel has, to the best knowledge of the undersigned Petitioner's counsel, neither sought to do so, nor requested the Commission to do so.

As for the ALJ's conclusions of law, they are likewise sound, well-founded, and directed precisely to the issues raised by the parties. Because they are so thorough and extensive, and because Petitioners contend they should be affirmed *in toto*, Petitioners will not attempt to reassert all of the ALJ's conclusions here, but rather, intend to summarize them, so as to show their pertinence and efficacy in resolving the issues raised below.

Indiana first adopted a licensing scheme for elevator mechanics and contractors in 2002, taking effect in 2003. It remains virtually identical today to the form in which it was originally enacted, and certainly remains so in all respects relevant to Petitioners' case. (Conclusions 2-3.) The requirements for a new mechanic's license are set forth in I.C. 22-15-5-12(b), and the statute lays out four (4) alternative paths to obtain such a license: (1) by reciprocity; (2) by experience and examination; (3) by training and examination; and (4) by being grandfathered in. (Conclusions 3-4.) The provision applicable to this case, concerning reciprocal licensure, requires Petitioners to show that Mark Zeller, Mike Zeller III, and Andrew Boeglin are entitled to new Indiana elevator mechanic's licenses because they held active elevator mechanic's licenses issued by a state that has a licensing program at least equivalent to the one established by Indiana under I.C. 22-15-5. I.C. 22-15-5-12(b)(1). (Conclusion 4.) As it is undisputed that each such Petitioner held such a license from Kentucky, the only question was whether Kentucky's licensing system is substantially equivalent to Indiana's own. (*Id.*)

The ALJ set forth and analyzed Kentucky's statutory counterparts to I.C. 22-15-5 at length, particularly its most pertinent provisions, being KRS 198B.4009, KRS 198B.4013, KRS 198B.4015, and KRS 198B.4017. (Conclusions 5-9.) Like Indiana, Kentucky provides four (4) routes to licensure, again, namely by: (1) reciprocity, under KRS 198B.4017; (2) experience and examination, per KRS 198B.4013(2)(a) and (b); (3) approved training programs, under KRS 198B.4013(2)(d), (e), and (f); and (4) grandfathering, under KRS 198B.4013(2)(c) and KRS 198B.4015. (Conclusion 10.)

Because the Indiana statutes do not themselves establish what is meant by substantial equivalency, the ALJ properly looked to a decision by the Indiana Supreme Court, construing a similar statutory provision regarding reciprocal chiropractic licensure, and finding it to mean, not an exact copy, but being “equal in value in essential and material requirements.” *Sutto v. Board of Med. Registration and Examination*, 242 Ind. 556, 566, 180 N.E.2d 533, 538 (1962).

(Conclusion 11.) In nearly all “essential and material” respects, the statutory schemes of Indiana and Kentucky are quite similar. Both state’s programs require licensing to work in the trade and provide the same four (4) general ways in which to obtain a license. Both states mandate CE in order to renew an existing mechanic’s license, and both require fees for licensing and renewal, impose certain administrative requirements upon license holders, and authorize the imposition of sanctions on license holders. (Conclusion 12.)

In fact, the only real substantive difference between the two state’s programs, is that “Indiana’s license is issued for a two-year period with the eight-hour continuing education requirement only applying to the second year. But Kentucky’s license is renewed annually, and each year has an eight-hour continuing education requirement.” (*Id.*) “So if anything, Kentucky’s licensing program might be viewed as *more stringent* than Indiana’s. But regardless, *it certainly is at least equal* in value *in essential and material requirements.*” (*Id.*) (emphasis added).

The Department, however, has taken the position that because Kentucky’s scheme started several years after Indiana’s, mechanics could still be grandfathered into Kentucky licenses at a time when they would otherwise have to pass an examination to receive a new Indiana license, and, therefore, the two programs were not equivalent to one another, until Kentucky began requiring testing for all new applicants beginning July 1, 2012. (Conclusion 15.) For this reason, it must likewise hold to the position that “no reciprocity licenses will ever be granted to any individual whose out-of-state license was obtained after May 1, 2003, if that out-of-state license was obtained without an examination submitted to the reciprocal state (*e.g.*, any out-of-state grandfathered licenses issued after May 1, 2003).” (*Id.*)

Such a position, however, is entirely untenable. As the ALJ rightly concluded, the plain and obvious meaning of Indiana’s statutes is to permit the issuance of a reciprocal license “whenever the out-of-state license was obtained in a manner that is at least equivalent to *any* of the avenues laid out in Indiana’s program[,]” because the licensing program must be considered as a whole. (Conclusion 17 [emphasis in original].) Furthermore, nothing in the current Indiana

statutory scheme prohibits the Department from issuing a reciprocal license to a mechanic who holds an out-of-state license which the mechanic received by way of grandfathering. (*Id.*) Neither the Department nor the Commission can make Indiana's statutes say what they plainly do not, and the absence of any amendatory legislation or rulemaking over the past decade, to close any perceived, potential "loophole," attest to acceptance of the statutory language as so plainly written. (*Id.*)

Petitioners agree, too, with the ALJ's further analysis, that all applicants for reciprocal Indiana mechanic's licenses cannot reasonably be expected to both hold an out-of-state license and to have passed an Indiana-mandated test, as that combination is required in none of Indiana's paths to licensure. (Conclusion 18.) Petitioners, however, have done just that, and it is suggested that they are, in all likelihood, the only Indiana elevator mechanics to be able to so claim. Likewise, any concern over the issuance of a mechanic's license to an applicant on the basis of grandfathering in another state who has not passed an examination is belayed by the fact that, in nearly all cases, those persons who grandfathered into Indiana's system in 2003 have never had to pass an examination to retain their licenses. (Conclusion 19.) Petitioners, again, present what is likely a very unique scenario among elevator mechanics in this state, having originally grandfathered in, and then later tested in, to Indiana licensure.

What is most fatal to the Department's case, though, is its issuance, "immediately, [and] without incident or inquiry[.]" of reciprocal Indiana mechanic's licenses to Zavislak and Mullarkey, both of whom clearly only grandfathered in to their Kentucky licenses well before the Department's arbitrarily assigned cutoff date of July 1, 2012. (Conclusion 20.) No reasonable basis for distinguishing the grant of reciprocal licenses to Zavislak and Mullarkey, and their denial to the similarly situated Petitioners, Mark Zeller, Mike Zeller III, and Andrew Boeglin, has ever been put forth. Nor can it be. Those Petitioners, after all, had done what neither Zavislak nor Mullarkey could ever claim to have done, that is, pass a Departmentally-approved Indiana elevator test.

Surely, this Commission will not condone the unjust, unequal, and inconsistent treatment of mechanic's license applicants who are so similarly situated as Mark Zeller, Mike Zeller III, and Andrew Boeglin were to Zavislak and Mullarkey. (*See* Conclusions 20-22.) That, of course, would be an open invitation for a court of law to set aside such a decision on judicial review. (*See* Conclusion 21, and authorities cited therein.)

**Conclusion**

Petitioners will allow Conclusions of Law numbered 23 and 24 of the ALJ's Non-Final to serve as a kind of "closing argument" as to why the reciprocal licenses sought by Petitioners herein must be issued to Mark Zeller, Mike Zeller III, and Andrew Boeglin.<sup>4</sup>

Simply put, fairness and common sense dictate the issuance of the reciprocal licenses to those three Petitioners. No one can dispute that they possessed and possess the skill to safely work as elevator mechanics. Their applications cannot be denied "on the basis of a narrow, unstated-and then singularly used-interpretation of a statute." (Conclusion 23.) Petitioners "have shown by substantial and reliable evidence that they were entitled to Indiana elevator mechanic licenses pursuant to Indiana Code § 22-15-5-12(b)(1), on the basis of their Kentucky elevator mechanic licenses, when they applied in April 2014." (Conclusion 24.)

**WHEREFORE**, Petitioners, by counsel, respectfully request the Commission to **AFFIRM** the ALJ's Non-Final Order of June 3, 2015, in all respects, as and for the Final Order of the Commission herein.

Respectfully submitted,

**LAW OFFICE OF DOUG BRIODY**



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<sup>4</sup> Petitioners would add, however, that although the Non-Final Order states the Department issued new elevator mechanic's licenses to Mark Zeller and Andrew Boeglin on April 2, 2015, (*see* Conclusion 26), Mark Zeller's new license was not mailed to him until May 4, 2015, and Andrew Boeglin has never yet received the new license which the Department assured him on April 2, 2015, would be issued forthwith. Petitioners do not challenge the ALJ's Non-Final Order in any respect due to such assertion, as the assertion by the ALJ is certainly reasonable in light of the discussion between the parties at the time of the hearing. Rather, this information is offered to the Commission only to show the continuing disparate treatment of Petitioners, even among themselves.

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).

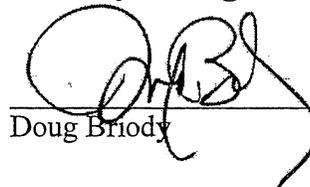
  
\_\_\_\_\_  
Doug Briody

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 17th day of August, 2015:

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Hon. Justin P. Forkner  
Administrative Law Judge  
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\_\_\_\_\_  
Doug Briody



MICHAEL R. PENCE, Governor  
STATE OF INDIANA

INDIANA DEPARTMENT OF HOMELAND SECURITY  
302 West Washington Street  
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August 7, 2015

Doug Briody  
Law Office of Doug Briody  
839 Stahl Ct.  
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RE: L. M. Zeller et. al  
Cause No. 14-12-FPBSC

Dear Mr. Briody;

The members of the Fire Prevention and Building Safety Commission, upon receipt of your Petitioners' Objection to Notice of Intent to Review; or, Alternatively, Request to Clarify Nature of Review and Request for Oral Argument, discussed the objection at the August 4, 2015 meeting. The Commission determined that neither your request for Affirming the Administrative Law Judge's Non-Final Order at the August 4, 2015 meeting, nor your alternative request for Oral Argument at the September 1, 2015 Commission meeting could be granted as the opportunity for both parties to file briefs by August 17, 2015 is still pending. The Commission did discuss the Request to Clarify the Nature of Review.

Their intentions are to fully understand the timeline of reciprocity presented, and to determine, if possible, if the granting of reciprocity in lieu of meeting the continuing education requirements is a singular event based upon this unique timeline, or if affirmation of the Non-Final Order creates a perpetual loophole whereby a licensed mechanic in multiple states could be continually licensed through alternating reciprocity claims without ever satisfying any continuing education requirements for Indiana.

Sincerely,

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

cc Pamela Walters  
James Schmidt



An Equal Opportunity Employer

EXHIBIT "A"

STATE OF INDIANA  
BEFORE THE FIRE PREVENTION AND BUILDING  
SAFETY COMMISSION

IN RE: ) ADMINISTRATIVE CAUSE NO.  
 ) 14-12  
L.M. ZELLER )  
Et al. )  
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RESPONDENT'S BRIEF IN OPPOSITION OF ADMINISTRATIVE LAW JUDGE'S  
NONFINAL ORDER ADDRESSING AGENCY ORDERS

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Introduction

Respondent submits this brief in opposition of the Administrative Law Judge's Nonfinal Order reviewing the denial by Respondent of Leo Mark Zeller's, Andrew Boeglin's, and Louis M. Zeller III's reciprocity-based applications for elevator mechanic licenses. Respondent properly denied licensure based on reciprocity as the applicants did not qualify for elevator mechanic licenses via reciprocity. Kentucky's licensing program was not equivalent to that of Indiana until July 2, 2012 and a license obtained prior to July 1, 2012 would not qualify for reciprocity under Ind. Code 22-15-5-12(b)(1).

Statement of Facts

On April 30, 2014, the Elevator and Amusement Section of the Division of Fire and Building Safety at the Indiana Department of Homeland Security received State Form 52377 "Elevator Mechanic License Renewal Application," copies of Kentucky Elevator Mechanic licenses, check # 117346 for three-hundred (\$300.00) dollars, and a request that Indiana Mechanic licenses be granted to Louis M. Zeller III, Andrew M. Boeglin, and Leo M. Zeller.

Indiana maintains a licensing program for elevator mechanics. The licensing program was enacted through legislation during the 2002 legislative session. An individual could be grandfathered into the program prior to May 1, 2003 by providing an application demonstrating proof of three (3) years of relevant work experience. After May 1, 2003, all applicants must demonstrate one of the following:

1. Reciprocity with a state whose licensing program is at least equivalent to the Indiana licensing program; or
2. Completion of a test and either an apprenticeship or applicable work experience.

On July 1, 2011, the State of Kentucky enacted a licensing program for all elevator mechanics working within the State of Kentucky. From July 1, 2011 until June 30, 2012, the State of Kentucky grandfathered individuals who provided evidence of experience in the elevator industry. *Beginning July 1, 2012, the State of Kentucky required all individuals seeking a Kentucky mechanics license to complete all licensure requirements established under KRS 198B.400 to 198B.540 which included a testing component* (emphasis added).

The Kentucky Mechanic Licenses obtained by Louis M. Zeller III, Andrew M. Boeglin, and Leo M. Zeller were *obtained prior to July 1, 2012 during a time when Kentucky did not require proof of successful completion of a test* and after May 1, 2003 during a time when Indiana did require proof of successful completion of a test. On June 5, 2014, the Division of Elevators issued an order which stated that the applications submitted on April 30, 2014 were denied due to the following:

“Their Kentucky License was issue[d] before the testing requirements were integrated as of July 1, 2012. This was confirmed with the State of Kentucky Department of Housing, Building & Construction, Division of Building Codes Enforcement, and Elevator Inspection. The licenses issued by the State of Kentucky prior to that date were not based on a licensing program that was at least equivalent to [the] Indiana licensing program. This information was provided to you on April 22, 2014 in the presence of your legal counsel.”

Indiana Mechanic Licenses were issued to Leo Mark Zeller and Andrew M. Boeglin on April 2, 2015 based on documentation of a passing grade for the NCPCCI 6B Elevator General examination and proof of applicable work experience in the elevator industry—information which the Respondent had requested but which had never been received.

### Argument

#### **I. Program Equivalency**

Respondent properly denied licensure based on reciprocity as the applicants did not qualify for elevator mechanic licenses through the reciprocity program. The applicants received their Kentucky licenses prior to July 1, 2012 when Kentucky did not require proof of successful completion of a test and after May 1, 2003 when Indiana did require proof of successful completion of a test.

The State of Indiana enacted a licensing program through legislation during the 2002 session. Ind. Code 22-15-5-12(b) states that an individual who is an applicant for an elevator mechanic license must meet one of four eligibility criteria. Ind. Code 22-15-5-12(b)(1) states that first of the applicable eligibility criteria is that the applicant can hold an active elevator mechanic license issued by a state that has a licensing program that is at least equivalent to the elevator mechanic licensing program established under Ind. Code 22-15-5. Ind. Code 22-15-5-12(b)(2) states that the second of the applicable eligibility criteria is that the applicant can satisfy both of the following:

A) Have at least one of the following types of work experience or training:

- i) Have at least three (3) years of documented work experience in the elevator industry in construction, maintenance, and service or repair;

- ii) Have at least eighteen (18) months experience in the elevator industry in construction, maintenance, and service or repair and have at least three (3) years experience in a related field that is certified by a licensed elevator contractor;
- iii) Complete an apprenticeship program that is registered with the Bureau of Apprenticeship and Training of the United States Department of Labor or a state apprenticeship program and that the commission determines is at least equivalent to three (3) years of work experience in the elevator industry in construction, maintenance, and service or repair; and

B) Successfully complete a written competency examination approved by the commission.

Ind. Code 22-15-5-12(b)(3) states that the third of the applicable eligibility criteria is that the applicant must successfully complete an elevator mechanic's program that consists of a combination of extensive training and a comprehensive examination that the commission has determined is at least equivalent to both the work experience required under subdivision Ind. Code 22-15-5-12(b)(2)(A)(i) and the competency examination established under subdivision Ind. Code 22-15-5-12(b)(2)(B). Ind. Code 22-15-5-12(b)(4) states that the fourth applicable eligibility criteria is that the applicant must furnish acceptable proof to the department of at least three (3) years work experience in the elevator industry in construction, maintenance, service or repair; and current performance of the duties of an elevator mechanic in Indiana without direct supervision; and apply for the license on or before May 1, 2003.

The State of Kentucky enacted a licensing program in 2011. The State of Kentucky's KRS 198B.4013 states that an applicant must provide proof of one of the following 1) the applicant for an elevator mechanic license has not less than thirty-six (36) months of work experience in the elevator industry, in construction, maintenance, service, repair, or any combination of these

activities as verified by current and previous employers, or equivalent experience while serving in the United States military services; and passage of a written, oral, or computerized examination administered by the department or the department's designee based upon the most recent referenced codes and standards for full licensure; 2) Proof the applicant for an accessibility and residential elevator mechanic license has not less than twelve (12) months of work experience in the elevator industry, in construction, maintenance, service, repair, or any combination of the activities verified by current and previous employers, or equivalent experience while serving in the United States military services; and passage of a written, oral, or computerized examination administered by the department or the department's designee based upon the most recent referenced codes and standards for the accessibility and residential elevator mechanic license the applicant seeks; 3) proof the applicant has worked without direct and immediate supervision as an elevator constructor, maintenance, or repair person for not less than three (3) years immediately prior to July 1, 2011; 4) Certificate of completion from a nationally recognized training program for the elevator industry such as the National Elevator Industry Educational Program, National Association of Elevator Contractors, or an equivalent program approved by the commissioner for elevator mechanic licensure; 5) For accessibility and residential elevator mechanic licensure, a certificate of completion from a nationally recognized training program specifically designed for the accessibility and private residence lift, such as the National Association of Elevator Contractors, or an equivalent program approved by the commissioner; or 6) Certificate of completion of an apprenticeship program for elevator mechanics, having standards substantially equal to those of KRS 198B.400 to 198B.540; and proof of registration with the Bureau of Apprenticeship and Training, United States Department of Labor, or a state apprenticeship council.

Louis M. Zeller III, Andrew M. Boeglin, and Leo M. Zeller submitted application to the State of Indiana and requested an elevator mechanic license based on reciprocity with the State of Kentucky. All three applications presented a copy of an elevator mechanic's license as issued by the State of Kentucky to all three individuals.

Prior to May 1, 2003, an applicant for an Indiana license could demonstrate three (3) years of experience and be granted a license under a grandfathering provision. After May 1, 2003, an applicant for an Indiana license was required to provide proof of successful completion of an approved test and either proof of an apprenticeship or applicable experience. Kentucky on the other hand enacted a program eight (8) years after Indiana had established its licensing program. Kentucky's program provided that an applicant could provide proof of applicable work experience prior to July 1, 2011 and be granted an elevator mechanic license under a grandfather provision. The application under this grandfather provision in Kentucky must be submitted prior to July 1, 2012. The grandfather provision allowed individuals to obtain licensure in Kentucky by applicable work experience and no testing requirement nine (9) years after Indiana had discontinued its own grandfather program. Kentucky also provided that an applicant could provide proof of successful completion of an approved test and either proof of an apprenticeship or applicable experience.

**Indiana statute provides that an applicant may be granted an Indiana Mechanic's License after submitting proof that the applicant holds an active elevator mechanic license issued by a state that has a licensing program that is at least equivalent to the elevator mechanic licensing program established under Ind. Code 22-15-5.** Ind. Code 22-15-5 established a grandfather provision with a set expiration date and provisions that provide that an individual must provide proof of successful completion of an approved test and applicable work experience or proof of an apprenticeship. Kentucky's program also has a grandfather provision

with a set expiration date and provisions that provide that an individual must provide proof of successful completion of an approved test and applicable work experience or proof of an apprenticeship. **A license issued by Kentucky prior to July 2, 2012 would not qualify for reciprocity under Indiana law because the licensing programs are not considered to be equivalent.** A license issued by Kentucky under its grandfather provision required proof of work experience only. The Kentucky grandfather provision expired eight (8) years after Indiana had already been administering its own elevator mechanic license program and nine (9) years after Indiana had discontinued its own grandfather provision. An applicant providing only three years of applicable work experience between July 1, 2011 and July 1, 2012 would only have been able to make application in Kentucky and not Indiana as Indiana's grandfather provision had been discontinued for many years. To make application in Indiana between July 1, 2011 and July 1, 2012, an individual would need to provide proof of successful completion of an approved test and applicable work experience or an apprenticeship. An applicant in Kentucky during this same time period had the ability to only provide work experience. By allowing individuals who received Kentucky licenses during July 1, 2011 through July 1, 2012 the ability to receive reciprocity in Indiana, this allows individuals who could not receive a license under the Indiana program to circumvent the requirements in Indiana. An individual who has not successfully completed an approved test, could therefore have made application in Kentucky under less stringent requirements and then immediately upon receipt of a Kentucky license made application in Indiana thus avoiding completion of the required test. While both states provided for a grandfather provision, Kentucky's program during July 1, 2011 through July 1, 2012 would not have been equivalent to Indiana who during this time period and for several years prior required successful completion of an approved test in addition to applicable work experience.

Respondent properly denied licensure based on reciprocity as the applicants did not qualify for Indiana elevator mechanic licenses through reciprocity. Kentucky's licensing program was not equivalent to Indiana's program until July 2, 2012; therefore, a Kentucky license obtained prior to July 1, 2012 would not qualify for reciprocity under Ind. Code 22-15-5-12(b)(1).

## **II. Continuing Education Requirements**

Ind. Code 22-15-5-15 provides that in order to renew a license issued under Ind. Code 22-15-5, an individual must satisfy the continuing education requirements and submit proof of completion to the Indiana Department of Homeland Security's Elevator and Amusement Section. A license holder must complete at least eight (8) hours of instruction within one (1) year before a license renewal.

If an individual holds a license from a state that has a program that is at least equivalent to the Indiana elevator licensing program and holds a license in the State of Indiana, it would be possible for the individual to circumvent the continuing education requirements. Application under the reciprocity provision only provides that an individual must hold an active license issued by a state that has a licensing program that is at least equivalent to the elevator licensing program established under Indiana Code. If an individual holds a license from a state with an equivalent licensing program to that of Indiana, that individual could allow the Indiana license to lapse without completing the continuing education requirements and simply apply for a new license immediately after the lapse based on the reciprocity program from the other state.

### Conclusion

Respondent properly denied licensure based on reciprocity since the applicants did not complete a licensing program which is at least equivalent to that of Indiana. The licensing program

in Kentucky was not equivalent until July 2, 2012. A Kentucky license obtained on or before July 1, 2012 would not qualify for reciprocity under Ind. Code 22-15-5-12(b)(1).

Respectfully submitted,



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