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April 16, 2012

RECEIVED
APR 16 2012
LABOR AND INDUSTRIAL RELATIONS COMMISSION

Via Facsimile: 573-751-7806
and U.S. Mail

Labor and Industrial Relations Commission
3315 W. Truman Boulevard, Room 214
Jefferson City, Missouri 65102-0599

Attention: Pamela Hofmann

Re: Objection No. 365 to Annual Wage Order No. 19 – Ozark County
Our File No. MU12-719 *(Prevailing Wage Objection/Laborers Local 663)*

Dear Ms. Hofmann:

In accordance with our telephone conversation, please find enclosed for consideration a document entitled "In Support of the Timely Filing of "Objection to Annual Wage Order No. 19 (Ozark County)" submitted on behalf of Laborers Local Union No. 663.

If you have any questions, please do not hesitate to contact me.

Very truly yours,

ARNOLD, NEWBOLD, WINTER
& JACKSON, P.C.

Ryan T. Dryer

RTD:ca
Enclosure

cc: *Via Facsimile: 573-751-3721*
and U.S. Mail
Division of Labor Standards
3315 W. Truman Boulevard, Room 205
Jefferson City, Missouri 65102
(w/enclosure)

{00170154;MU12-719;CJA }

RECEIVED
APR 16 2012
LABOR AND INDUSTRIAL RELATIONS COMMISSION

BEFORE THE LABOR AND INDUSTRIAL RELATIONS COMMISSION OF MISSOURI

IN RE:	**OBJECTION TO ANNUAL WAGE ORDER NO. 19**	))))	**Objection No. 365**

IN SUPPORT OF THE TIMELY FILING OF "OBJECTION TO ANNUAL WAGE ORDER NO. 19" (OZARK COUNTY)

In the instant case, the "Objection to Annual Wage Order No. 19 (**Ozark County**)" issued on behalf of Laborers Local Union 663 ("Laborers 663"), was sent via United Parcel Service (UPS) Next Day Air on April 6, 2012, with separate copies to both the Commission and the Missouri Department of Labor Standards. Thus, the document was scheduled to be received and filed with the Commission on April 9, 2012, the last day such filings could be accepted under the regulations. The copy sent to the Department of Labor Standards was inadvertently destroyed by UPS in processing, while the copy sent to the Commission was inexplicably delayed, and not received until 9:00 a.m. on April 10, 2012. The Commission has communicated their intent to dismiss the Objection due to lack of jurisdiction resulting from untimely filing. However, this strict interpretation would render the regulation arbitrary and capricious, where the Commission has the discretion to reasonably interpret the regulation consistent with the intent of the filing requirements, and accept the Objection as timely.

Missouri's Code of State Regulations governs the practices and procedures for proceedings before the Missouri Department of Labor and Industrial Relations (hereinafter "the Commission"). *See **8 CSR § 20-2.010**.* With regard to filing notices of appeal, applications or other paper required with the Commission, 8 CSR § 20-2.010(4) provides that any such documents shall be filed "as of the date endorsed by the United States Post Office on the envelope or container in which the paper is received, or the date received if filed by facsimile." *Id.*

The authority of the Commission to adopt regulations for quasi-judicial functions is granted by Mo. Rev. Stat. § 286.060(8). Further, with regard to prevailing wage objections, the Missouri Prevailing Wage statutes state as follows:

> *At any time within thirty days after the certified copies of the determinations have been filed with the secretary of state and the department, any person who is affected thereby may object in writing to a determination or a part thereof that he deems objectionable by filing a written notice with the department, stating the specific grounds of the objection. If no objection is filed, the determination is final after thirty days.*

Mo. Rev. Stat. §290.262(3). The statute contains no language with regard to determination of the date of filing. Cases involving the filing deadlines workers' compensation claims are based on the language found in statute, and should not be determinative of the present case. While the language of regulation 8 CSR 20-2.010(4) is admittedly substantially the same as that of the

workers' compensation statute, the regulation, as applied to objections to annual wage orders, is arbitrary and capricious, and should not be strictly enforced in this instance.

Mo. Rev. Stat. § 536.014 provides the following with regard to commission rules:

No department, agency, commission or board rule shall be valid in the event that:

(1) There is an absence of statutory authority for the rule or any portion thereof; or
(2) The rule is in conflict with state law; or
(3) The rule is so arbitrary and capricious as to create such substantial inequity as to be unreasonably burdensome on persons affected.

"Arbitrary and capricious" has been defined in the context of administrative rules and regulations as willful and unreasoning action, without consideration of and in disregard of the facts and circumstances. *See* ***Psychiatric Healthcare Corporation of Missouri v. Department of Social Services***, 100 S.W.3d 891, 900 (Mo.App.2003), *citing* ***Jones v. City of Jennings***, 595 S.W.2d 1 (Mo.App.1979). The test is whether the regulation bears a rational relationship to a legitimate state interest. *Id.* With regard to prevailing wage objections, the Commission's determination as timely those objections received via US Post Office after the filing deadline, but endorsed by the US Post Office prior to the filing deadline, indicates an intention by the Commission to respect those objections as legitimate and to disregard as immaterial the unreasonable delays in transit not within the control of the sender, focusing instead on evidence of mailing as sufficient for compliance with filing requirements.

Similar situations have been examined by Missouri Courts previously with regard to filings with the Commission under the Missouri Workers' Compensation statutes where notices of appeal sent via private carrier were sent prior to the expiration of the filing date, but were not received until the filing deadline had expired. *See e.g.,* ***Mansfield v TG Missouri Corporation,*** *149 S.W.3d 895 (Mo.App.2004);* ***Grice v. City of Robert****, 824 S.W.2d 470 (1992).* However, objections to Prevailing Wage Orders are not within the scope of the Workers' Compensation statutes. In ***Grice v. City of Robert***, examined by the Missouri Court of Appeals for the Southern District, is most analogous to the present situation, as a workers' compensation appeal sent via overnight UPS delivery was delayed by weather, and thus was not received prior to the filing deadline. ***Grice***, 824 S.W.2d at 472. The Court referenced the Missouri Workers' Compensation statute governing filings, Mo. Rev. Stat. § 287.480, which contains substantially the same language as 8 CSR 20-2.010, citing no exception for late-receipt of filings except those endorsed by the United States Post Office. *See id., citing* ***Patterson v. St. Louis University Hospital***, 780 S.W.2d 106, 108 (Mo.App.1989). The Court relied on the language of the statute, holding that "[w]here a statute has no exception courts should not engraft one by judicial legislation." *Id.*

Federal Courts have expressed that, in circumstances similar to the instant case, form should not be elevated over substance. In ***Kreider Dairy Farms, Inc. v. Glickman***, 1998 WL 481926 (E.D.Pa. 1998), the U.S. District Court for the Eastern District of Pennsylvania addressed a case where an agency filing was determined by the date "postmarked," otherwise undefined in regulations. *Id., vacated by* ***Kreider Dairy Farms, Inc. v. Glickman,*** 190 F.3d 113 (3rd Cir. 1999)(as appeal was pending, District Court lacked jurisdiction over non-final decision). The Court held that the "postmark" definition was ambiguous, and found that "a party that sends a document to the hearing clerk via Federal Express has made at least a reasonable effort to comply with the postmark requirement, and consequently should be permitted to consider the

document filed on the date it was given to Federal Express." *Id.*, *citing* ***State of Oregon v. FCC***, 102 F.3d 583, 585, (D.C.Cir. 1996)(holding that "the FCC acts arbitrarily and capriciously when it rejects an application as untimely based on an ambiguous cut-off provision, not clarified by FCC interpretations, if the applicant made a reasonable effort to comply"). As the United States Supreme Court held in ***Foman v. Davis***, 371 U.S. 178 (1962), with regard to the Federal Rules of Civil Procedure, "[i]t is too late in the day...for decisions on the merits to be avoided on the basis of such mere technicalities." *Id.*

The Court in ***Kreider*** further held that the agency's ruling was at odds with the realities of the modern practice of law, finding that the postmark requirement bucks the current trend favoring the use of delivery services. *Id.* The Court considered the irony that, while sending the filing via private carrier may effect delivery of the document sooner than sending same via US Post Office, this would result in a determination by the agency that the document was later filed and therefore not considered. *Id.*

Attached as Exhibit "A" is the United Parcel Service Tracking Information evidencing a letter package containing an original and three copies of the "Objection to Annual Wage Order No. 19" regarding Ozark County with Tracking No.. 1ZF4194X2210034541 addressed for delivery to the Labor and Industrial Relations Commission.. The UPS Next Day Air package was picked up by UPS April 6, 2012, and scheduled for delivery by UPS on Monday, April 9, 2012. The package was delivered by UPS to the Labor and Industrial Relations Commission at 9:00 a.m., Tuesday, April 10, 2012, with no explanation by UPS as to why it is was not delivered April 9, 2012, as scheduled.

Attached as Exhibit "B" is the United Parcel Service Tracking information evidencing a letter package containing a copy of the "Objection to Annual Wage No. 19" regarding Ozark County with Tracking No. 1ZF4194X2210034550 addressed for delivery to the Division of Labor Standards. The UPS Next Day Air package was picked ups by UPS April 6, 2012, and scheduled for delivery by UPS to the Division of Labor Standards on Monday, April 9, 2012. Apparently the package was damaged in transit to the UPS facility in Lenexa, Kansas, and was undeliverable. Unfortunately, it was not discovered by this office that the package was not delivered as scheduled until Tuesday, April 10, 2012.

It is worth noting that of the eleven (11) Objections to Annual Wage Order No. 19 posted on the Commission's website as of this writing, six (6) were sent to the Commission exclusively via UPS, two (2) were sent to the Commission via Federal Express (with copies to individuals placed via US Mail), and the remaining three (3) did not contain a description of the method of delivery. None of the Objections were sent more than six (6) days prior to the filing deadline.

Dismissal of the Prevailing Wage Objection, verifiably sent prior to the filing date via UPS, would be an arbitrary and capricious interpretation of 8 CSR § 20.010, as it deprives the objectors of a decision on the merits based upon a filing requirement that holds no rational relationship to a legitimate state interest. Therefore, the "Objection to Annual Wage Order No. 19," filed on behalf of Laborers Local Union No. 663, should be accepted as timely filed.

ARNOLD, NEWBOLD, WINTER
& JACKSON, P.C.

Michael G. Newbold, MO Bar No. 25523
Ryan T. Dryer, MO Bar No. 59893
1125 Grand Boulevard, Suite 1600
Kansas City, Missouri 64106
Telephone: (816) 421-5788
Facsimile: (816) 471-5574
Attorneys for Objector

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of April, 2012, the foregoing was sent *via facsimile* as follows:

1) Missouri Labor and Industrial Relations Commission, attention Pamela Hofmann, at 573-751-7806; and

2) Missouri Division of Labor of Standards at 573-751-3721;

and a copy was sent by U.S. Mail, postage prepaid, as follows:

1) Labor and Industrial Relations Commission
Attention: Pamela Hofmann
3315 W. Truman Boulevard, Room 214
Jefferson City, Missouri 65102-0599

2) Division of Labor Standards
3315 W. Truman Boulevard, Room 205
Jefferson City, Missouri 65102

Ryan T. Dryer

United States

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Tracking Detail

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1ZF4194X2210034541

Updated: 04/16/2012 2:39 P.M. Eastern Time

Delivered

Delivered On:
Tuesday, 04/10/2012 at 9:00 A.M.

Left At:
Front Desk

Signed By:
DOZIER

Proof of Delivery

Request Status Updates »

Shipping Information

To: JEFFERSON CITY, MO, US

Shipped By

UPS Next Day Air®

Additional Information

Shipped/Billed On:	04/06/2012
Type:	Package

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Shipment Progress

What's This?

Location	Date	Local Time	Activity
Jefferson City, MO, United States	04/10/2012	9:00 A.M.	DELIVERED
	04/10/2012	5:28 A.M.	Out For Delivery
	04/10/2012	3:03 A.M.	Arrival Scan
Lenexa, KS, United States	04/10/2012	1:03 A.M.	Departure Scan
Lenexa, KS, United States	04/06/2012	10:29 P.M.	Arrival Scan
Kansas City, KS, United States	04/06/2012	9:59 P.M.	Departure Scan
	04/06/2012	8:59 P.M.	Origin Scan
Kansas City, MO, United States	04/06/2012	6:01 P.M.	Pickup Scan
United States	04/06/2012	6:00 P.M.	Order Processed: Ready for UPS

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Exhibit "A"

United States

New User | Log-In | Contact UPS | The UPS Store Search Sub

My UPS Shipping Tracking Freight Locations Support UPS Solutions

Tracking Number Track Log-In for additional tracking details. Other Tracking Options

Tracking Detail

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1ZF4194X2210034550

Updated: 04/16/2012 2:43 P.M. Eastern Time

Exception

Last Location:
Lenexa, KS, United States, Monday, 04/09/2012

Change Delivery »
Request Status Updates »
Report a Claim »

Shipping Information

To: MO, US

Shipped By

UPS Next Day Air®

Additional Information

Shipped/Billed On: 04/06/2012
Type: Package

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Shipment Progress

What's This?

Location	Date	Local Time	Activity
Lenexa, KS, United States	04/09/2012	11:11 A.M.	Damage reported. / Damage claim under investigation.
Lenexa, KS, United States	04/07/2012	6:48 A.M.	The package was damaged in transit. UPS will notify the sender with the details. / Package was damaged and is being held at a UPS location.
Lenexa, KS, United States	04/06/2012	10:29 P.M.	Arrival Scan
Kansas City, KS, United States	04/06/2012	9:59 P.M.	Departure Scan
	04/06/2012	8:58 P.M.	Origin Scan
Kansas City, MO, United States	04/06/2012	6:01 P.M.	Pickup Scan
United States	04/06/2012	5:00 P.M.	Order Processed: Ready for UPS

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Exhibit "B"