



Adjudicator

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Industrial Commission welcomes new Commissioner Kevin R. Abrams

The Industrial Commission (IC) of Ohio would like to welcome Kevin R. Abrams as the new public member of the commission.

Abrams comes to the IC from the Bureau of Workers' Compensation (BWC) where he served as assistant law director since 1988. Abrams feels his previous experience in the workers' compensation world will be a "huge asset" to his new position for two reasons.

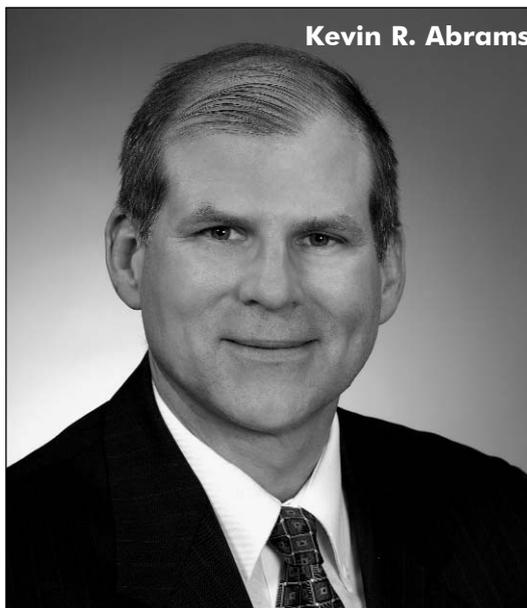
"One is the general workers' compensation knowledge: Knowing claims law and having had extensive experience with claims law," said Abrams. "My great hope and anticipation is that will bode well for me in terms of decision-making regarding claims."

Abrams also believes that his past experience will assist him in his new role as chair of the Self-Insuring Employers Evaluation Board, which is the responsibility of the public member of the commission.

Abrams said he "spent a lot of time working the general area of self-insurance" while at BWC, and also presented cases involving self-insuring employers to the IC.

Governor Bob Taft appointed Abrams to the IC and he began work here on August 2. Abrams attended his first hearings on that day as a new commissioner.

Abrams, a native of Williamsburg, earned his bachelor's degree from Amherst College in Massachusetts in 1978, and then his law degree from the Ohio State College of Law in 1982. He started with the BWC in 1981 and returned as assistant law director in 1988 after working in private practice.



Kevin R. Abrams

In his role as assistant law director, Abrams provided legal advice to BWC in most areas of workers' compensation. His primary areas of responsibility included oversight of administrative and court settlements of BWC claims, self-insurance legal issues, bankruptcy and collection matters, and special projects involving claims issues.

Abrams also served as chairperson of the Self-Insured Review Panel (SIRP); liaison to the Attorney General and Special Counsel for court cases and as a frequent contact with the IC

regarding inter-agency issues. Abrams addressed claims issues in various areas such as PTB, Disabled Workers' Relief Fund, and VSSRs.

In addition to his public service, Kevin was also in private practice, focusing on workers' compensation matters.

He is a member of the Ohio State Bar Association (OSBA), as well as the Public Member of the OSBA Workers' Compensation Specialty Board.

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Supreme Court Summaries

Supreme Court finds that non-lawyers that appear in a representative capacity before the Commission and Bureau are not engaged in the unauthorized practice of law when such appearance is in conformity with the standards set forth in Commission Resolution R04-1-01

In 2002, the Cleveland Bar Association filed a complaint with the Board of Commissioners on the Unauthorized Practice of Law alleging that CompManagement and its employees were engaged in the unauthorized practice of law by appearing in proceedings before the Commission and the Bureau. In

May of 2004 the Board of Commissioners on the Unauthorized Practice of Law issued a report that recommended that the Supreme Court find that employees of CompManagement that appeared at proceedings before the Commission and the Bureau representing parties were engaging in the unauthorized practice of law.

In a 5-2 decision issued on December 15, 2004, the Supreme Court of Ohio rejected the recommendation of the Board. Instead, the Court ordered that the case be remanded to the Board to consider any allegations by the Cleveland Bar Association that CompManagement's employees failed to act in accordance with the standards set forth in Commission Resolution R04-1-01.

The Supreme Court noted that lay representation had been a feature of Ohio's workers' compensation system since its inception and that non-lawyer representatives

are today, more than ever, an integral and critical part of Ohio's workers' compensation system. The Court noted that a 1970 agreement between the Unauthorized Practice of Law Committee of the Ohio State Bar Association and several actuarial firms, that set forth a list of various functions that actuarial service

companies could perform and those which could not be performed before the Commission and the Bureau, had been a cornerstone of Commission policy on non-lawyer appearance and practice before the Commission and Bureau for more than 30 years. The Court also noted that the Commission codified and updated the 1970 standards in Resolution No. 04-1-01.

The Court recognized that if the Court adopted the recommendation of the Board the outcome would significantly alter the administrative landscape and virtually ban all non-lawyer involvement in the hearing process. The Court recognized that in certain limited settings the public interest is better served by authorizing laypersons to engage in conduct that might be viewed as the practice of law. The Court held, considering that mandating the use of attorneys in the workers' compensation setting would frustrate

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ORC 4123.52 bars retroactive payment of Statutory PTD for a period in excess of two years of the application for PTD

On April 11, 2001, an injured worker applied for statutory PTD. An SHO granted the award with compensation beginning April 11, 1999 finding that 4123.52 bars retroactive payment for a period in excess of two years before the application of PTD was filed. The injured worker filed a mandamus action alleging the commission abused its discretion in not awarding compensation back to the 1984 injury date. The Court of Appeals granted the requested writ reasoning that ORC 4123.52 did not apply. In *State ex rel. Adams v. Indus. Comm. and Aluchem, Inc.*, 104 Ohio St. 3d 640, 2004 Ohio 6891, the Supreme Court held that injured worker's application was bound by the provision of ORC 4123.52. The filing of the application was the pivotal issue. The April 11, 2001 application triggered the two year limitation in ORC 4123.52. The Supreme Court reversed the decision of the Court of Appeals and reinstated the order of the Industrial Commission.

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Industrial Commission Policy Updates

Hearing Officer Manual Updates

Memo F2 Loss of Vision- Corneal Transplants and Corneal Implants

The improvement of vision resulting from a corneal transplant or corneal implant is a correction of vision and thus shall not be taken into consideration in determining the percentage of vision actually lost pursuant to the scheduled loss provision of O.R.C. 4123.57.

NOTE: *State ex rel. Kroger Co. v. Stover* (1987) 31 Ohio St.3d 229
State ex rel. Gen. Elec. Corp. v. Indus. Comm. (2004) 103 Ohio St. 3d 420
Memo F2 was amended on November 23, 2004

Memo R6 Interpreters for the Hearing Impaired or for Foreign Language

The services of interpreters will be secured for hearings or for medical exams involving individuals who could not communicate otherwise during the hearing or medical exam due to deafness or to a foreign language barrier. Interpreters are scheduled by the Office of Customer Service in those instances where the Industrial Commission finds such services necessary. A separate request must be submitted for each hearing where an interpreter is required.

Injured workers should be informed of their right to have an interpreter present. When a Hearing Officer or medical examiner does not know in advance of the need for interpretive services, the matter shall be reset and an interpreter shall be scheduled to enable the person to effectively communicate.

The interpreters will submit a C-19 form for payment to the Office of Customer Service. The interpreting coordinator shall then submit the C19 form to Provider Affairs for payment from the Surplus Fund. Approval signature from the requestor is required for proper processing.

NOTE: Industrial Commission/BWC Joint Resolution, No. R88-1-200 (September 28, 1988)
Memo R6 was amended on January 27, 2005

Industrial Commission Resolutions

Effective January 27, 2005, Industrial Commission **Resolution R05-1-01** revised paragraph (A)(ii) of Resolution R03-1-04. The resolution addresses continuances and blockouts.

The revision makes the following distinction: "If the commission receives notice of a pre-scheduled activity, including, but not limited to, a vacation, seminar, or plant shutdown, at least thirty days prior to the scheduled conflict, the commission shall not schedule a hearing during the pre-scheduled activity for a period not to exceed a total of twenty business days in a calendar year."

Effective January 21, 2005 **Resolution R04-1-03** makes permanent the standards of conduct for third party administrators set out in Resolution R04-1-01.

A portion of the resolution follows: "in light of the December 15, 2004 decision in the *Cleveland Bar Assn. v. CompManagement, Inc.* 104 Ohio St.3d 168, 2004-Ohio-6506, the Industrial Commission desires that the standards of conduct for third party administrators, union representatives, or employees of employers who appear before the Industrial Commission and the Bureau of Workers' Compensation in a representative capacity, that are set forth in Resolution R04-1-01, be established on a permanent basis."

The complete text of the Industrial Commission's resolutions can be viewed online or printed from the IC's Web site at www.ohioic.com.

Industrial Commission Rules

The Industrial Commission amended **Rule 4121-3-12: Suspension of the Processing of claims**. The rule, effective October 1, 2004 now reads as follows: "When the bureau or the commission orders an injured or disabled employee to submit to a medical examination and such employee refuses to be examined or in any way obstructs the examination, the employee's claim for compensation shall be suspended during the period of his refusal or obstruction."

The Commission also amended **Rule 4121-3-20: Additional awards by reason of violations of specific safety requirements**. The amendment was effective January 1, 2005.

The amendment affects processing of VSSR claims in cases where the injured worker is employed through a temporary agency. The following language is outlined in Rule 4121-3-20: "For the purpose of this rule "employer" shall be defined to include

the customer employer of a temporary service agency or the client employer of a professional employer organization where the customer employer or client employer has the right of control as to the manner or means of performing the work."

Further information is specified regarding the actual processing of the VSSR claim in the following language: "Upon the filing of an application for an additional award with the commission, the commission shall send a copy of the application to the employer, customer employer of a temporary service agency or client employer of a professional employer organization and to its authorized representatives by mail."

The complete text of the Industrial Commission's rules can be viewed online or printed from the IC's Web site at www.ohioic.com.

Supreme Court Summaries continued

VSSR Code in effect at the time of installation of machine applies when the equipment is an installation or construction

An injured worker sustained an industrial injury in October 1999 when she was injured by a cabbage-coring machine. She sought an additional award arguing that the employer had violated a specific safety requirement, OAC 4121:1-5-11(D) (13), which requires the employer to provide a guard on all power knives. The safety requirement was in effect at the time of her injury, but there was no safety requirement in effect pertaining to the cabbage-coring machine at the time of installation of the machine. The Commission denied her application. The Court of Appeals found no abuse of discretion. In *State ex rel. Arce v. Indus. Comm. and Hirzel Canning Company, Inc.*, 105 Ohio St.3d 90, 2005 Ohio 572, the injured worker argued that the court should overrule *State ex. rel. Ohio Mushroom v. Indus. Comm.*, 47 Ohio St.3d 59, 547 N.E.2d 973 which declared that "code applicability is controlled by the date the machine in question was placed into service, not the date of injury." The court agreed and overruled *Ohio Mushroom*.

However, it was noted that OAC 4121:1-5-01(A) states that the code that was in effect at the time when the machine was placed into service applies if there is an installation or construction. The court found that the set up of the cabbage-coring machine met the key components of an "installation." The components are size, relative permanence and immobility. The Court determined that the Commission was correct in finding the cabbage-coring machine did not violate any specific safety requirement in effect at the time it was placed into service. In other words, the "grandfather clause" in OAC 4121:1-5-01(A) applied. The Court found the Commission did not abuse its discretion in denying the VSSR award.

R.C. 4123.511(J) applies to allow recovery of overpaid compensation

In *State ex rel. Wooten v. Indus. Comm.*, 104 Ohio St.3d 186, 2004 Ohio 6505 the Supreme Court affirmed a Court of Appeals decision finding that the Bureau could recover amounts overpaid to an injured worker pursuant to Section 4123.511(J) of the O.R.C. In 1988, the injured worker contracted an occupational disease and the claim was allowed. In 1999, an application for PTD compensation was granted. The employer challenged the award. Subsequently it was determined that the injured worker was capable of performing sustained remunerative employment and therefore ineligible for PTD compensation. During the period of time between the administrative actions, the injured worker was paid PTD compensation. Section 4123.511(J) O.R.C. was adopted in 1993 allowing for the recovery of overpaid compensation by withholding the overpaid amount from future awards. The Bureau sought to recover the amount of overpaid PTD compensation under Section 4123.511(J) O.R.C. The injured worker argued that since she was injured prior to the enactment of Section 4123.511(J) O.R.C., the Bureau was precluded from recovering the overpayment. However, the Supreme Court determined that the period of the overpayment, not the date of the injury, was the relevant date where the period of overpayment post-dated the effective date of the statute, regardless of the date of injury. The Court held that the Bureau was entitled to withhold the amount of overpaid PTD benefits.

Mere statement of the existence of a prerequisite for invoking continuing jurisdiction is insufficient

The injured worker was awarded PTD benefits in 1998 beginning July 3, 1996. The injured worker worked odd jobs in 1996, 1997 and 1998. In 2000, the Bureau filed a motion seeking termination of benefits and a declaration of fraud and overpayment. An SHO denied the motion. Reconsideration was filed by the Bureau. The commission issued an order stating that the SHO order contained clear mistakes of law and stated that the SHO in granting PTD failed to consider the fact that the injured worker was working immediately prior to and after the SHO hearing. The Commission terminated claimant's PTD benefits, declared an overpayment and found fraud. The Court of Appeals found no abuse of discretion. In *State ex rel. Gobich v. Indus. Comm.*, 103 Ohio St.3d 585, 2004 Ohio 5990, the Supreme Court reversed the judgment of the Court of Appeals finding that the mere statement of the existence of a prerequisite to continuing jurisdiction is not enough to provide an adequate explanation for invoking continuing jurisdiction. The Court found the Commission's order did not adequately apprise the injured worker of why the claim was being reopened. An adequate explanation was mandatory to allow the aggrieved party an opportunity to prepare a meaningful defense. Because of a failure to provide an adequate explanation, the Commission was not entitled to invoke continuing jurisdiction and therefore, abused its discretion in terminating PTD.

Standards differ for the first and second periods of a change of occupation award

The injured worker's claim was allowed for "interstitial pulmonary fibrosis with bilateral apical lung disease." She left her job to avoid further injurious dust exposure but did not seek other employment. She requested a change of occupation award. The Commission granted the application, in part, by ordering compensation for the first 30 weeks, but denied compensation for the additional 100 weeks because the injured worker did not prove that she sought other employment. The Court of Appeals granted the employer's mandamus complaint and directed that the Commission vacate the initial thirty week period. In *State ex rel. Regal Ware, Inc. v. Indus. Comm.* 105 Ohio St. 3d 1, 2004 Ohio 6893, the Supreme Court reversed the lower court's judgment and determined that the Commission decision was not an abuse of discretion. The Court found a distinction between the two time periods cited in ORC 4123.57(D). The first period is a period of 30 weeks, commencing as of the occupation discontinuance or change, and the second time period is a period of 100 weeks immediately following the first period's expiration. The Court noted that the injured worker triggers the first period by discontinuing employment due to a qualifying disease, thereby negating a job search requirement. Regarding the second period, OAC 4121-3-25(E) provides that "an award for change of occupation in excess of the initial 30 weeks must be supported by evidence of reasonable attempts to secure employment."

Spring Hearing Officer Training takes place at Maumee Bay

Industrial Commission (IC) of Ohio hearing officers gathered at Maumee Bay state park in May for training to keep them informed of policy changes and various other issues.

The day started with a welcome from IC Chairman, Bill Thompson, and Commissioners, Donna Owens and Pat Gannon. Dr. Deborah Venesy of the Cleveland Clinic spoke on the conservative treatment of back pain.

Dr. Nabil Ebraheim, Professor and Chairman of the Department of Orthopedics, of the Medical College of Ohio informed hearing officers of the surgical aspects for back pain.

Tom Connor, Director of Hearing Services, explained IC Resolution 4-1-01 on ethics and discussed standards of conduct when appearing at Commission hearings.

Chairman Thompson, and Commissioners Owens and Gannon then spoke regarding current issues before the Commission.

Paul Walker, IC Legal Counsel, Rick Tilton, Hearing

Officer Trainer, and Connor gave an update on IC policies, rules, procedures, new legislation, and changes.

Brad Sinnott of Vorys, Sater, Seymour and Pease gave a case law update. Connor and Steve Mustard, Document Technical Manager, discussed the roll-out of the Enterprise Content Management System and the hearing process.

In addition to regional training sessions which hearing officers go through twice a year, the Commission hosts at least one statewide meeting annually. This portion of the hearing officer's annual statewide training was open to outside parties. Participants were eligible to receive Continuing Legal Education (CLE) credit for some classes offered. The Ohio Supreme Court Commission on Continuing Legal Education approved the seminar for 6.0 hours of CLE credit.

The IC's hearing officers also attended a second day of training where they discussed internal issues. The second day of the meeting involved staff presentations on medical issues, issues impacting the hearing process, a new dictation system, and a question and answer session with the Commissioners.

Industrial Commission Staff Hearing Officers receive PTD and VSSR training

Industrial Commission Staff Hearing Officers had PTD and VSSR training during November 2004.

The training began with Paul Walker, IC Legal counsel, issuing an update on changes in the PTD rule. Alan Miller, Staff Hearing Officer, presented a case law update on "Fraud and the Termination of PTD Awards."



From l to r: hearing officers David Packer, Jack Boller, Brian Smith, Mike Scholl, and Bob Cromley serve as panelists during the 2004 PTD and VSSR training.

Matt Finnegan, Staff Hearing Officer, discussed statutory PTD issues, and Tom Connor, Director of Hearing Services, spoke on several PTD issues.

Walker also issued information regarding VSSR Rule Revisions. A VSSR panel was set up to discuss

issues such as pre-hearing conferences, non-record hearings, record hearings and new evidence, resets, continuances, and settlements, rehearings, notice issues, subpoenas, and the expanded role of BWC. In closing, David Packer, Staff Hearing Officer, provided a VSSR case law update.

Supreme Court Summary ...continued from page 2

the goals and design of the workers' compensation system, that non-lawyers who appear and practice in a representative capacity before the Commission and the Bureau in conformity to Commission Resolution No. R04-1-01 are not engaged in the unauthorized practice of law.

Subsequent to the Supreme Court's decision, the Commission promulgated Resolution No. R04-1-03 which adopted the standards set forth in Resolution R04-1-01 on a permanent basis.

Reminder

When filing online appeals to a Staff Hearing Officer order through I.C.O.N., supporting evidence needs to be submitted by FAX within one business day. Please FAX all supporting evidence to 614-466-3374.