

# THE ADJUDICATOR

Issue 1 • Volume 14

Years of

## Hard Work Pays Off

Ohio Industrial Commission  
Crafts New Wage Loss Rule





# *In This Issue:*

## FEATURES

Stakeholder Input: Vital in Crafting New Wage Loss Rule	2
4125-1-01 Wage Loss Rule	3
2013 Employee of the Year Makes Big Impression in Cincinnati	12
Keeping Representatives Informed with Emergency Text Alerts	13
Decades of History Perfectly Preserved in Columbus	14

## DEPARTMENTS

<b>Doctor's Orders</b> - Empty Medical Exam Rooms Equal Missed Revenue	15
<b>Security Spotlight</b> - Numerous Security Enhancements Lead to a Safer IC	16

## UPDATES

Hearing Officer Manual Updates	17
Ohio Supreme Court Cases	19

## IC SNAPSHOTS

A Look at the Statistics that Shape Our Agency	23
--	----



# Stakeholder Input

## Vital in Crafting New Wage Loss Rule



### **Adam Gibbs, *Director of Communications***

Years of hard work by members of Ohio's workers' compensation community paid off when the new Wage Loss Rule went into effect on February 13, 2014.

"Rule 4125-1-01, the new Wage Loss rule, is a joint rule of the Industrial Commission (IC) and the Ohio Bureau of Workers' Compensation (BWC)," Chairman Tim Bainbridge said. "The rule sets forth the requirements for filing applications for wage loss compensation, which is an award for those injured workers who suffer a loss in wages after returning to employment other than their former position of employment or who cannot find employment consistent with the

disability resulting from their claim."

Work on the new Wage Loss Rule began several years ago after it was discovered that the previous rule needed to be updated to address online job searches, clarify the different standards for receiving working and non-working wage loss compensation as well as to provide exceptions to the requirement of a job search in limited situations. The Rules Advisory Committee, which consists of representatives from the Ohio Manufacturers Association, the Ohio Association of Self-Insuring Employers, the Ohio Chamber of Commerce, the Ohio AFL-CIO, injured workers' attorneys,

the Association of Claimants' Counsel, IC representatives and Ohio Bureau of Workers' Compensation attorneys, met multiple times over the span of a year to craft the new rule.

"The major changes to the Wage Loss Rule involve the rearranging of the definitions to be in alphabetical order and the addition of separate paragraphs discussing the prerequisites for receiving working and non-working wage loss compensation," Bainbridge said. "The proposed rule specifically provides exceptions to the requirement of a supplemental job search for those injured workers applying for or receiving working wage loss compensation."

Those exceptions are applicable when the injured worker returns to work in an alternative position with the same employer or begins work with another employer at the direction of the employer of record and when the injured worker

must obtain medical treatment for the allowances in the claim and the treatment cannot be obtained outside of work hours.

Other Wage Loss Rule changes include:

- Providing the criteria that the IC and BWC will evaluate when adjudicating wage loss applications and establishing the manner in which wage loss compensation will be calculated.
- Mandating that self-insuring employers adjudicate initial and subsequent requests for wage loss compensation within thirty days after receiving the requests and file copies of their decisions regarding such applications with the BWC or IC for placement in the claim file.
- Providing criteria for the consideration of online job searches.



## 4125-1-01 Wage Loss Compensation

Ohio Industrial Commission Rule Effective: February 13, 2014

### (A) Definitions

The following definitions shall apply to the adjudication of applications for wage loss compensation:

(1) "Adjudicator" means the administrator of the bureau of workers' compensation, a district hearing officer, a staff hearing officer, or the industrial commission. However, in the case of a wage loss application filed with a self-insuring employer, the self-insuring employer shall make the initial determination as provided in paragraph (H) of this rule.

(2) "Comparably paying work" means suitable employment in which the injured worker's weekly rate of pay is equal to or greater than the average weekly wage of the injured worker.

(3) "Employer of record" means the employer with whom the injured worker was employed at the time of the injury or on the date of disability in an occupational disease claim, or to the entity that is determined by the bureau of workers' compensation, or by industrial commission order, to succeed to the rights and responsibilities of the employer for workers' compensation claim purposes.

(4) "Employment" means work performed or to be performed pursuant to a contract of hire between an employee and an employer as those terms are defined in divisions (A) and (B) of section 4123.01 of the Revised Code. "Employment" also includes work performed or to be performed as self-employment.

(5) "Former position of employment" means the employment engaged in by the injured worker, including job duties, hours and rate of pay, at the time of the industrial injury or on the date of disability in an

## 4125-1-01 Wage Loss Compensation Continued

occupational disease claim allowed under Chapter 4123 of the Revised Code.

(6) "Injured worker," for purposes of wage loss compensation, means an employee as defined in division (A) of section 4121.01 and division (A)(1) of section 4123.01 of the Revised Code, who asserts a right, demand, or claim for benefits pursuant to division (B) of section 4123.56 of the Revised Code.

(7) "Injured worker's weekly wage loss" means his or her working wage loss or non-working wage loss during a calendar week or the injured worker's work week.

(8) "Non-working wage loss" means the dollar amount of the diminishment in wages sustained by an injured worker who has not returned to work because he or she has been unable to find suitable employment (as described in paragraph (C) of this rule.) However, the extent of the diminishment must be the direct result of physical and/or psychiatric restrictions caused by the impairment that is causally related to an industrial injury or occupational disease in a claim allowed under Chapter 4123 of the Revised Code.

(9) "Present earnings" means the injured worker's actual weekly earnings which are generated by gainful employment except as provided in paragraph (A)(9)(b) of this rule. It is a rebuttable presumption that earnings from paid leave provided by the employer will be included in present earnings.

(a) Earnings generated from commission sales, bonuses, gratuities, and all other forms of compensation for personal services customarily received by an injured worker in the course of his or her employment and accounted for by the injured worker to his or her employer will be included in present earnings for the purposes of computing the wage loss award. In instances where sales commission, bonuses, gratuities, or other compensation are not paid on a weekly or biweekly basis, their receipt will be apportioned over the number of weeks it is determined were required to initiate and consummate the sale or earn the bonus, gratuity, or other compensation.

(b) In the case of an injured worker engaged in self-employment, "present earnings" means gross income minus business-related expenses. For purposes of calculating present earnings, there shall be a rebuttable presumption that an injured worker engaged in self-employment has a gross income of at least fifty percent of the statewide average weekly wage or such other compensation that the bureau of workers' compensation shall impute to self-employed persons for purposes of determining premium payments. Income derived from self-employment shall be reported on at least a quarterly basis.

(10) "Restriction" means any physical and/or psychiatric limitation directly resulting from the allowed conditions in the claim.

(11) "Statewide average weekly wage" has the same meaning as set forth in division (C) of section 4123.62 of the Revised Code.

(12) "Suitable employment" means work which is within the injured worker's restrictions, and which may be performed by the injured worker subject to all physical, psychiatric, mental, and vocational limitations to which the injured worker was subject on the date of the injury, or on the date of disability in occupational disease claims.

(13) "Voluntary retirement" means voluntary termination of employment by an injured worker such that the injured worker is completely removed from the active work force based on factors that are not causally related to the allowed conditions in the claim.

(14) "Wages" means the amount upon which the injured worker's average weekly wage is calculated pursuant to section 4123.61 of the Revised Code.

(15) "Working wage loss" means the dollar amount of the diminishment in wages sustained by an injured worker who has returned to employment which is not his or her former position of employment. However, the extent of the diminishment must be the direct result of physical and/or psychiatric restriction(s) caused by the impairment that is causally related to an industrial injury or occupational disease in a claim allowed under Chapter 4123 of the Revised Code.

### **(B) Applications for Wage Loss Compensation**

Applications for wage loss compensation shall be filed on forms provided by the bureau of workers' compensation or equivalent forms. In cases involving self-insuring employers, a copy of the application shall be filed with the self-insuring employer. No payment of compensation shall be approved by the administrator, or by a self-insuring employer in a self-insured claim, unless the request is filed on the appropriate form or equivalent form that provides the required information as described in paragraph (B)(1) to (B)(4) of this rule. Upon the earlier of a determination not to pay wage loss compensation by the administrator, or by the self-insuring employer in a self-insured employer claim, or upon expiration of thirty days of the filing of the application for wage loss compensation, in the absence of payment of wage loss compensation, the application for wage loss compensation will be referred to the industrial commission.

(1) The injured worker must certify that all the information that is provided in the application is true and accurate to the best of his or her knowledge and further certify that he or she served a copy of the application, with copies of supporting documents, on the employer of record unless the employer of record is out of business.

(2) A medical report shall accompany the application. The report shall contain:

- (a) Identification of the restrictions of the injured worker;
- (b) An opinion on whether the restrictions are permanent or temporary;
- (c) When the restrictions are temporary, an opinion as to the expected duration of the restrictions. Temporary restrictions cannot be certified for a period to exceed ninety days without a new examination of the injured worker;
- (d) When the restrictions are permanent, the report must be based on an examination or treatment conducted within ninety days prior to the initial date of wage loss compensation requested on the application for wage loss compensation;
- (e) The date of the last medical examination;
- (f) The date of the report;
- (g) The name of the physician who authored the report; and
- (h) The physician's signature.

(3) Supplemental medical reports regarding the ongoing status of the medical restrictions causally related to the allowed conditions in the claim must be submitted to the bureau of workers' compensation or the self-insuring employer in self-insured claims once during every ninety day period after the filing of the initial application, if the restrictions are temporary. If the restrictions are permanent, the bureau of workers' compensation or the self-insuring employer may request a supplemental medical report once during every one hundred eighty day period subsequent to the filing of the initial application. If such a request is made, both the medical examination shall be completed and the medical report resulting from the supplemental medical examination shall be submitted to the bureau of workers' compensation, or to the self-insuring employer in self-insured claims, within ninety days of the date of the request for the supplemental medical report. The supplemental medical reports shall comply with paragraphs (B)(2)(a) to (B)(2)(c) and (B)(2)(e) to (B)(2)(h) of this rule.

Paragraph (B)(3) of this rule shall not prohibit the employer's authority to require the injured worker to be examined by a physician of the employer's choice pursuant to section 4123.651 of the Revised Code and rule 4121-3-09 of the Administrative Code.

(4) The application shall contain an employment history. The employment history shall include a description of each position which was held by the injured worker.

### **(C) Non-Working Wage Loss Compensation**

An injured worker applying for or receiving non-working wage loss compensation shall supplement his or her wage loss application with job search statements describing the search for suitable employment, in accordance with the following:

- (1) Job search statements shall be submitted for every week where non-working wage loss compensation is sought;
- (2) The completed job search statements shall be submitted with the wage loss application and/or any subsequent request for non-working wage loss compensation;
- (3) An injured worker who receives non-working wage loss compensation for periods after the filing of the application for wage loss compensation shall submit the job search statements completed pursuant to paragraphs (C)(1), (C)(4) and (C)(5) of this rule, at a minimum, every four weeks to the bureau of workers' compensation or the self-insuring employer in self-insured claims during the period when non-working wage loss compensation is requested;
- (4) Job search statements shall include the name and address of each employer contacted, the employer's telephone number, the position sought, a reasonable identification by name or position of the person contacted, the date and method of contact, for on-line job searches, a copy of the on-line posting and verification of the application submission, the result of the contact, and any other information requested by the bureau of workers' compensation job search statement; and
- (5) Job search statements shall be submitted on forms provided by the bureau of workers' compensation or equivalent forms.

### **(D) Working Wage Loss Compensation**

Except as otherwise provided in paragraphs (D)(4) and (D)(5) of this rule, an injured worker applying for or receiving working wage loss compensation shall supplement his or her wage loss application with a job search statement describing the injured worker's search for comparably paying work unless excused by the bureau of workers' compensation, the industrial commission, or the self-insuring employer in self-insured employer claims.

- (1) Unless a job search has been excused by the bureau of workers' compensation, the industrial commission, or the self-insuring employer in self-insured employer claims, the job search statements shall comply with the following requirements:
  - (a) Job search statements shall be submitted for every week where working wage loss compensation is sought;
  - (b) The completed job search statements shall be submitted with any subsequent request for working wage loss compensation;
  - (c) An injured worker who receives working wage loss compensation for periods after the filing of the application for wage loss compensation shall submit the job search statements completed pursuant to paragraph (D)(1) of this rule, at a minimum, every four weeks to the bureau of workers' compensation or the self-insuring employer in self-insured employer claims during the period when working wage loss compensation is requested;
  - (d) Job search statements shall include the name and address of each employer contacted, the employer's telephone number, the position sought, a reasonable identification by name or position of the person contacted, the date and method of contact, for on-line job searches, a copy of the on-line posting and verification of the application submission, the result of the contact, and any other information required by the bureau of workers' compensation job search statement;
- (2) Job search statements shall be submitted on forms provided by the bureau of workers' compensation or equivalent forms.
- (3) Failure to perform a job search as required by paragraph (D) of this rule will be construed as a voluntary limitation of income in accordance with paragraph (G)(2) of this rule.



## 4125-1-01 Wage Loss Compensation Continued

(4) When an injured worker qualifies for compensation for temporary total disability pursuant to division (A) of section 4123.56 of the Revised Code, working wage loss compensation may be payable, but no job search is required, when the injured worker returns to alternative employment with the same employer, or another employer at the direction of the employer of record, as provided in division (A) of section 4123.56 of the Revised Code and rule 4121-3-32 of the Administrative Code.

(5) Working wage loss compensation may be payable, but no job search is required, when the injured worker must miss work in order to obtain treatment for the allowed conditions that cannot be obtained outside of work hours. Under paragraph (D)(5) of this rule, an injured worker must file an application for wage loss compensation in addition to providing documentation that:

- (a) The treatment was medically necessary for the injured worker to perform his or her job;
- (b) The injured worker could not continue to work full time without the treatment; and
- (c) The treatment was available only during the injured worker's hours of employment.

### **(E) Factors to Consider in the Adjudication of an Application for Wage Loss Compensation**

The injured worker is responsible for and bears the burden of producing evidence regarding his or her entitlement to wage loss compensation. Unless the injured worker meets this burden, wage loss compensation shall be denied. A party who asserts, as a defense to the payment of wage loss compensation, that the injured worker has failed to meet his burden of producing evidence regarding his or her entitlement to wage loss compensation is not required to produce evidence to support that assertion. However, any party asserting a defense to the payment of wage loss compensation, for a reason other than the injured worker's failure to produce evidence, through motion, appeal, or otherwise is solely responsible for and bears the burden of producing evidence to support those defenses. If there is insufficient evidence to support a defense to the payment of wage loss compensation, that defense shall not be used as a grounds to deny such compensation. In no case shall this rule be construed as placing on the industrial commission any burden to produce evidence.

In considering an injured worker's eligibility for wage loss compensation the adjudicator shall give consideration to, and base the determinations on, evidence in the file, or presented at hearing, relating to:

- (1) The injured worker's search for suitable employment when required under the provisions of this rule.
  - (a) As a prerequisite to receiving non-working wage loss compensation, and working wage loss compensation unless excused under paragraph (D) of this rule, for any period during which such compensation is requested, the injured worker shall demonstrate that he or she has:
    - (i) Complied with paragraph (B)(2) of this rule and, if applicable, with paragraph (B)(3) of this rule;
    - (ii) Sought suitable employment with the employer of record at the onset of the first period for which wage loss compensation is requested unless the injured worker establishes that it would be futile to seek suitable employment with the employer of record. (e.g. The injured worker was discharged or the employer of record is out of business.); and
    - (iii) In the case of non-working wage loss, the injured worker must register with the Ohio department of job and family services or, if the injured worker is an out-of-state resident, must register with the equivalent of the Ohio department of job and family services in the state of residence and begin or continue a job search if no suitable employment is available with the employer of record. Proof of registration with the applicable agency is required for both in-state and out-of-state residents to demonstrate compliance with this rule.
  - (b) An injured worker may first search for suitable employment which is within his or her skills, prior employment history, and educational background. If within sixty days from the commencement of the injured worker's job search, he or she is unable to find such employment, the injured worker shall expand his or her job search to include entry level and/or unskilled employment opportunities.
  - (c) A good faith effort to search for suitable employment that is comparably paying work is required of those seeking non-working wage loss compensation pursuant to paragraph (C) of this rule and of

## 4125-1-01 Wage Loss Compensation Continued

those seeking working-wage loss compensation pursuant to paragraph (D) of this rule, who have not returned to suitable employment that is comparably paying work, except for those injured workers who are receiving public relief and are defined as work relief employees in Chapter 4127 of the Revised Code. A good faith effort necessitates the injured worker's consistent, sincere, and best attempts to obtain suitable employment that will eliminate the wage loss. In evaluating whether the injured worker has made a good faith effort, attention will be given to the evidence regarding all relevant factors including, but not limited to:

- (i) The injured worker's skills, prior employment history, and educational background. These factors may be considered a positive or negative asset to securing suitable employment;
- (ii) The number, quality (e.g., in-person, internet / e-mail, telephone, U.S. mail, with resume), and regularity of contacts made by the injured worker with prospective employers, public and private employment services;
- (iii) Except as provided in paragraph (E)(1)(c)(v) of this rule, for an injured worker seeking any amount of non-working wage loss compensation, the amount of time devoted to making prospective employer contacts during the period for which non-working wage loss compensation is sought as compared with the time spent working at the former position of employment or number of hours able to work due to the restrictions; while the adjudicator shall consider this comparison in reaching a determination of whether there was a good faith job search, the fact that an injured worker did not search for work for as many hours as were worked in the former position of employment shall not necessarily be dispositive;
- (iv) Except as provided in paragraph (E)(1)(c)(v) of this rule, for an injured worker seeking any amount of working wage loss compensation, the amount of time devoted to making prospective employer contacts during the period for which working wage loss compensation is sought as well as the number of hours spent working; and any non-claim related limitations on the injured worker's opportunity to make prospective employer contacts because of his or her working; while the adjudicator shall consider this comparison in reaching a determination of whether there was a good faith job search, the fact that the sum of the hours the injured worker spent searching for work and working is not as many hours as were worked in the former position of employment shall not necessarily be dispositive;
- (v) Where the injured worker, in the former position of employment, worked a variable number of hours per week, the adjudicator shall determine, with respect to the former position of employment, for the period of fifty-two calendar weeks preceding the injury, or in occupational disease cases, the date of disability, the minimum, maximum, and average number of hours per week the injured worker worked. If the injured worker worked less than fifty-two calendar weeks in the former position of employment, the determination shall be based on the number of weeks the injured worker actually worked. The adjudicator shall consider these determinations in relation to:
  - (a) The amount of time devoted to making prospective employer contacts during the period for which working wage loss is sought as well as the number of hours spent working, for an injured worker seeking any amount of working wage loss; and
  - (b) The amount of time devoted to making prospective employer contacts during the period for which non-working wage loss is sought as compared with the time spent working at the former position of employment, for an injured worker seeking non-working wage loss; while the adjudicator shall consider the determinations arrived at pursuant to paragraph (E)(1)(c)(v) of this rule in reaching a conclusion as to whether there was a good faith job search, the number of hours per week, in and of itself, shall not necessarily be dispositive.
- (vi) Any refusal without good cause by the injured worker to accept assistance from the bureau of workers' compensation in finding employment;
- (vii) Any refusal by the injured worker to accept the assistance, where such assistance is rendered free of charge to the injured worker, of any public or private entity or the assistance of the employer of record in finding employment;

## 4125-1-01 Wage Loss Compensation Continued

(viii) Labor market conditions including, but not limited to, the numbers and types of employers located in the geographical area surrounding the injured worker's place of residence;

(ix) The injured worker's restrictions;

(x) Any recent activity on the part of the injured worker to change his or her place of residence and the impact such a change, if made, would have on the reasonable probability of success in the search for employment;

(xi) The injured worker's economic status as it impacts on his or her ability to search for employment including, but not limited to, such things as access to public and private transportation and telephone service and other means of communications;

(xii) The self-employed injured worker's documentation of efforts undertaken on a weekly basis to produce self-employment income;

(xiii) Any part-time employment engaged in by the injured worker and whether that employment constitutes a voluntary limitation on the injured worker's present earnings;

(xiv) Whether the injured worker restricts his or her search to employment that would require him or her to work fewer hours per week than he or she worked in the former position of employment. However, the injured worker shall not be required to seek employment which would require him or her to work a greater number of hours per week than he or she worked in the former position of employment; and

(xv) Whether, as a result of the restrictions arising from the allowed conditions in the claim, the injured worker is enrolled in a rehabilitation program with the opportunities for Ohioans with disabilities agency whereby the injured worker attends an educational institution approved by the opportunities for Ohioans with disabilities agency.

### (2) The injured worker's failure to accept a good faith offer of suitable employment.

(a) Offers of employment by the employer of record will not be given consideration by the adjudicator unless they are made in writing and contain a reasonable description of the job duties, hours, and rate of pay.

(b) The adjudicator shall consider employment descriptions of any jobs offered to the injured worker by employers other than the employer of record.

(c) Although the injured worker's refusal to accept a good faith offer of suitable employment may be considered by the adjudicator as a reason for denying, reducing, or eliminating wage loss compensation, the injured worker may not be required, as a precondition to the receipt of wage loss compensation, to accept a job offer which would require the injured worker to work a greater number of hours per week than the former position of employment except as provided in paragraph (E)(2)(d) of this rule. The adjudicator may consider an employer's requirement that the injured worker work different shifts or relocate as factors in determining whether the injured worker failed to accept a good faith offer of suitable employment.

(d) Where the injured worker, in the former position of employment, worked a variable number of hours per week and the injured worker is offered a job which would require the injured worker to work a variable number of hours per week, the offer of variable hour employment shall not be considered an offer of unsuitable employment solely because the minimum or maximum number of hours per week to be worked by the injured worker in the position offered is insubstantially greater or less than the minimum or maximum number of hours per week which the injured worker worked in the former position of employment. In determining whether, pursuant to this paragraph, an offer of employment is suitable, the adjudicator shall:

(i) Determine, for the period of fifty-two calendar weeks preceding the date of the industrial injury or, in occupational disease cases, the date of disability, the maximum, minimum, and average number of hours per week which the injured worker worked in the former position of employment. If the

## 4125-1-01 Wage Loss Compensation Continued

injured worker worked less than fifty-two calendar weeks in the former position of employment, the determination shall be based on the number of weeks the injured worker actually worked; and

(ii) Compare the maximum and minimum number of hours per week which the injured worker could be required to work in the position of employment offered to the injured worker to the determinations made in paragraph (E)(2)(d)(i) of this rule to assist in determining whether the offer is one of suitable employment.

(3) Other actions of the injured worker which result in a wage loss not causally related to the allowed conditions in the claim, including, but not limited to, the voluntary retirement of the injured worker, provided that where an injured worker has secured employment which will likely extend beyond the short term and which will likely become comparably paying work and/or will likely provide other employment-related benefits, the injured worker's lack of a search for comparably paying work may not bar his or her receipt of wage loss compensation but is a factor that may be considered in a broader based analysis as to whether the injured worker has voluntarily limited his or her income.

### **(F) Orders Issued by the Industrial Commission and its Hearing Officers**

The industrial commission and its hearing officers in issuing orders granting or denying wage loss compensation shall comply with the requirements of division (B) of section 4121.36 of the Revised Code. To comply with division (B) of said section, the commission and/or hearing officer shall recite in those orders that they have considered and weighed the evidence, as required by paragraph (E) of this rule.

(1) In the event of a denial of compensation for a week or period of weeks for which an application has been made, the commission or hearing officer shall recite in the order that the injured worker has not met his or her burden of proving compliance with this rule for that week or period of weeks and shall state the evidence relied upon to support the denial of wage loss for that week or period of weeks.

(2) If the commission or hearing officer grants any amount of wage loss compensation for a week or period of weeks for which an application has been made, the commission or hearing officer must find and recite in the order that:

(a) The injured worker's present earnings are less than the injured worker's wages;

(b) The difference between the injured worker's wages and present earnings is the result of medical restrictions that are causally related to an industrial injury or an occupational disease allowed in a claim which was filed under Chapter 4123 of the Revised Code and in which wage loss is requested;

(c) The injured worker has made a good faith effort to search for suitable employment which is comparably paying work, when required by paragraph (C) or (D) of this rule, but has not returned to suitable employment which is comparably paying work; and

(d) The injured worker has otherwise complied with the requirements of this rule.

### **(G) Computation of Wage Loss**

(1) Unless otherwise provided in paragraphs (G)(2) and (I)(2) of this rule, diminishment of wages shall be calculated based on the:

(a) Injured worker's average weekly wage at the time of the injury or at the time of the disability due to occupational disease in accordance with the provisions of section 4123.61 of the Revised Code; and

(b) The injured worker's present earnings as defined in paragraph (A)(9) of this rule.

(2) Voluntary limitations of income

(a) The wage loss compensation to be paid an injured worker who voluntarily fails to accept a good faith offer of suitable employment shall be calculated as sixty-six and two-thirds per cent of the difference between the injured worker's average weekly wage in the former position of employment and the weekly wage the injured worker would have earned in the employment he or she refused to accept.



## 4125-1-01 Wage Loss Compensation Continued

(b) If the adjudicator finds that the injured worker has returned to employment but has voluntarily limited the number of hours which he or she is working, or has accepted a job which does not constitute comparably paying work, and that the injured worker is nonetheless entitled to wage loss compensation, the adjudicator, for each week of wage loss compensation requested by the injured worker, shall determine: the number of hours worked by the injured worker in the employment position to which he or she has returned, and the hourly wage earned by the injured worker in the employment position to which he or she has returned. In such a case, the adjudicator shall order wage loss compensation to be paid at a rate of sixty-six and two-thirds per cent of the difference between: the injured worker's average weekly wage in the claim and the weekly wage the injured worker would have earned had the injured worker not voluntarily limited his or her hours.

(c) Where the adjudicator finds that the injured worker has returned to employment and has voluntarily limited the number of hours which he is working, and that the injured worker is nonetheless entitled to wage loss compensation, but that paragraphs (G)(2)(a) and (G)(2)(b) of this rule is not directly applicable, the adjudicator shall have the discretion to establish the manner to be utilized in the calculation of wage loss compensation that is not unreasonable, unconscionable or arbitrary.

(3) If an injured worker applies for wage loss compensation for a period during which he received amounts from a wage replacement program fully funded by the employer, such amounts shall be considered as present earnings for purposes of wage loss calculation.

(4) An injured worker's wage loss compensation shall not be reduced by any amounts the injured worker receives from unemployment compensation, social security disability benefits, or public or private retirement plans. The wage loss compensation of an injured worker who is receiving public relief shall not be reduced by any monies received by the injured worker from work relief.

(5) If any wage loss compensation has been paid for the same period or periods for which temporary non-occupational accident and sickness insurance is or has been paid pursuant to an insurance policy or program to which the employer has made the entire contribution or payment for providing insurance or under a non-occupational accident and sickness program fully funded by the employer, wage loss compensation paid for the period or periods shall be paid only to the extent by which the payment or payments exceeds the amount of the non-occupational insurance or program paid or payable. Offset of the compensation shall be made only upon the prior order of the bureau or industrial commission or agreement of the claimant.

### **(H) Where the Employer of Record is a Self-Insuring Employer it Shall:**

(1) Adjudicate the initial application for wage loss compensation and inform the injured worker of its decision no later than thirty days after a request for wage loss compensation is received;

(2) Adjudicate all issues which arise with respect to the ongoing entitlement to wage loss compensation and inform the injured worker of its decision no later than thirty days after the issue arises; and

(3) Ensure that a copy of any decision described in paragraphs (H)(1) and (H)(2) of this rule is filed with the bureau of workers' compensation or the industrial commission for placement in the claim file.

### **(I) Prospective Application**

(1) This rule shall apply to the adjudication of all applications for wage loss compensation filed on or after the effective date of this rule.

(2) Notwithstanding paragraph (I)(1) of this rule, if an injured worker files an application for wage loss compensation in a claim in which the injury occurred or the date of disability arose prior to May 15, 1997, the wage loss compensation paid shall be calculated based on the greater of the full weekly wage or the average weekly wage.

# 2013 Employee of the Year Makes A

## Big Impression in Cincinnati

*Adam Gibbs, Director of Communications*



*Commissioner Jodie Taylor, Chairman Tim Bainbridge, Carma Callender, Rachael Rentas-Black, Shelly Ahr and Melissa Westrich*

She has only been in the Cincinnati Regional Office for a little over two years, but that didn't stop Cincinnati Regional Manager Carma Callender from winning the agency's highest honor.

On April 28, Callender was named the Ohio Industrial Commission's (IC) 2013 Employee of the Year.

"I'm truly honored and humbled to receive this award as I am aware of the caliber of the employees at the Ohio Industrial Commission," Callender said.

Callender was awarded the Employee of the Year award during an office visit from Chairman Tim Bainbridge, Commissioner Jodie Taylor, Director of Legislative Services Jacob Bell and Chief Legal Counsel Rachael Rentas-Black.

In March 2013, Callender was named Employee of the Month, which made her eligible to win the 2013 Employee of the Year award.

At that time, her Employee of the Month nominator wrote:

"Since Carma came to the Cincinnati office, the morale of the office has improved significantly," her nomination read. "She is a supervisor who is knowledgeable about workers' compensation

and the Industrial Commission's policies and procedures."

To win the award, Callender was selected from a group of outstanding Employee of the Month winners.

Those 2013 EOM winners were:

Aisha Dunning – Program Administrator  
Alan Miller – Staff Hearing Officer  
Carol Pappas – Staff Hearing Officer  
Chuck Anderson – Staff Hearing Officer  
Gary Braunn – Software Development Specialist  
Joe Kemerley – Management Analyst  
John Gibbons – District Hearing Officer  
Julie Duganne – Claims Examiner  
Mike Feeney – Director of Operations Support  
Patricia Haines – Word Processing Specialist  
Rebecca Kraemer – Claims Examiner

For winning the EOY award, Callender was rewarded with an engraved plaque, personalized notepads and a certificate for two days off.

A native of Perrysburg, Ohio, Callender earned her bachelor's degree from Bowling Green State University where she majored in Spanish and multicultural diversity. She earned her law degree from Capital University in Columbus. Before she began working for the IC, she worked for a managed care organization and a third party administrator in Columbus. She later became a district hearing officer in Mansfield District Office before transferring to the Toledo Regional Office. Callender began managing the Cincinnati Regional Office in January 2012.

# Keeping Representatives Informed with Emergency Text Alerts

Adam Gibbs, *Director of Communications*

Sometimes the best advertising is a big snowstorm and a little word-of-mouth.

At the beginning of the year, 46 workers'

compensation representatives signed up to receive emergency text alerts from the Ohio Industrial Commission (IC) that would announce potential office closings and hearing cancellations.

After the IC announced via text message that hearings in Toledo and Lima were cancelled on January 6 and 7 due to a large snowstorm and subzero temperatures, 48 additional representatives decided to sign up for the text alert program.

"The emergency text alert initiative increased in popularity rather rapidly once representatives saw the benefit of it firsthand," Chairman Tim Bainbridge said. "We developed the program as another tool to keep our customers informed when hearings need to be cancelled due to an extreme weather event."

So far, 523 representatives have enrolled in the emergency text-messaging program that launched on December 27, 2013.

Representatives who are interested in receiving the text alerts can visit the "Texting Contacts" section of the Representative Profile page on ICON to sign up for the service. Representatives can submit multiple phone numbers on that page.

In the event of an emergency involving an Industrial Commission office, these contacts will

be sent a text message alert that offers further details. If an employee is no longer employed at a representative's organization, representatives can remove the employee's phone number from the list or the former employee can reply "STOP" to the text message they receive to sign out of the service.

"Message data rates may apply due to an individual's phone plan which may set a limit on their text messages," Information Technology Director Nilima Sinha said.

"Representatives should make sure all contacts listed are aware of this."

**"We developed the program as another tool to keep our customers informed."**

# Decades of IC History Perfectly Preserved in Columbus

*Adam Gibbs, Director of Communications*



From the first Ohio Industrial Commission Annual Report to a photo of the 1911 signing of the legislation that created Ohio's

workers' compensation

system, the artifacts tell the story of the Ohio Industrial Commission from its inception.

Now the historical pieces have a new home in a display case in the hearing room lobby of the William Green Building.

"The Ohio Industrial Commission has been serving the public for over 100 years, so many of these pieces have been around since before World War I," Chairman Tim Bainbridge said.

"It is important to preserve our history and our legacy because it demonstrates how far this agency has come over the past ten decades."

In order to preserve the delicate items, the Operations Support Department teamed up with the Communications Department. Director of Operations Support Mike Feeney developed the idea for a new display case and Facilities Planning Project Manager Tim Soards designed the display case and had it custom-made by J.E. Morris.

"In March, our Operations Support Department asked me to assist in the presentation of IC artifacts in a new display case," Layout Design Specialist Lindsay Boyd said. "After a plan was developed, I traveled with Tim Soards to purchase display items such as frames, easels and a shadowbox."

Boyd spent a week cleaning the dust-covered relics and then created a way to present the items without sacrificing their preservation. She designed a layout strategy for the case and created placards so that visitors could read each item's description.

The display includes a collection of workers' compensation cases from the 1920s and 1940s, the first IC Annual Report and pictures of the 1911 Ohio Workmen's Compensation Act signing.

There are also photos of the first workers' compensation check issued on April 28, 1913 to Lemuel C. Fridley along with an ancient eye examination kit that was used to examine injured workers.

"For the eye kit, I created a stand for it to sit in that not only holds the fragile piece

together, but also raises and tilts it for people to view it better," Boyd said.

Chairman Tim Bainbridge said people who regularly attend hearings in Columbus have taken an interest in the historical display.

"The presentation really looks good and people have noticed it," he said. "I think their curiosity demonstrates that members of the workers' compensation community are interested in our story."

**"It is important to preserve our history and our legacy."**





# Empty Medical Exam Rooms Equal Missed Revenue

Terrence B. Welsh, M.D., *Chief Medical Advisor*

How can Ohio's health care organizations, universities, and medical schools perform a valuable public service while providing a new revenue stream?

By performing independent medical examinations for the Ohio Industrial Commission!

Since 1913, Ohio's workers' compensation system has provided injured workers with medical care and financial compensation for work-related injuries, diseases and deaths. As part of our dedication to providing injured workers with accurate and compassionate medical exams, the Ohio Industrial Commission (IC) is dedicated to recruiting experienced and talented medical examiners to conduct independent medical exams.

This is the reason we are currently recruiting AMA Guide 5th Edition trained physicians throughout Ohio to perform independent medical exams on injured workers. It is a win-win situation because Ohio's injured workers receive top-notch medical exams from experienced doctors and providers generate new revenue as a result.

There are many reasons that PTD examinations would be a great addition to your clinical practice.

We offer:

- Competitive, tiered compensation based on the complexity of the examination
- Specialty-specific claim assignment
- Comprehensive training provided by IC Medical Services

- Flexible, physician-direct examination scheduling
- Our Chief Medical Advisor and Director of Medical Services are always available for consultation on complex medical-legal issues
- Electronic files are accessible at all of your practice locations

Reimbursement rates are according to the BWC fee schedule.

Ohio Industrial Commission Fee Schedule for PTD Independent Medical Evaluations Services Fees	
Evaluation, one body part or organ system	\$500
Evaluation, two or three body parts or organ systems	\$600
Evaluation, mental and behavioral health	\$600
Evaluation, four or more body parts or organ systems	\$700

Evaluation fees include: examination, document review and the report.

When an injured worker fails to keep an appointment scheduled in the examiner's office, a \$100 "no show" fee may be billed. A \$100 fee may also be billed if an injured worker cancels an appointment for an examination in an IC office and no substitute examination is scheduled.

For further details, go to our website at [IC.Ohio.gov](http://IC.Ohio.gov). Click "Medical Specialist Resources."

If you are interested, please forward your CV directly to me at: [twelsh@ic.state.oh.us](mailto:twelsh@ic.state.oh.us). Also, feel free to contact me with any questions.

DOCTOR'S ORDERS



## Numerous Security Enhancements Lead to a Safer IC

**Michael Tanner**, *Director of Security Services*

Over the past three years, the Ohio Industrial Commission (IC) has made tremendous strides in improving the safety and security of all 12 IC offices throughout the state.

From May 2013 through May 2014, I personally made over 50 security operation visits to each IC office. These visits were made for the purposes of unannounced fire evacuation drills, facility security checks, active shooter trainings or to attend "high risk" injured worker hearings.

During these office visits, I also inspect the facilities for security breaches that may affect the safety of our customers. Any security breach, such as doors being propped open or insufficient visitor check-in procedures, is something the IC takes very seriously.

A new security initiative that has greatly improved IC hearing safety is the establishment of a database for customers who have indicated that they may be a potential security threat. Once an injured worker, employer or one of their representatives have been identified as a potential threat, I, along with my staff, updates the database to include the

new security risk. With this information, hearing officers throughout the state are notified of the security risk's past behavior and risk level prior to the hearing date.

In addition to the security risk database, the IC has installed surveillance cameras in the public area of each IC office. Along with their deterrent effect, surveillance cameras add to the overall security of agency operations by capturing the activities that take place inside and outside IC facilities.

Lastly, please remember if you have a hearing where you believe that security should be alerted due to the parties involved, to contact me 24 hours in advance. Advising IC personnel on the day of the hearing does not provide me with the opportunity to enhance our security measures should the need arise.

Your safety is my first and foremost priority. As a visitor to IC offices, consider yourself the eyes and ears of our security operation. If you ever see something at an IC office that may pose a security risk or if you have any security-related concerns, I can be personally reached at 614-387-3867 or [mtanner@ic.ohio.gov](mailto:mtanner@ic.ohio.gov).



# HEARING OFFICER MANUAL UPDATES

## Guidelines for Permanent Total Disability Tentative Grant Orders Memo G5, April 4, 2014

Permanent total disability tentative grant orders shall be issued when:

- (A) The Industrial Commission specialist states that based upon the allowed conditions the injured worker is unable to perform any sustained remunerative employment; and
- (B) The injured worker's medical evidence states that based upon the allowed conditions the injured worker is unable to perform any sustained remunerative employment; and
- (C) If it exists, the employer's medical evidence states that the injured worker is unable to perform any sustained remunerative employment based upon the allowed conditions; and
- (D) If it exists and addresses the issue of permanent total impairment, the Bureau of Workers' Compensation's medical evidence states that the injured worker is unable to return to sustained remunerative employment based upon the allowed conditions.

Remember, the permanent total tentative order process for "GRANTS" is for those claims where the granting of the application is medically obvious.

## Staff Hearing Officers Review of Settlements Memo O3, April 4, 2014

ORC 4123.65(D) requires that an Industrial Commission staff hearing officer review settlements and determine whether the "settlement agreement is or is not a gross miscarriage of justice."

A review of the following documentation shall be deemed sufficient to discharge this responsibility:

- 1) A settlement agreement signed by all necessary parties and/or their attorney, which may include a monetary allocation with a consideration of the injured worker's future medical needs. The signature of a non-attorney representative is not sufficient or appropriate as that action would constitute the unauthorized practice of law. An e-signature is permitted so long as the legal requirements of Ohio Admin. Code 4125-1-02 are met. An e-mail is not sufficient to constitute an e-signature. Also, the thirty-day period provided to the parties to withdraw from the settlement agreement as described in ORC 4123.65(C) cannot be waived by the parties.
- 2) In state fund claims, a BWC approval order setting forth the terms of the final agreement of all necessary parties, including the amount allocated to each claim. In addition, the settlement documentation must also provide information which justifies the reasoning for the settlement as required by ORC 4123.65(A). A separate order need not be issued in every claim so long as all parties to each settled claim are provided notice, in a BWC approval order, as to the settlement value of each claim being settled. In addition, if the amount of the overall settlement set forth in the BWC approval order matches the amount contained in the settlement agreement, it is not necessary for the BWC to obtain another signature of the parties.

The staff hearing officer review shall include the documentation referenced above, and such additional



# HEARING OFFICER MANUAL UPDATES

information as may be necessary to determine the basis for the settlement amount. Generally speaking, review of documentation relied on to support the BWC approval order will satisfy this requirement.

If the staff hearing officer determines that the amount and the terms of the settlement are not clearly unfair, the staff hearing officer should indicate that the settlement agreement was reviewed. If the staff hearing officer does not have sufficient information, as defined in this policy, to review the settlement or determines that there is some other type of procedural defect, the parties should be given the opportunity to cure any defect prior to the SHO completing the review of the settlement. In such event, the IC shall notify the parties what additional information is needed and/or what defect must be addressed, and provide the parties 10 days to submit the necessary information and/or cure the defect. However, in no situation shall the parties be granted additional time that would result in the IC losing jurisdiction over the settlement. If necessary additional information is not received or procedural defects are not cured in the required timeframe, or the staff hearing officer determines that the settlement is "clearly unfair," an order shall be issued disapproving the settlement within the thirty-day "cooling off" period.

## Use of Audiovisual Evidence Memo R7, April 4, 2014

The use of audiovisual evidence is permitted in Industrial Commission hearings.

A written synopsis of the audiovisual evidence shall accompany the audiovisual evidence that is filed with the Commission. At the time that a party files audiovisual evidence with the Commission, said party shall provide a copy of the synopsis to the opposing party except in cases where the opposing party is represented. In the latter cases, the party shall provide a copy of the synopsis to the representative of the opposing party. A party that intends to present audiovisual evidence at hearing must request additional time, in writing, if additional time will be required. The request for additional time must accompany the appeal or motion that is creating the issue at hearing, or be filed when it is evident that the contested matter will come to hearing.

The Industrial Commission will make every effort to ensure that audiovisual evidence that is filed will be made available as a document in ICON and be viewable at hearing on the hearing officer's computer. It is the obligation of the party filing audiovisual evidence to ensure that the Industrial Commission has been able to format the evidence for viewing. If the Industrial Commission is unable to make the audiovisual evidence available, it is the obligation of the party offering audiovisual evidence to bring to the hearing the equipment required for presentation of the audiovisual evidence. It is also the obligation of the party that introduces such audiovisual evidence to submit a complete copy of the evidence for the file.

The date and time of the recording of the audiovisual evidence should be incorporated into the audiovisual medium that will be clear during the presentation of the audiovisual evidence.

If a Hearing Officer finds that a party who intends to submit audiovisual evidence has not complied with this policy, the Hearing Officer shall continue the hearing at the request of the opposing party and order the submitting party to comply with Industrial Commission policy. Any time a Hearing Officer encounters a situation where it appears a hearing will disrupt a docket due to length or otherwise, the Hearing Officer shall take available steps to minimize the disruption. Such steps may include moving the hearing to the end of the hour or the end of a docket. The Hearing Officer may also seek assistance of other Hearing Officers not scheduled for hearings that day.





## SUPREME COURT CASE UPDATES

State ex rel. Robinson v. Industrial Commission, 2014-Ohio-546, 134 Ohio St.3d 471  
February 20, 2014

**The Industrial Commission did not abuse its discretion when it found that an Injured Worker voluntarily abandoned her former position of employment by violating a written work rule where the Injured Worker's duties as a LPN were identified in the employee handbook and her job description.**

Issue: Whether the Industrial Commission abused its discretion when it found that an Injured Worker voluntarily abandoned her former position of employment when her employer discharged her for violating a written work rule that clearly defined the prohibited conduct for which the Injured Worker was terminated.

Holding: The Supreme Court of Ohio affirmed the decision of the Tenth District Court of Appeals. The Ohio Supreme Court rejected the Injured Worker's contention that Louisiana-Pacific was not satisfied in this matter because the employer could not identify a specific written work rule that clearly defined the prohibited conduct for which she was terminated. The Court held that the Injured Worker's job description and employee handbook sufficiently identified the employer's expectations and put the Injured Worker on notice that her failure to satisfy those expectations could result in termination.

Case Summary: Injured Worker was hired by the employer as a licensed practical nurse in 1996. At the time of hire, the employer provided her a job description and, thereafter, updated its employee handbook. Her job description specifically indicated that she was to perform her nursing duties in accordance with federal, state and local standards and the employer's guidelines.

Throughout the course of her employment, Injured Worker was disciplined several times. On January 18, 2008 and February 29, 2008, the employer wrote the Injured Worker up for violating work rules. On the February discipline form, the Injured Worker acknowledged that she had been warned that future violations would result in discharge.

On April 10, 2008, the Injured Worker suffered an industrial injury. She was treated and released to light-duty work. On April 11, 2008, a state inspector reported to the employer that the Injured Worker had failed to report a dietary change and to administer a tube feed at the proper rate. Both failures were violations of the employer's Rules of Procedure. Injured Worker was not scheduled to work on April 15th or 16th. On April 16, 2008, the director of nursing prepared Injured Worker's termination paperwork and called to request that she come into the facility for a meeting. The Injured Worker did not return the employer's calls until April 18, 2008, but refused to come into her place of employment for the meeting. Subsequently, on April 30, 2008, the employer informed the Injured Worker of the April 16, 2008 termination by letter.

Prior to receiving the termination letter, on April 17, 2008, Injured Worker sought treatment. On that date, she reported that while attending physical therapy her back pain increased. Despite her claim, the nurse-practitioner released her to work with restrictions. However, on April 21, 2008, a physician certified her as temporarily and totally disabled from all employment, including light duty, beginning on the date of the injury.

The BWC granted TTD beginning on April 16, 2008. On appeal, a DHO vacated the BWC and denied the TTD, reasoning that Injured Worker had voluntarily abandoned her employment. An SHO affirmed the DHO decision, stating that Injured Worker's termination was voluntary. The SHO rejected the Injured Worker's argument that the timing of her termination was a pretext in order to avoid paying TTDC. The SHO found that each rule or policy infraction was, in fact, in writing or that her training as an LPN would have put Injured Worker on notice of her duties. The Injured Worker then filed for mandamus, arguing that Louisiana-Pacific was not applicable in



## SUPREME COURT CASE UPDATES

this case because the employer could not identify a specific written work rule that clearly defined the prohibited conduct for which she was fired and, thus, Injured Worker's discharge was a pretext.

The Court of Appeals rejected the Injured Worker's argument. The court noted that Louisiana-Pacific's requirement of a written work rule exists so that employees are on notice that their action or inaction can result in termination. The Court then determined that the Injured Worker's job description contained specific job duties, which indicated that she must carry out those job duties in accordance with applicable federal, state and local standards. The court further noted that the employee handbook provided notice of discipline, including discharge, for violation of such procedures. The court also rejected the argument that her termination was pretextual, finding that there was evidence on file that the employer terminated her and attempted to inform her of that termination prior to any doctor certifying her as temporarily and totally disabled.

The Supreme Court affirmed this judgment, stating that the position description and employee handbook were sufficient to put the Injured Worker on notice. Therefore, the Industrial Commission did not abuse its discretion when it found that the Injured Worker had voluntarily abandoned her employment, which made her ineligible for TTDC benefits.

**State ex rel. Smith v. Indus. Comm., 2014-Ohio-513, 138 Ohio St.3d 312,  
reconsideration denied, 2014-Ohio-1674, 138 Ohio St.3d 1471  
February 18, 2014**

**The Industrial Commission did not abuse its discretion when it denied compensation for loss of vision and hearing where there was no evidence demonstrating an actual loss of vision resulting from an injury to the eyes and an actual loss of hearing secondary to an injury to the ears.**

Issue: Whether an Injured Worker, who loses his sight and hearing secondary to a brain injury, is eligible to receive compensation for loss of vision and hearing?

Holding: The Supreme Court held that R.C. 4123.57 does not permit an award of compensation for loss of vision or hearing when the inability to see or hear results from a lack of brain-stem functioning. The Court reasoned that R.C. 4123.57 provides compensation for loss of sight only where an Injured Worker demonstrates that a loss of vision results from injury to the eye and that a loss of hearing results from injury to the ears. As such, the Court concluded the Commission did not abuse its discretion when it denied the Injured Worker's request for compensation for loss of vision and hearing resulting from a brain-stem injury.

Case Summary: On December 28, 1995, the Injured Worker sustained an injury while pushing a heavy cart at work. The claim was initially allowed for "bilateral inguinal hernia." The Injured Worker underwent surgery to repair the hernia in 1996. During the post-operative period, the Injured Worker suffered cardiopulmonary arrest, which resulted in an anoxic brain injury. Thereafter, the claim was additionally allowed for "anoxic brain damage." By 2004, medical reports documented that the Injured Worker was unable to stand or walk and that he was confined to a wheelchair or bed at all times and noted that the Injured Worker had a total loss of function of multiple parts of his body. The Commission eventually awarded the Injured Worker compensation for the loss of use of his bilateral arms and legs.



## SUPREME COURT CASE UPDATES

The Injured Worker subsequently filed a C92 application and the Bureau of Workers' Compensation scheduled Dr. Ortega to examine the Injured Worker regarding the application. In a report dated March 26, 2009, Dr. Ortega documented contractures and gross tremors of all extremities and a fixed gaze, but noted the Injured Worker had pupillary reaction to bright light. The physician concluded the Injured Worker had suffered 76% permanent partial whole person impairment as a result of the allowances in the claim.

In June 2009, the Injured Worker filed for an award for loss of use of bilateral eyes and ears, based on reports of Dr. Hess, which the BWC construed as an additional allowance request. The BWC requested a file review from Dr. Ortega to opine whether the claim should be additionally allowed for the conditions of loss of eyes and loss of ears. In a July 23, 2009 report, Dr. Ortega indicated that these conditions were related to the claim on a flow-through basis, but the claim need not be amended to include them since the conditions were included in the diagnosis of anoxic brain damage.

Thereafter, the BWC requested an addendum report from Dr. Ortega that addressed whether the Injured Worker had suffered the loss of use of his eyes and ears. In a report dated August 26, 2009, Dr. Ortega opined that there was no reliable physical test or examination that could be conducted to determine if the Injured Worker suffered definite vision and hearing loss as a result of his brain injury. The physician noted that, during his March 26, 2009 examination, he elicited a pupillary response to bright light, indicating intact optic nerves. However, Dr. Ortega noted that the Injured Worker did not respond to any testing of the visual or hearing senses because of the brain damage. The BWC referred the motion for loss of use of sight and hearing to the Commission for hearing.

On November 13, 2009, a DHO denied the motion for scheduled loss of use of the left and right ears, finding that the Injured Worker had not provided medical evidence establishing this loss. The DHO determined that the Injured Worker had not sustained the loss of use of his vision, relying upon Dr. Ortega's reports dated March 26, 2009 and August 26, 2009. On appeal, an SHO affirmed the DHO's order, finding that the Injured Worker's request was not supported by medical evidence documenting a loss of hearing or vision. The SHO, relying upon Dr. Ortega's August 26, 2009 report, noted that the Injured Worker's request was not supported by any objective testing. The Injured Worker filed an appeal and, in an order mailed on January 27, 2010, an SHO, on behalf of the Commission, refused that appeal. Thereafter, the Injured Worker filed an action in mandamus.

The magistrate recommended that the Court of Appeals deny the writ because the Commission had not abused its discretion in denying the loss of use award. Specifically, the magistrate determined that the Injured Worker was not able to satisfy the requirements of R.C. 4123.57(B) relating to vision loss. The magistrate noted that, to qualify for a loss of vision award, Injured Worker must present proof that he has sustained more than a 25 percent loss of uncorrected vision. The magistrate reasoned that, since there was no way to test the Injured Worker's vision, there was also no way to determine what loss, if any, he may have sustained. Therefore, the magistrate concluded that the Commission did not abuse its discretion. Similarly, the magistrate determined that there was no medical evidence in the record that demonstrated that the Injured Worker's ears were impaired. The magistrate explained that the evidence on file established that any auditory sensation which entered the ears could not reach the brain because of the anoxic brain damage, not that the ears were malfunctioning.

The Injured Worker argued that, since the Commission awarded a loss of use of his bilateral arms and legs based on his anoxic brain condition, likewise, he was entitled to loss of use awards for his eyes and ears. In rejecting the argument, the magistrate emphasized that the standard for loss of vision and hearing is not the same as for loss of use of arms or legs. In addition, the magistrate rejected the Injured Worker's argument that it was inconceivable that a man in a vegetative state could be denied an award for loss of vision and hearing simply because his loss cannot be established by medical or clinical findings. The magistrate reasoned that the medical evidence on file demonstrated a loss of response to stimuli not a loss of either vision or hearing. The magistrate



## SUPREME COURT CASE UPDATES

concluded that the evidence on file only revealed that the anoxic brain damage interfered with signals from the eyes and ears, but there was no evidence to support that the eyes and ears themselves were not functioning.

The Court of Appeals rejected the Injured Worker's argument that the standard articulated by the Supreme Court in *Alcoa* and *Gassman* should apply. However, the Court of Appeals conceded that the proof necessary to demonstrate a total loss of vision or hearing under R.C. 4123.57(B) is somewhat flexible, citing *Autozone, Inc.*, *Kincaid*, *Sheller-Globe Corp.*, *Lockheed*, and *Kingry* as examples. The court noted that, in these decisions, the Supreme Court and the Court of Appeals held that the Commission did not abuse its discretion by granting a scheduled loss award for the total loss of vision or hearing where the medical evidence considered the practical application of clinical or other data showing a loss of 100 percent or less. In other words, the courts have held the standard does not require a showing of 100 percent loss to be compensable.

The Court of Appeals concluded that Dr. Hess' report constituted "some evidence" of a total loss of vision and hearing. Since the SHO rejected Dr. Hess' report as evidence, the court concluded a new adjudication was necessary. Moreover, the Court of Appeals determined that the report and addendum of Dr. Ortega did not constitute "some evidence" on which the SHO could rely because Dr. Ortega did not apply the correct legal standard. Reasoning that Dr. Ortega might have reached a different conclusion if he had applied the appropriate standard, the court ordered that the claim be returned to the Commission for clarification of Dr. Ortega's report and a new adjudication. The employer's appeal to the Supreme Court followed.



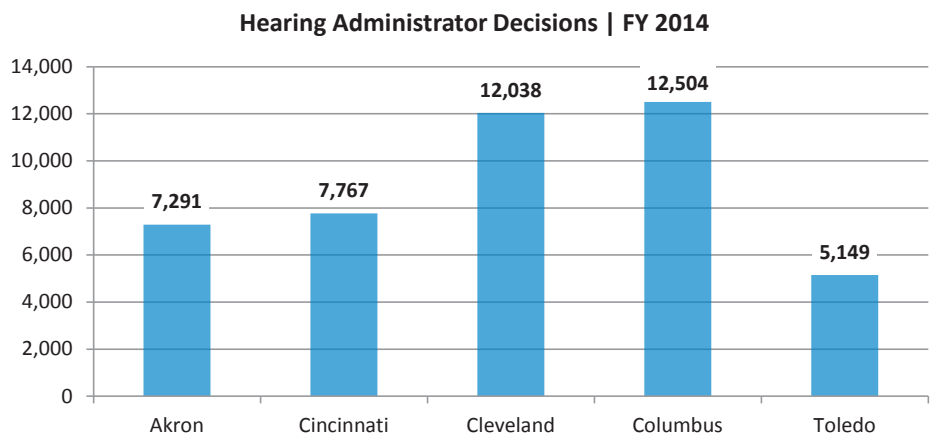
## IC SNAPSHOTS

### A Look at the Statistics that Shape Our Agency

The Ohio Industrial Commission recently released its Annual Report for Fiscal Year (FY) 2014. Below are a few of the statistical highlights from the previous fiscal year.

#### Hearing Administrator Decisions

Hearing administrators perform a variety of functions that facilitate the adjudication process. In addition to processing approximately 24,374 continuance requests during FY 2014, they also processed 15,168 requests to withdraw motions or appeals and cancel scheduled hearings. Additionally, hearing administrators processed requests for extensions related to PTD filings and requests regarding other miscellaneous issues. Statewide, hearing administrators made decisions on, or referred to hearing, approximately 44,749 issues during FY 2014. Regional volumes of Hearing Administrator activity are presented in this graph.



#### Hearings Held by Employer Group

In FY 2014, hearings were conducted for approximately 35,513 different employers. Hearings for claims of private state-funded employers accounted for 56 percent of all hearings while self-insuring employers accounted for 27 percent; public county employers accounted for 13 percent; and public state employers' claims accounted for 4 percent. The volume of claims heard reflects actual employee workload production as each claim must be reviewed and processed at multiple levels to perfect the adjudication process. Given that multiple claims may be scheduled for presentation at one hearing, the hearings held figure can be slightly lower. For example, one PTD hearing may consist of three claims filed by an Injured Worker. Reporting would reflect these totals accordingly. Rates are assessed based on the lower hearings held figure.

Employer Type	State Fund	Self-Insured	Pol. Sub (County)	State	Total
Hearings Held	75,557	36,397	17,457	6,080	135,491
Claims Heard*	75,986	36,484	17,457	6,274	136,201

\* Claims heard inclusive of PT Heard-With claims





# IC SNAPSHOTS

## Hearing Officer Performance

Hearing timeframe performance mandates and benchmarks have been set forth in House Bill 107 and House Bill 413 for the DHO, SHO, and Commission hearing venues. On average, all IC offices and venues performed within the statutory limits set forth that require a claim to be heard within 45 days of a motion or appeal filing. The overall performance benchmarks for Filing to Mailing are set at 52 days for each hearing venue. This performance measure is based on the combination of the two statutory periods Filing to Hearing and Hearing to Mailing (45 + 7).

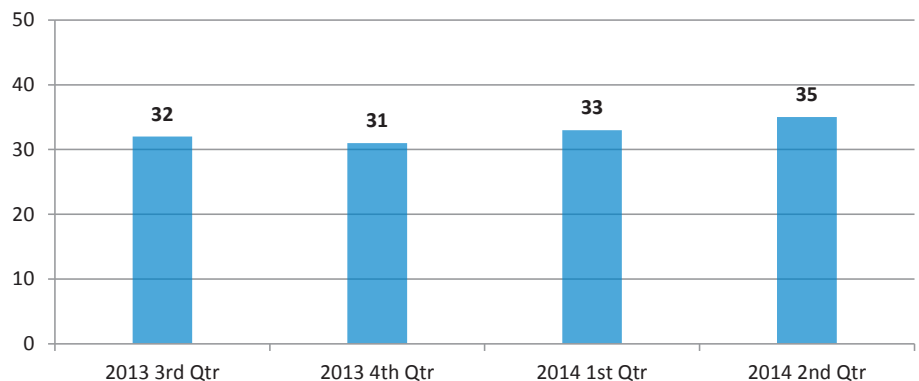
## DHO Performance

District hearing officers (DHO) conduct hearings on two formal docket types – Allowance (primarily injury allowance, compensation, and treatment issues) and C-92 (permanent partial disability issues). Only allowance dockets fall

under time frame requirements outlined in House Bill 107.

DHOs heard a total of 75,056 allowance docket claims during FY 2014. Of those, 62,032 qualified for inclusion in time studies. On average, the DHO process was completed within 33 days during FY 2014.

DHO Allowance Filing to Mailing Performance | FY 2014

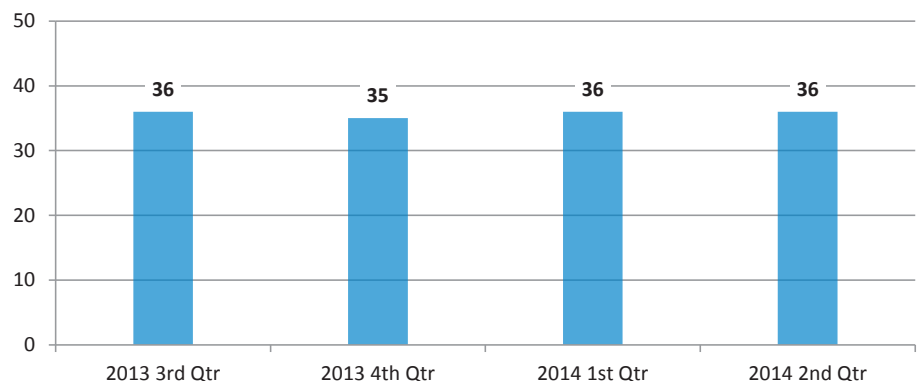


## SHO Performance

Staff hearing officers (SHO) conduct hearings on five formal docket types – Appeal (primarily injury allowance, compensation, and treatment issues), PTD (permanent total disability), Reconsideration (permanent partial disability issues), VSSR (Violations of Specific Safety Requirements), MISC (other issues not designated to a

pre-defined docket type). Only appeal dockets fall under time frame requirements outlined in House Bill 107. SHOs heard a total of 33,841 appeal claims during FY 2014. Of those, 29,548 qualified for inclusion in time studies. On average, the SHO process was completed within 36 days during FY 2014.

SHO Appeal Filing to Mailing Performance | FY 2014





# **Industrial Commission**

Timely, Impartial Resolution of Workers' Compensation Appeals

**30 West Spring Street, Columbus, Ohio 43215**

**[www.OhiolC.com](http://www.OhiolC.com), (800) 521-2691**

**John R. Kasich**, Governor

**Mary Taylor**, Lt. Governor

**Thomas H. Bainbridge**, Chairman

**Jodie M. Taylor**, Member

**Karen L. Gillmor, Ph.D.**, Member

The Adjudicator is produced and published by the Communications Department of the Ohio Industrial Commission. Please contact us with any concerns.

**Adam Gibbs**, Director of Communications

**30 West Spring Street, 8<sup>th</sup> Floor**

**Columbus, Ohio 43215**

**614-387-4500, (888) 511-4005**



*An Equal Opportunity Employer and Service Provider*