Hearing Officer Manual

September 10, 2012

State of Ohio
Industrial Commission
Policy Statements and Guidelines

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FORWARD

The intent of the October 13, 2011 revision of the *Hearing Officer Manual* is to serve as both a training tool and a reference source. The contents of this manual set forth guidelines and are the basis for decision making for hearing officers and the members of the Industrial Commission. In addition to internal use, it is available as a reference source for claimants, employers, BWC employees and representatives of parties who are involved in contested workers' compensation claims before the Industrial Commission.

The first edition of this manual was originally released in January 1989. It was initially developed under the provisions of O.R.C. Section 4121.32 (D). It also adopted one of the recommendations from the *Report of the Select Committee on Workers' Compensation.*

This 2001 version of the manual can be easily accessed through the Internet at http://www.ic.state.oh.us. In addition, a print version may be obtained through the Industrial Commission mailroom by calling 614.644.8009. As the Industrial Commission recognized in its first edition, workers' compensation law is not static. Therefore, the computer and loose-leaf print versions of the *Hearing Officer Manual* can be updated to provide the user with the most current and accurate reflection of Commission policy. Suggested changes and comments are welcome.

Thomas H. Bainbridge, Chairman

Jodie M. Taylor, Member

Karen L. Gillmor, Member

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May 7, 2001 Memo A1

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Foster Grandparent Volunteers Are Not Employees

Individuals volunteering for the Foster Grandparent Program as administered by the ACTION Agency shall not be considered employees for the purpose of the Ohio Workers' Compensation laws or administering the Ohio Workers' Compensation scheme. The Industrial Commission and BWC shall not access fees or require payments of any type under the Ohio Workers' Compensation law from ACTION, its employees, agents, and grantees for injuries or disability sustained by Foster Grandparent Program volunteers.

NOTE: *U.S. v Connor. et al*., Case C-2-83-896 S.D. Ohio, E.D. Order of Judgment and Permanent Injunction (November 4, 1985)

May 7, 2001 Memo A2

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Handicap Relief vs. Additional Allowance

The granting of handicap relief does not constitute an automatic additional allowance in the claim. Instead, the determination of whether or not an additional condition should be allowed in the claim is to be made by a separate determination that is not based on the fact that handicap relief may or may not have been granted.

The evidence used to support a handicap application may be relevant to the determination of whether or not an additional condition should be allowed.

It is a Hearing Officer's responsibility to determine whether or not the additional condition is proximately related to the underlying allowed condition in the claim.

NOTE: O.R.C. 4123.343

May 7, 2001 Memo A3

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Contract for Coverage – Special Services

O.R.C. 4123.03 authorizes a contract for coverage for "employees" not otherwise covered.

In certain cases, prisoners and convicted persons sentenced to community service can have valid claims.

This is not to be confused with Public Works Relief Employment (PWRE) claims under O.R.C. 4127.01 et seq.

If the state, city, county, or other subdivision alleges coverage under O.R.C. 4123.03 a valid contract must exist, copies of which should be obtained from the BWC prior to adjudication.

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Where the Same Injury Results in Both an Ohio and a Foreign Claim

When the Hearing Officer determines that a claim is compensable and the evidence shows the claimant has also recovered compensation or benefits arising out of the same injury or occupational disease under the laws of another state, the Hearing Officer shall determine whether or not the non-Ohio action has been finally decided non-compensable, by that other state.

When the other state's claim has been finally allowed or is still in litigation, the Hearing Officer shall order that credit be taken for amount paid under the non-Ohio action.

When the non-Ohio action has been finally decided non-compensable, the Hearing Officer shall direct that any amount paid under the non-Ohio claim be reimbursed to the party which paid that amount (such as an insurance company, other State's Workers' Compensation fund or self-insuring employer) to the extent that amount would have been properly payable under the Ohio claim, any amount properly payable under the Ohio which was not paid by the non-Ohio claim shall be paid to the party to whom it would normally be paid (normally compensation to the claimant, benefits the provider).

NOTE: O.R.C. 4123.54*, Liberty Mutual Insurance Co. v Industrial Commission*, 40 Ohio St.3d 109

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Substantial Aggravation

Hearing Officers must ensure that an order is clear as to which standard of aggravation is being applied in a claim. Therefore, in claims with dates of injury or disability on or after August 25, 2006, the hearing officer should state that the claim is either allowed or disallowed for substantial aggravation of a pre-existing condition. Obviously, if the issue is abatement of a substantially aggravated condition, that should be stated as well, and only applied to dates of injury or disability on or after August 25, 2006.

Further, when allowing a claim for substantial aggravation of a pre-existing condition, the hearing officer must cite in the order evidence which documents the substantial aggravation by objective diagnostic findings, objective clinical findings, or objective test results. The determination as to whether a “substantial aggravation” has occurred is a legal determination rather than a medical determination. Therefore, while it is necessary that a hearing officer rely on medical evidence which provides the necessary documentation pursuant to the statute, it is not necessary that the relied upon medical evidence contain an opinion as to substantial aggravation.

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Firefighters' and Police Officers' Occupational Disease

Once a firefighter or police officer presents evidence that he has been exposed to heat, smoke, toxic gases, chemical fumes or other toxic substances in the performance of his duty and that he suffers from any cardiovascular, pulmonary or respiratory disease which is caused or induced by such exposures, it shall be presumed the disease he suffers from was contracted or induced in the course of and arising out of employment and is compensable. This presumption may be rebutted only by affirmative evidence. This presumption applies to all claims with O.R.C. 4123.68(W) regardless of the date of disability.

A cardiovascular, pulmonary or respiratory disease aggravated by exposure to heat, smoke, toxic gases, chemical fumes or other toxic substances in the performance of duty of a police officer or firefighter has been induced by those exposures and is a compensable occupational disease.

NOTE: O.R.C. 4123.68(W), *Falcony v. City of Youngstown* 88 C.A. 56 (Unreported, Mahoning County Court of Appeals)

May 7, 2001 Memo B2

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Baker's Asthma

Baker's Asthma, medically, is a reaction of the immune system to micro-organisms transported on flour dust. Because the causative agent of the disease is a micro-organism, and is not the dust which carries it, it is the policy of the Industrial Commission that claims for Baker's Asthma not be treated as claims subject to the conditions, restrictions, limitations, and other provisions applicable to diseases of the respiratory tract resulting from injurious exposures to dust under O.R.C. 4121.68 and 4123.57(D).

April 17, 2002 Memo B3

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ORC 4123.85 and *White v. Mayfield*

There appears to be confusion as to the Industrial Commission's application of the case *White v. Mayfield* (1988), 37 Ohio St.3d 11. *White* provided that the disability date necessary for the application of the statute of limitations contained in ORC 4123.85, occurs when the injured worker first became aware through medical diagnosis that he or she was suffering from such disease, or the date on which the injured worker first received medical treatment for such a disease, or the date the injured worker first quit work on account of such disease, which ever date is the latest. While there does not seem to be much confusion as to date of diagnosis or the date of first medical treatment, there is confusion in situations where either the injured worker retired prior to being diagnosed with an occupational disease and/or where there is no request for disability compensation.

It is the Commission's position that where there has not been a request for disability compensation or where the injured worker retired prior to being diagnosed with an occupational disease that involves a long latency period, that the claim is timely filed. Claims are only untimely filed pursuant to *White* where they have been filed more than two years after diagnosis and first medical treatment <u>and</u> two years after the injured worker quit work on account of the disease. If an injured worker has not yet quit work on account of the disease, the two-year period has not even begun to run.

This position is consistent with ORC 4123.68 that provides that a claim may be compensable to the extent of payment of medical and

hospital bills even if the injured worker is not disabled from work due to the disease.

The limitation period begins to run when the latest of the three elements in *White* occurs. If the last element has not yet occurred, 4123.85 has not begun to run. Therefore, the claim application is to be found timely filed.

May 7, 2001 Memo C1

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Vacation Pay Not Offset

Vacation pay and temporary total disability compensation may be paid concurrently. Vacation pay is an earned, accrued contractual benefit that is vested. The receipt of vacation pay does not constitute the receipt of wages in lieu of compensation. This policy and rationale also applies to holiday pay.

May 7, 2001 Memo C2

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Professional Sports Team Set-offs

Under O.R.C. 4123.56(C) the phrase "all claims pending on July 17, 1986" shall be interpreted to mean all claims where the date of injury or the date of disability in occupational disease claims occurs on or after July 17, 1986.

September 10, 2012 Memo C3

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Jurisdiction over the Issue of Maximum Medical Improvement

In order for a Hearing Officer to proceed on the issue of Maximum Medical Improvement (MMI), it is necessary that Temporary Total Disability be an issue in the claim.

A Hearing Officer has the ability to proceed on the issue of MMI when the injured worker is: (1) on TTD compensation, or is requesting TTD compensation, at the time a party files a request that the claimant be found to have reached MMI, and/or (2) when the claimant is on TTD compensation, or is requesting TTD compensation, at the time of the hearing. A hearing notice that lists Temporary Total and/or Termination of Temporary Total as issues to be heard is sufficient to allow a hearing officer to address MMI.

When terminating ongoing TTD compensation due to the issue of MMI, TTD compensation should be paid through the date of the hearing at which the compensation is being terminated.

September 10, 2012 Memo C4

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Salary Continuation

Numerous questions and concerns have been raised as to how hearing officers should handle Salary Continuation and what impact salary continuation has on the payment of temporary total disability compensation. Following is a variety of circumstances with a discussion of how hearing officers should handle those circumstances:

1. **Wage Agreements.** Salary Continuation is not the same thing as a wage agreement. Wage agreements are provided for in OAC 4123-5-20.

2. **Finding of Temporary Total Disability and Rate of Payment.** Generally, when hearing officers are aware that an injured worker received wages over a period of temporary total disability, the hearing officer should state that TTD is paid less wages received. Also, hearing officers should include in their orders a statement that the injured worker was temporarily and totally disabled despite the fact that salary continuation may have been paid by the employer. However, to the extent that temporary total disability compensation would exceed the after tax amount received by the injured worker through salary continuation, that excess amount should be paid in temporary total disability to the injured worker, so that the injured worker receives the same net amount of money as they would if they had been paid only temporary total disability compensation. The after tax amount should be measured against 72% of the FWW for the first 12 weeks of disability, and 66 2/3% of the AWW thereafter. For example, if the injured worker is disabled

from the time of injury, and the employer pays salary continuation for six weeks, the after tax amount of salary continuation should be measured against 72% of the FWW, and six weeks of TTD should then be paid at 72% of the FWW.

3. **Termination of Benefits/MMI.** Hearing officers do not have jurisdiction to terminate salary continuation benefits. In addition, hearing officers do not have jurisdiction to make a declaration of maximum medical improvement in claims where temporary total disability compensation is not being paid or requested. However, salary continuation benefits may be discontinued by either the employer or the injured worker at any time without any regard to the requirements of ORC Section 4123.56.

4. **Waiting Period for Permanent Partial Disability.** Prior to June 30, 2006, ORC 4123.57 requires that an injured worker wait forty-weeks from the last payment of compensation under ORC 4123.56, or forty weeks from the date of injury. If the injury occurred on or after June 30, 2006 or the occupational disease was contracted on or after June 30, 2006, ORC 4123.57 requires that the injured worker wait twenty-six weeks from the last payment of compensation under ORC 4123.56, or twenty-six weeks from the date of injury or date the occupational disease was contracted. If the employer pays salary continuation at a rate high enough to prevent BWC from paying temporary total disability benefits, then no benefits under ORC 4123.56 would have been paid. The injured worker would need only wait the applicable waiting period from the date of injury or date of contraction of the occupational disease to apply for permanent partial disability benefits.

5. **Application of *Crabtree/Russell* to Salary Continuation.** As earlier stated, hearing officers do not have jurisdiction to terminate salary continuation benefits. However, where ongoing temporary total disability benefits are not being paid due to salary continuation benefits being paid by the employer,

and the salary continuation benefits cease, temporary total disability benefits shall commence or be ordered to commence. If a request is filed to declare the injured worker MMI, *Russell* applies, and that period of disability shall be deemed continuous and not a new period of disability. Thus, a termination due to MMI should take place at the date of hearing.

6. **VSSR Awards.** If a VSSR award is made in a claim where salary continuation was paid for some period of time, the VSSR award should be applied to the amount of TTD compensation that would have been paid had salary continuation not been paid.

May 5, 2008 Memo C5

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Temporary Total Disability/Treatment Due to Psychological Conditions

Treatment requests may be submitted by a psychologist, a medical doctor, a doctor of osteopathy, a licensed professional clinical counselor, or a licensed independent social worker. However, evidence in support of disability due to psychological conditions may only be submitted by a psychologist, a medical doctor, or a doctor of osteopathy.

May 7, 2001 Memo D1

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Impairment of Earning Capacity (Temporary Partial) Payment for Back Period

The more specific and more recently enacted portion of O.R.C. 4123.57 controls over the more general language of O.R.C. 4123.52 to the extent that the two-year limitation provision of O.R.C. 4123.52 does not preclude the payment of an award of impairment in earning capacity for a back period in excess of two years from the filing of the request for same.

Hearing Officers are to scrutinize both the logical relevancy of the medical evidence that establishes the impairment rate as well as the causation that proximately links the impairment of earning capacity to the injury or occupational disease; i.e. whether the impairment of earning capacity is the direct and proximate result of the allowed conditions.

May 7, 2001 Memo E1

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Award Based Only upon Allowed Conditions

Prior to making a C-92 or C-92A award, carefully review the medical evidence on file in order that the decision will be based only upon the allowed conditions in a claim.

May 7, 2001 Memo E2

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Permanent Partial – Hearing Officer Discretion

Hearing Officers shall be limited in their determinations of disabilities under O.R.C. 4123.57 to the percentage of permanent partial impairment based on the medical or clinical findings specifically expressed in a physician's report. Hearing Officers are to adopt one of the impairment ratings. However, when a Hearing Officer determines that the medical or clinical findings reasonably demonstrable support a percentage of permanent partial disability other than an impairment rating as found by one of the physicians, the Hearing Officer may adopt a percentage of permanent partial disability which is within the range of impairment ratings as given by the physicians even though such percentage of permanent partial disability is not the same as any of the physicians impairment ratings.

The Hearing Officer is to note in the order that the determination is based upon the medical or clinical findings of a particular doctor or doctors. Also Hearing Officers are to note the reports of additional physicians, if appropriate.

It is the duty of the Hearing Officer to evaluate the physicians' ratings of impairment and issue the determination as provided by O.R.C. 4123.57.

The parties may agree subject to the approval of the Hearing Officer to a compromise rating of permanent partial disability, which is within the range of impairment ratings where medical evaluations are in conflict.

NOTE: Industrial Commission Resolution, No. R81-7-30 (June 3, 1981)

May 7, 2001 Memo E3

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Percentage Awards in Whole Numbers

Hearing Officers shall make percentage awards under O.R.C. 4123.57 only in whole number units.

May 7, 2001 Memo E4

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100% Limitation – Cause of Action Before or After 10-01-63

The percentages of permanent partial disability resulting from awards made in claims where the cause of action accrued prior to October 1, 1963 shall not be added to the percentages of permanent partial disability resulting from awards made in claims when the cause of action accrued on or after October 1, 1963 so as to preclude an otherwise qualified claimant from receiving an award under O.R.C. 4123.57.

NOTE: *Pace v. Daugherty. et al.* (July 26, 1979) Cuyahoga App. No. 37972 Unreported

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May 7, 2001 Memo E5

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Permanent Partial – Payment over Omitted Periods

All permanent partial disability awards are to be first paid over past omitted periods. The balance, if any, shall begin from the date of the last payment of compensation.

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Processing C-92 while Temporary Total in Another Claim

In cases where a claimant has two claims involving the same body parts, and the claimant is currently receiving temporary total disability in one claim while a C-92 is pending in the second claim, the Hearing Officer should process the C-92 application even though the claimant may be receiving temporary total compensation in the second claim involving the same body parts. Should the examining physicians be unable to render an opinion because they are unable to split the evaluations between the claims it may be understandable that the process would be somewhat delayed.

However, should the examining physicians not have a problem in splitting the evaluations between the claims, the processing of the C-92 application should continue to go forward and not be delayed awaiting termination of the payment of temporary total disability compensation in the other claim.

NOTE: *State ex rel. General Motors Corporation v. Industrial Commission* (1977) 50 Ohio St.2d 155

August 2, 2010 Memo E7

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Processing Applications for Compensation Pursuant to O.R.C. 4123.57(A) when Allowance Question is in Court

The Industrial Commission shall not process a C-92 Application during the pendency of the employer's appeal of the original allowance in Court under O.R.C. 4123.512. However, should the injured worker dismiss the complaint with the consent of the employer pursuant to Civil Rule 41(A), the C-92 Application shall be processed during the pendency of the employer's appeal filed under O.R.C. 4123.512. If a question of an additional allowance is in Court, there is jurisdiction to process a C-92 Application as it relates to the original conditions allowed in the claim that are not being contested in Court.

Please see Hearing Officer Manual policy I5 regarding the processing of other compensation and medical benefit issues during the pendency of the original allowance or additional allowance in court.

NOTE: 1962 O.A.G. No. 2794 and O.R.C. 4123.512(H)

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Partial Loss of Vision

The computation of a permanent partial loss of sight of an eye shall be made on the basis of vision actually lost by the particular individual and not based on a percentage computed on a hypothetical scale of normalcy.

Example:

Assume a claimant had, pre-injury, 20% uncorrected vision and, post injury, 5% uncorrected vision. The proper method of calculation would be based on the percentage of remaining vision of the individual compared to the actual vision before the injury. Here, the claimant had lost 75% of the uncorrected vision the claimant had before the injury. Hence, the claimant would be entitled to an award of 75% for loss of partial vision.

NOTE: *State ex rel. Spangler Candy Company v. Industrial Commission* (1988) 36 Ohio St.3d. 231 *Berchie Layne v. Elmer Keller* (1968) Franklin App. No. 8634 Unreported *Swander v. Industrial Commission* (December 15, 1983) Franklin App. No. 82 AP-737 Unreported

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October 13, 2011 Memo F2

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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. The proper measure for loss of vision is the percentage of vision actually lost when comparing the pre-injury vision to the post-injury vision, prior to any corrective treatment. However, if the result of the attempted corrective procedure is that the vision has worsened, that fact may be taken into account when making an award.

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; *State ex rel. Baker v. Coast to Coast Manpower, L.L.C., 129 Ohio St.3d 138, 2011-Ohio-2721.*

May 7, 2001 Memo F3

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Ankylosis of Finger Joints

The claimant is entitled to an award for total loss of use of a finger when it is found that the claimant suffers ankylosis of the proximal interphalangeal (PIP) joint of a finger. In other words, ankylosis of the joint below the middle phalange is a loss of more than the middle and distal phalanges of the finger.

NOTE: *State ex rel. Betty Reed Glower v. Industrial Commission* (1988) Franklin App. No. 86 AP-1026, unreported.

November 27, 2007 Memo G1

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G1 Rescinded 11/27/01

Pursuant to Industrial Commission action Hearing Officer Manual Memo G1, dated May 07, 2001, was rescinded on November 27, 2007.

May 7, 2001 Memo G2

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Employer May File Application for Permanent Total Disability

An employer has standing to file a Permanent Total Disability Application/Motion on behalf of a claimant. Such employer-initiated actions should be processed in the same manner as those initiated by claimant.

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Request for Readjustment of Starting Date and/or Request for Reallocation of Permanent and Total Disability Award

(1) If a request for readjustment of a starting date and/or a request for reallocation of a permanent and total disability award from an order issued by Staff Hearing Officers is filed, such request is to be referred to the Hearing Administrator. Every request for adjustment of the permanent and total disability starting date and/or reallocation of permanent total disability compensation is to be accompanied by an explanation supporting why such relief should be granted and the evidence relied on to support the request.

(2) Prior to the time the Staff Hearing Officer that issued the order awarding permanent total disability compensation adjudicates the request for readjustment of a starting date and/or a request for reallocation of a permanent and total disability award under 4123.52, the Hearing Administrator is to make initial contact of the requesting party's representative as well as the opposing party's representative to determine whether the request for adjustment of starting date and/or reallocation of the permanent and total disability award is uncontested or contested.

If the opposing parties and the Administrator do not contest the request for adjustment of starting date and/or reallocation and the Staff Hearing Officer is in agreement with the request, the Staff Hearing Officer that issued the order awarding permanent total disability compensation is to issue a supplemental order that conforms with the requirements of the *Mitchell* case.

If the Hearing Administrator finds that the request is contested, or the Staff Hearing Officer after review, determines that the requested relief is not appropriate, the request is to be scheduled for hearing before a

Staff Hearing Officer. The hearing that is held is to be limited to only the issue that is being placed into controversy, whether it is readjustment of starting date or reallocation of the permanent and total disability award. The Staff Hearing Officer is not to reconsider the merits of the original determination that the claimant is permanently and totally disabled, but is limited to the issue of adjustment of starting date and/or reallocation of permanent and total disability compensation.

May 7, 2001 Memo G4

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Submission of Medical Evidence or Vocational Reports for Permanent Total Disability Which Were Not Timely Filed per O.A.C. 4121-3-34

Hearing Officers shall not consider medical evidence which has not been timely filed per O.A.C. 4121-3-34 unless prior approval of the Hearing Administrator has been given.

April 4, 2014 Memo G5

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Guidelines for Permanent Total Disability Tentative Grant Orders

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.

State of Ohio
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Death Benefits – Eligibility for Maximum Benefits

Pursuant to O.R.C. 4123.59, dependents are eligible for and may receive maximum death benefits, provided the decedent was receiving total disability compensation at the time of death and 2/3 of the decedents' average weekly wage is equal to or greater than the statewide average weekly wage for the date of death. Therefore, death benefits are limited by the decedent's average weekly wage as determined in the injury or occupational disease claim causing death.

NOTE: *Zupp v. Youngstown Fire Dept.* (1988), 37 Ohio St.3d 202
State ex rel. Pickrel v. Industrial Commission (1989), 43 Ohio St.3d 128

May 7, 2001 Memo H2

State of Ohio
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Policy Statements and Guidelines

Eligibility for Death Benefits and Accrued Compensation

The Supreme Court has determined that the portion of O.R.C. 4123.60 which in effect denies accrued but unpaid workers' compensation to dependents of workers who died from work-related causes, while compensating dependents of workers who died from causes other than a compensable injury or occupational disease, violates the Equal Protection Clauses of the Ohio and United States Constitutions. Therefore, in appropriate claims, the dependents of a decedent may receive both accrued compensation and death benefits.

NOTE: *State ex rel. Nyitray v. Industrial Commission* (1983) 2 Ohio St.3d 173

May 7, 2001 Memo H3

State of Ohio
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Policy Statements and Guidelines

Reapportionment of Death Benefits – Remarriage

When a dependent spouse remarries, reapportionment of the death award shall be made to the remaining dependents immediately. The reapportionment award shall start and be made effective on the date of remarriage of the dependent spouse, not two years after the date of remarriage.

NOTE: O.R.C. 4123.59 *State ex rel. Kenneth Endlich, Deceased v. Industrial Commission* (1984) 16 Ohio App.3d 309

May 7, 2001 Memo H4

State of Ohio
Industrial Commission
Policy Statements and Guidelines

Appeal Abated by Death

An appeal by claimant is abated by the death of the claimant. An appeal by an employer is not abated by the death of the claimant.

NOTE: *Seabloom Roofing & Sheet Metal Co. v. Mayfield* (1988) 35 Ohio St.3d 108

State of Ohio
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Policy Statements and Guidelines

Accrued Compensation Reminder

The statute of limitation on a C-6, Application for Payment of Compensation Accrued at Time of Death, is one year from the date of death.

Final settlement monies do not represent compensation accrued at the time of death for the purposes of O.R.C. 4123.60.

Certain accrued compensation awards will not be expended due to the fact that proper persons are not available for payment.

The classes of "persons" or entities who may receive compensation are: (1) Dependents; (2) Dependent's estate - Example, If the Commission awards death benefits to the surviving spouse of a deceased employee and the spouse dies before the funds can be disbursed, then accrued benefits for the period between the deceased employee's death and spouse's death shall be paid to the spouse's estate; (3) Injured worker's estate - An injured worker's estate may be entitled to compensation that accrued to the injured worker, but had not been paid at the time of the injured worker's death; and (4) Persons, whether or not dependent, who expended funds for medical/funeral bills, or are the health-care providers who rendered care.

In cases in which the death is unrelated, and a C-6 is filed with no dependents, O.R.C. 4123.60 states that the medical and funeral bills may be paid to the extent of the accrued compensation. In such cases, the order must be carefully crafted to direct payment by the BWC or SI.

For example, claimant is temporarily and totally disabled at the time of death due to a herniated disc. During surgery claimant is found to have unrelated carcinoma and expires on November 15,1987, the

day after surgery. Claimant was injured on September 13,1987 and no compensation had been paid. The order in this case would direct, that " . . . the C-6 filed January 4,1988 is granted: temporary total is paid for the period September 14,1987 to November 15, 1987.

As there are no dependents BWC is directed to expend this compensation solely for payment or reimbursement for medical or funeral bills on account of last illness and death, such bills as are submitted within the rules of the Industrial Commission/BWC.

This order will have the effect of paying carcinoma bills or funeral bills until the award is exhausted. This order should address the period of compensation not dollar amounts. As stated above, it is possible that the entire award will not be expended, and in such a case the Hearing Officer would have no authority to order the payment.

NOTE: *State ex rel. Nossal v. Terex Div. of I.B.H*., (1999), 86 Ohio St.3d 175 *State ex rel. Liposchak v. Industrial Commission* (2000), 90 Ohio St.3d 276

May 7, 2001 Memo H6

State of Ohio
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Policy Statements and Guidelines

Rate of Compensation Where There Are Wholly Dependent Persons

The weekly rate of compensation to be divided among all dependents in an allowed death claim where any of the dependents were wholly dependent upon the decedent at the time of his death is 66 2/3 percent of the decedent's average weekly wage as of the date of injury (or date of disability in an occupational disease claim), but not more than the statewide average weekly wage for the year of death nor less than one-half the statewide average weekly wage for the year of death. This is true regardless of the date of injury or disability and regardless of whether or not decedent was receiving compensation as of the date of death.

NOTE: *State ex rel. Doersam v Industrial Commission* 45 Ohio St.3d 115 (1989)

May 13, 2009 Memo I1

State of Ohio
Industrial Commission
Policy Statements and Guidelines

Continuing Jurisdiction – 10 Years and 5 Years

When the date of injury or disability is prior to August 25, 2006, and when there has been a payment of compensation under O.R.C. 4123.56, 4123.57, or 4123.58, the claim is active for ten years from the date of the last payment of compensation or ten years from the last payment of a medical bill, whichever is later.

When the date of injury or disability is on or after August 25, 2006, the claim is active for five years from the date of the last payment of compensation or five years from the last payment of a medical bill, whichever is later.

NOTE: O.R.C. 4123.52.

May 7, 2001 Memo I2

State of Ohio
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Two Year Limit and O.R.C. 4123.52, Application for Compensation Construed and Additional Conditions

O.R.C. 4123.52, in part, that " . . . the Industrial Commission shall not make any such modification, change, finding, or award which shall award compensation for a back period in excess of two years prior to the date of filing application therefore . . ."

An attending physician's statement is not an "application" for compensation, but merely medical evidence in support of same. An appropriate application must be reduced to writing and signed by either the claimant or his authorized representative. An attending physician's statement is not to be substituted for an application to reactivate a claim in those instances where a claim has been considered inactive according to BWC guidelines.

Letters, motions, or other documents, medical or otherwise, must be carefully evaluated by Hearing Officers on a case by case basis when determining whether or not such evidence rises to the level of an application for compensation pursuant to O.R.C. 4123.52. Hearing Officers must distinguish between what is an apparent request for compensation as opposed to merely supporting evidence.

Lost-time applications for allowance of the claim are applications for compensation. Therefore, there is jurisdiction to award compensation from the date of injury or date of disability when such claim is allowed, irrespective of the length of time elapsed, e.g. the claim is allowed initially in court.

When a claimant applies for a residual or flow-through condition as an additional allowance, "the two-year notice requirement in O.R.C. 4123.84(A) does not apply . . . and these claims must be considered

within the commission's continuing jurisdiction under O.R.C. 4123.52." The Clementi case issued in 1988 has been overruled.

NOTE: *Specht v. BP Am., Inc*., 86 Ohio St.3d 29 (1999)

September 08, 2014 Memo I3

State of Ohio
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Last Payment of Compensation – Date on Face of Warrant or Date of Last Transfer

When determining the date of last payment of compensation for purposes of R. C. 4123.52, use the date which appears on the face of the last warrant issued in payment of compensation, or the date of the last transfer made by electronic funds transfer (EFT) or electronic benefits transfer (EBT).

NOTE: *Cocherl v. Ohio Department of Transportation*, Court of Appeals, Tenth Appellate District, 2007 Ohio 3225, June 26, 2007

May 7, 2001 Memo I4

State of Ohio
Industrial Commission
Policy Statements and Guidelines

Computation of Time Limitations

O.R.C. 1.14 provides that the " . . . time within which an act is required by law to be done shall be computed by excluding the first and including the last day . . ." If the last day falls on a Sunday, a legal holiday, a day in which a public office is closed or a day in which a public office closes before its usual closing time, then the act may be performed on the next succeeding day which is not a Sunday or a legal holiday.

June 18, 2014 Memo I5

State of Ohio
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Processing Compensation and Medical Benefits Issues in Claims When an Original Allowance or Additional Allowance Issue is in Court

The chart below and on the next page delineates how compensation and medical benefits issues should be handled and processed when an appeal is pending in court. Column one identifies the compensation or medical benefit issue. Column two indicates whether or not the compensation or medical benefit issue can be considered for adjudication when the original allowance issue is on appeal to court pursuant to O.R.C. 4123.512. Column three indicates whether or not the compensation or medical benefit issue can be considered for adjudication when an additional allowance issue is on appeal to court pursuant to O.R.C. 4123.512.

Note: Hearing Officer Manual policy E7 also addresses related issues.

Yes indicates – Process or adjudicate the request for compensation or benefits

No indicates – Do not process or adjudicate the request for compensation or benefits

Issue in Question	Original Allowance and R.C. 4123.512 Appeals to Court	Additional Allowance and R.C. 4123.512 Appeals to Court
Temporary Total Disability	**Yes**	**Yes**
Permanent Total Disability	**Yes**	**Yes**
Medical Expenses	**Yes**	**Yes**
Permanent Partial Disability	**No, except when it is the employer's appeal and the complaint is dismissed with the consent of the employer under Civil Rule 41(A), or it is the injured worker's appeal and the request is based on conditions that have been allowed by final administrative order.**	**No, except if the request is based on the original allowance, or it is the employer's appeal to court and the complaint is dismissed with the consent of the employer under Civil Rule 41(A), or it is the injured worker's appeal and the request is based on conditions that have been allowed by final administrative order.**
Scheduled Loss	**No, except when it is the employer's appeal and the complaint is dismissed with the consent of the employer under Civil Rule 41(A), or it is the injured worker's appeal and the request is based on conditions that have been allowed by final administrative order.**	**No, except if the request is based on the original allowance, or it is the employer's appeal to court and the complaint is dismissed with the consent of the employer under Civil Rule 41(A), or it is the injured worker's appeal and the request is based on conditions that have been allowed by final administrative order.**
Impairment of Earning Capacity	**No, except when it is the employer's appeal and the complaint is dismissed with the consent of the employer under Civil Rule 41(A), or it is the injured worker's appeal and the request is based on conditions that have been allowed by final administrative order.**	**No, except if the request is based on the original allowance, or it is the employer's appeal to court and the complaint is dismissed with the consent of the employer under Civil Rule 41(A), or it is the injured worker's appeal and the request is based on conditions that have been allowed by final administrative order.**
Wage Loss Compensation	**Yes**	**Yes**

Motion for additional Condition	**Yes**	**Yes**
Living Maintenance	**Yes**	**Yes**
Living Maintenance Wage Loss	**Yes**	**Yes**
Handicap Reimbursement (CHP-4)	**Yes**	**Yes**
Violation of a Specific Safety Requirement	**Yes**	**Yes**

May 7, 2001 Memo J1

State of Ohio
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Signing of Notice of Appeals

If an I-12 Notice of Appeal is filed unsigned, this fact should be noted on the face of the form so the Hearing Officer conducting the hearing may consider whether there has been substantial compliance with O.A.C. 4121-3-18, which requires that appeals be signed by the party appealing or authorized representative.

A signature is not considered a jurisdictional requirement. An application or other request should not be dismissed due to the lack of a signature. A party may correct the defect at the time the document is challenged.

May 7, 2001 Memo J2

State of Ohio
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Policy Statements and Guidelines

Remanding of Claims

Hearing Officers shall not remand issues to a lower tribunal unless absolutely necessary. One of the few times when remanding is appropriate is where BWC has not made a decision or taken some action which is mandated by law, i.e. a specialist examination under O.R.C. 4123.68 or a decision on a medical treatment issue. As all Industrial Commission appeal hearings are de novo in nature, Hearing Officers should proceed on all issues which have been properly noticed to the parties. All issues raised in the application or motions which are the subject of the hearing should be considered regardless of whether they were addressed by the lower tribunal (District Hearing Officers/BWC).

For example, where a District Hearing Officer is adjudicating the issue of allowance of claim and denies the claim based on a failure to file within the two year statute of limitations, the Staff Hearing Officer, if of the opinion that the claim was timely filed, shall proceed to address the merits of the allowance and not remand that issue back to the District Hearing Officer.

February 01, 2002 Memo J3

State of Ohio
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Handling Subrogation Motions

Where BWC and the injured worker have executed and entered into a full and final subrogation settlement agreement, BWC policy is that the agency is not required to reimburse injured workers for subrogation recoveries. BWC/*Holeton* subrogation issues should be resolved through the Court of Claims or other appropriate courts and not the Industrial Commission.

Payment of compensation and benefits should not have been an issue in past subrogation settlement agreements. The Industrial Commission does not have jurisdiction in these matters since the issue involved is not one involving a contested claims matter affecting compensation and benefits under Ohio Revised Code Chapter 4123.

If a motion requesting reimbursement of past subrogation payments reaches the Industrial Commission, the issue should be referred to the Hearing Administrator. The Hearing Administrator will need to review each claim to determine if a contested claims matter exists and if any of the monies involved in the subrogation settlement agreement constituted compensation or benefits.

Should it be determined that compensation and benefits were not involved in the subrogation settlement agreement, an *"Ex Parte Order"* should be issued indicating that the Industrial Commission lacks jurisdiction in the matter. The following language should be used in the *"Ex Parte Order":*

"The Industrial Commission lacks jurisdiction to consider the merits of the claimant's motion filed _____ for the reason that any funds recovered by the BWC through subrogation are not a contested claims matter and did not affect the amount of compensation or benefits the claimant received as a result of the industrial injury."

Should the Hearing Administrator determine that it appears that a contested claims matter involving compensation or benefits was affected by the subrogation settlement agreement, then the claim will be referred to hearing to determine, if in fact, compensation and benefits were involved.

NOTE: *Holeton v. Crouse Cartage* (2001), 92 Ohio St 3d 115, ORC 4123.93, ORC 4123.931

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Allowance – Dismissal Order v. Merits

(A) In allowance determinations, once the parties have discussed the merits at issue, the allowance should be either allowed or denied. The published order should contain express allowance or denial language. Decisions may not, in order to comply with O.R.C. 4123.511, be held for additional evidence to be submitted after the hearing.

When allowing a claim, the hearing officer shall provide a written description of the diagnosis or condition which is being allowed in the claim. In addition, the name of the physician authoring the report and the date of the report shall be included. The hearing officer shall not include the ICD-9-CM code for the condition(s) being allowed in his or her order.

(B) Should a party which appealed an order of the Administrator or a district hearing officer request dismissal of that appeal prior to hearing, the hearing officer shall grant the requested dismissal. If the request for dismissal is made after a discussion of the merits of the appeal, the hearing officer must deny dismissal of the appeal.

If a party who has filed an application, motion, or other request for action in a claim wants to dismiss that request, that party may do so prior to an initial hearing on the merits. Once a hearing on the merits has commenced, the underlying application, motion, or other request for action in a claim cannot be dismissed.

(C) If a party requests the allowance of a symptom rather than a condition, that request should be dismissed rather than

disallowed.
In allowance determinations, do not use terms such as "dismissed with prejudice" or "dismissed without prejudice" in your orders.

This policy does not affect the hearing officers' responsibility to determine if the action involves agreement as to handicap relief or unenforceable prior waiver of right to compensation.

NOTE: O.R.C. 4123.343, O.R.C. 4123.54, O.R.C. 4123.80

April 17, 2002 Memo K2

State of Ohio
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Precise Order Writing

Every order should clearly state the action taken. (For example: deny the C-85A; pay TT from 1-1-85 to 2-12-85; authorize ten physical therapy treatments.) Hearing Officers should aim for condensed, precise reasoning in their orders. The orders must delineate that evidence upon which the Hearing Officer is relying. The orders must also reflect that all evidence contained in the record has been reviewed and considered.

An issue or issues under review at any level of the hearing process will be addressed and considered independently on its merits. Hearing Officers will not use the terminology "deny and affirm" to deal with issues which come before them. Whether affirming, modifying or vacating a prior decision, the order shall address each issue and sub-issue raised at hearing. In all cases, even when affirming the prior decision, the order shall state the rationale and evidence which was relied upon.

Hearing Officers are not to “cut and paste” language from underlying orders into their final orders. Should a Hearing Officer wish to adopt or incorporate language from the underlying order, he or she should paraphrase the language or use similar language in his or her decision. If the concepts and thoughts in the underlying order are superb, a Hearing Officer can make those ideas his or her own by rewriting the order in his or her own words.

Hearing Officers are not permitted to issue “form orders” in any case without the express prior approval of the Industrial Commission.

When a doctor's report is the basis for the order, it is sufficient to cite the doctor's report by name and date. For example, the following

language should be used "The following reports were relied upon: doctor's name and date of report."

This policy shall apply to all orders, regardless of the issues involved.

May 7, 2001 Memo K3

State of Ohio
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Orders on Coverage – No Jurisdiction to Address Risk Matters

Hearing Officers have no jurisdiction to address risks.

This means Hearing Officers cannot grant coverage, transfer coverage, credit risks, or invent risks.

In an order in which a Hearing Officer is to determine a proper employer, the Hearing Officer should make that finding by employer name. Use of the work "risk" alone in the order causes immediate problems.

On occasion a Hearing Officer will have a claim against a company that has been bought out, taken over, or otherwise ceased existence as a separate corporate entity, during the time between injury and hearing. Even in that type of case, the order should name the proper employer, but never state anything about charges to risks. A finding should never be made against a party unless they have had notice of hearing.

Risks, claims experience, and other charges in the course of employment are a BWC matter, decided by the Adjudicating Committee, if necessary. Parties in need of assistance should be directed to contact the BWC: do not add "helpful" language to an order, as it creates confusion that causes delay.

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Overpayments, Reimbursement from the Surplus Fund and Recoupment Pursuant to O.R.C. 4123.511(K)

(1) State Fund Employer: If an order to pay compensation or benefits is published on or before October 19,1993 by the Industrial Commission of Ohio or BWC and as a result compensation and/or benefits are paid, but subsequently, in a final administrative or judicial action, it is determined that such payments should not have been made, the amount shall be charged to the surplus fund. The amount of overpayment shall not be charged to the state fund employer's experience. The employer's remedy for the determined overpayment to be charged to the surplus fund shall be governed by the statute in effect on the date when the order was issued that ordered the BWC to pay compensation and benefits, and not determined on the date that the vacating order was issued, or the date of the final administrative or judicial action. O.R.C. 4123.511(K) should not be cited when the employer's right to surplus fund charge off is determined to have vested on or before October 19, 1993.

If an order to pay compensation or benefits is published on or after October 20, 1993 by the Industrial Commission or BWC and as a result compensation and/or benefits are paid, but subsequently, in a final administrative or judicial action it is determined that such payment should not have been made, the withholding provisions of O.R.C. 4123.511 (K) shall apply for the determined overpayment.

(2) Self-Insuring Employer: If an order to pay compensation or benefits is published by the Industrial Commission and a self-

insuring employer pays compensation or benefits pursuant to that order, but subsequently, in a final administrative or judicial action, it is determined that the payment of compensation, benefits, or both, should not have been made, then the order finding the overpayment shall remain silent as to the method of withholding or reimbursement.

NOTE: *State, ex rel. Sysco Food Service of Cleveland Inc. v. Industrial Commission* (2000), 89 Ohio St.3d 612, *State, ex rel. Roadway Express v. Industrial Commission* (1998), 82 Ohio St.3d 510, *State, ex rel. Cooper Tire & Rubber Co. v. Industrial Commission* (June 25, 1998), Franklin App. No. 97APD04-591, Unreported, (Memorandum Decision), *State, ex rel. Complete Auto Transit, Inc. v. Ohio Bureau of Workers' Compensation,* (May 19,1998), Franklin App. No. 97APD04-463, Unreported, (Memorandum Decision) and *Cable v. Industrial Commission* (Oct. 22,1996), Franklin App. No. 95APD06-737, Unreported, (Memorandum Decision).

September 29, 2008 Memo K5

State of Ohio
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Timely Completion of Orders

Hearing Officers are to complete and issue their orders in a timely fashion. The hearing officer must issue an interlocutory advisement order if he or she will not be able to issue a final order within twenty-four (24) hours of the conclusion of the hearing. The advisement order will indicate why the hearing officer is taking the issue under advisement.

It is recognized that new evidence or arguments may be introduced at hearing requiring the need for more time to evaluate information in the claim file, and that some hearing issues may be complex and require more than twenty-four (24) hours to complete the final order. In those cases, once a hearing officer has issued an interlocutory order taking the matter under advisement, he or she must complete and issue a final “Mitchellized” order within seven (7) calendar days of the hearing. If a final “Mitchellized” order is not expected to be issued within seven (7) calendar days due to extenuating circumstances, the hearing officer is required to meet with their regional manager to discuss a date certain when the order will be issued.

In no case will an order be issued more than fourteen (14) calendar days after the hearing absent consent of the regional manager.

October 13, 2011 Memo K6

State of Ohio
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Corrected Orders

Corrected orders are intended to correct typographical or other minor errors which may be necessary, and may be requested on a Request for a Corrected Order form. Corrected orders are not intended to change the decision that was made involving the merits of the issue that came to hearing. Hearing Officers shall review requests for corrected order and determine whether such order should be issued.

Corrected orders may be issued during the appeal period to the order that is to be corrected so long as no appeal has been filed to that order. Once an appeal to an order is filed, the Hearing Officer can no longer correct the order without the party agreeing to withdraw the appeal.

Requests for a corrected order that are filed outside of an appeal period for orders that have already become final should be treated as requests to exercise continuing jurisdiction and docketed at the appropriate level.

If the requested correction is agreed to by all parties, whether in the appeal period or outside of the appeal period, a corrected order may be issued without hearing to reflect the agreed correction.

May 7, 2001 Memo L1

State of Ohio
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Hearing Room Demeanor

Hearing Officers shall wear proper attire while conducting hearings. "Proper attire" implies a degree of formality which will foster the respect of all parties as well as cultivate professionalism. For gentlemen this mandates a tie and either a sports coat or suit coat. For ladies this includes those types of clothes usually worn by female practitioners in the Civil Courts as well as any other apparel exhibiting good taste.

Hearing Officers shall conduct fair, impartial and professional hearings. This implies a degree of formality and objectivity in the way Hearing Officers and representatives interact in the hearing room and public areas near the hearing room. Therefore, Hearing Officers and representatives should not address each other on a first name basis in such places.

Hearing Officers shall review the claims on their hearing docket prior to hearing. Hearing Officers should strive to avoid the unprofessional appearance created by an obviously unprepared Hearing Officer.

May 7, 2001 Memo L2

State of Ohio
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Policy Statements and Guidelines

District Hearings – Hand Carrying Claims

Hearing Officers are not permitted to carry claims between District Offices. Claims are to be sent through normal channels to avoid lost or misplaced claims.

October 13, 2011 Memo L3

State of Ohio
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Signing of Orders

Hearing Officers should sign their typed orders on a daily basis. When schedules or traveling do not permit Hearing Officers to sign their orders, other Hearing Officers will be designated to sign the orders.

Hearing Officers must carefully proofread all orders that they sign. The signer of the order is charged with the responsibility of discovering typographical errors and ensuring that such errors are corrected prior to publishing the order.

The designated signer should ensure that the order conforms to the hearing worksheet of the Hearing Officer who made the decision.

If a designated signer has a question regarding the contents of the order, the order shall be returned to the Hearing Officer who made the decision prior to its publication.

December 01, 2007 Memo L4

State of Ohio
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Review of District Dockets

A Hearing Officer shall review dockets ahead of schedule. Files should be ready for review two weeks in advance. All claims shall be reviewed on-line with the ECM computer system in preparation and prior to hearings at the district office.

May 7, 2001 Memo L5

State of Ohio
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Policy Statements and Guidelines

Informing Claimants about Payment

Hearing Officers should be very careful when responding to an inquiry regarding when a claimant will receive a check. There are many variables that affect the issuance of checks.

There are several steps after the file leaves a Hearing Officer's office. The BWC and self-insured employer issue checks and are the proper entities to address questions regarding same. Each BWC District Office has public inquiry assistants at the front counter available to answer such questions.

May 7, 2001 Memo L6

State of Ohio
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Policy Statements and Guidelines

Hearing Officer Schedule Sheets Not Public

Schedule sheets and printed or verbal information concerning Hearing Officer identity is not for general circulation. Inquiries should be referred to the Director of Hearing Services.

May 7, 2001 Memo L7

State of Ohio
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Policy Statements and Guidelines

Ex-Parte Discussions

Hearing Officers shall not engage in ex-parte discussions on the merits of any claim.

May 7, 2001 Memo L8

State of Ohio
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Determination of Correct Employer in Claims Involving Temporary or Employee Leasing Agencies

In a claim involving a temporary or employee leasing agency, where the agreement between the customer company and the agency requires the agency to secure workers' compensation coverage for the temporary or leased employees, the claim should be filed against the agency as the employer and the Hearing Officer should enter an order with the agency named or identified as the employer of record. When addressing the issue of whether a customer company of a temporary or employee leasing agency is also an employer subject to a claim for a violation of a specific safety requirement, Hearing Officers shall apply the following paragraph:

Where an employer employs an employee with the understanding that the employee is to be paid only by the employer and at a certain hourly rate to work for a customer of the employer and where it is understood that the customer is to have the right to control the manner or means of performing the work, such customer is the employer for purposes of claims for VSSR's within the meaning of the Workers' Compensation Act.

May 7, 2001 Memo M1

State of Ohio
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Psychiatric Consultation Fee – No Psychiatric Condition Allowed

Consultation fees for psychiatric or psychological evaluations may be paid in claims where no psychiatric condition has yet been recognized, when such consultation is a necessary part of pre-operative work-up, or is to be used by the attending physician as an instrument in the planning of a future course of treatment.

September 29, 2008 Memo M2

State of Ohio
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No Communication with Physician Examining for Industrial Commission

No person or party other than Industrial Commission employees shall communicate with a licensed practitioner examining or reviewing on behalf of the Industrial Commission. This restriction shall also apply to the party being examined other than during the examination itself.

When an injured worker has been scheduled for an examination by an Industrial Commission physician, the injured worker's attorney or the attorney representing the listed employer, or the official representative of the injured worker or employer, shall be prohibited from attending or observing said examination.

This shall not affect the right of any party to proceed under O.A.C. 4121-3-09 (A) (7) or impair the right of parties to file additional medical or other evidence with the Industrial Commission for inclusion in the claim file.

NOTE: Industrial Commission Resolution, No. R82-7-3 (January 25, 1982)

May 7, 2001 Memo M3

State of Ohio
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Failure to Appear – Rehabilitation Plan

If the claimant fails to appear for a statutorily required or ordered examination compensation is normally suspended. At times, after the order is placed suspending the benefit, the claimant is accepted into a rehabilitation plan. If this scenario should occur, living maintenance and appropriate medical benefits should be payable. If after the rehabilitative effort is complete the claimant requests a similar benefit, to that which prompted the need for the initial exam, that exam should be performed. There will be exceptions, as in where a claimant may be hospitalized or reinjured, etc. These should be considered on a case by case basis.

May 7, 2001 Memo M4

State of Ohio
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Status of Mechanotherapists

A Mechanotherapist is recognized under Ohio law as a licensed practitioner for workers' compensation purposes. Therefore, a Mechanotherapist can be a treating physician and should be treated as any licensed practitioner.

NOTE: O.A.C. 4123-7-03, O.A.C. 4731-1-07, O.R.C. 4731.151

September 10, 2012 Memo M5

State of Ohio
Industrial Commission
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Documentation Submitted by Physician Assistants, Advanced Practice Nurses, Certified Nurse Practitioners, and Clinical Nurse Specialists

Medical documentation submitted by an Advanced Practice Nurse **(**APN), a Certified Nurse Practitioner (CNP) or a Clinical Nurse Specialist (CNS) operating within the scope of his or her standard care arrangement (SCA) or by a Physician Assistant (PA) who is practicing under an approved supervision agreement is evidence to be considered by a hearing officer. An APN, CNP or CNS, depending upon his or her area of specialization, may submit documentation regarding the evaluation of the injured worker's (IW) wellness; regarding preventive or primary care services required by IW; and regarding care for the IW's complex health problems. Under an approved supervision agreement, a PA may submit documentation assessing injured workers and developing and implementing treatment plans for injured workers which are within the supervising physician's normal course of practice and expertise, and which are consistent with the approved physician supervisory plan or the policies of the health care facility in which the PA is practicing. Such medical evidence is not sufficient to justify the payment or non-payment of compensation under the provisions of Revised Code Section 4123.56 through Revised Code Section 4123.60.

Prescription drug and therapeutic device documentation submitted by a PA, APN, CNS, and CNP, who has been granted prescriptive authority under the provisions of Chapter 4723 or 4730 of the Revised Code or Chapter 4723 or 4730 of the Administrative Code, is evidence to be considered by a hearing officer.

Documentation may be submitted by a PA, APN, CNP or CNS on office letterhead, appropriate BWC forms and other similar evidence. Documentation must be signed by the APN, CNP or CNS authorized to treat in the SCA, or by the PA practicing under an approved supervision agreement.

NOTE: Chapters 4730 and 4723 ORC and Chapters 4730 and 4723 OAC.

February 10, 2003 Memo M6

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Documentation Submitted by Licensed Professional Clinical Counselors and Independent Social Workers

Medical Documentation submitted by a Licensed Professional Clinical Counselor (LPCC) and an Independent Social Worker (LISW) operating within the scope of his or her statutory authority, is evidence to be considered by a hearing officer for the purposes delineated below.

An LPCC and LISW, depending upon his or her area of specialization, may submit medical documentation regarding the diagnosis of mental and emotional disorders and the treatment of mental and emotional adjustment or development disorders of an injured worker's (IW) psychological condition.

Such documentation is to be considered by the hearing officer for recognition of the allowance of a condition. Documentation must be signed by the LPCC and LISW authorized to treat the IW.

Medical documentation, regarding an injured worker's diagnosis of mental and emotional disorders and the treatment of mental and emotional adjustment or development disorders of an injured worker's psychological conditions, submitted by a LPCC and LISW is not sufficient evidence, in and of itself, to certify disability.

NOTE: ORC 4757.01, ORC 4757.02, ORC 4757.21, ORC 4757.22, ORC 4757.26, ORC 4757.27, ORC 4757.42, OAC 4757-3-02, OAC 4757-5-01 (F) (5), OAC 4757-15-02, OAC 4757-21-03, ORC 4123.58, OAC 4121-3-34.

April 23, 2003 Memo M7

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Adjudication of Claims with the Issue of Exposure to Blood or Other Bodily Fluids as Delineated by ORC Section 4123.026

When an issue involving an exposure to blood or other bodily fluid, as delineated in Ohio Revised Code Section 4123.026, is set for hearing before a hearing officer, that hearing officer should apply the statutory criteria to the issues before him or her.

The hearing officer should describe, in detail, in his or her order the issues before them. Their decision should set forth the reasons for granting or denying payment for the diagnostic services and/or medical care which is before them, including the circumstances surrounding the exposure. Medical reports, bills and other documents specifying treatment services and supporting payment should be identified.

The following language shall be used when granting payment for diagnostic and standard medical care:

"This claim is allowed for exposure to blood or other bodily fluid for the limited purpose provided by ORC 4123.026, which provides for the payment of appropriate post-exposure diagnostic services, consistent with the standard of medical care existing at the time of the exposure, in the absence of injury, occupational disease or death. No other form of compensation or benefits is payable in this claim unless it is found that the injured worker has sustained an injury, occupational disease or death as a result of employment."

This policy is applicable to all exposures to blood or other bodily fluid, on or after March 14, 2003, as described and delineated in Ohio Revised Code Section 4123.026.

NOTE: ORC 4123.026, ORC 4123.01

May 7, 2001 Memo N1

State of Ohio
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Final Settlement – Pending or Subsequent Application

Final settlement of a claim does not preclude later adjudication of an employer's application for handicap reimbursement regardless of whether the reimbursement request was filed before or after settlement.

May 7, 2001 Memo N2

State of Ohio
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All Parties May Appear at Hearings

All parties and their representatives may appear at and present evidence that speaks to the issue of handicap reimbursement at CHP-4 hearings.

May 7, 2001 Memo N3

State of Ohio
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No Relief for Sureties

Handicap reimbursement relief is not to be awarded to sureties for non-complying, self-insuring employers.

NOTE: *Holben v Interstate Motor Freight System*, (1987) 31 Ohio St.3d 152

September 08, 2014 Memo O1

State of Ohio
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Settlements – Finality, Abatement, and Withdrawal

A settlement is final upon the expiration of 30 days after the administrator approves the settlement for state fund claims, or 30 days after the self-insuring employer and injured worker sign the settlement agreement in self-insured claims. Upon the expiration of the 30 days, the settlement cannot be altered and the claim cannot be opened as it has been settled. This is irrespective of whether the injured worker has negotiated the settlement check or is willing to return that check uncashed.

Pursuant to R.C. 4123.65 as effective October 20, 1993 settlements are not subject to the abatement provisions contained in Ohio Adm.Code 4123-5-21 if the settlement has reached the stage of being approved by the Administrator in state fund claims or has been signed by both the employer and the injured worker in self-insured claims. If the settlement has reached this stage, it will be unaffected by the death of the injured worker during the pendency of the 30-day cooling off period unless there is evidence that, prior to the death, either the injured worker, the employer, or the administrator had withdrawn from, or the Industrial Commission disapproved of, the settlement. Absent evidence of withdrawal or disapproval prior to the death, the settlement will become final upon the expiration of the 30-day cooling off period as provided in R.C. 4123.65 unless pursuant to R.C. 4123.65 (C), the settlement can be voided for good cause shown. The death of the injured worker, by itself, is insufficient to constitute good cause to void a settlement.

The abatement provisions of Ohio Adm.Code 4123-5-21 (A) are generally applicable to joint applications for approval of a State Fund

settlement filed pursuant to R.C. 4123.65 when the injured worker's death occurs before the settlement is approved by the Administrator.

However, the abatement provisions of Ohio Adm.Code 4123-5-21 (A) are nullified and not applicable in circumstances where the Administrator fails to process the application for the approval of a State Fund settlement pursuant to R.C. 4123.65 within a reasonable period of time.

NOTE: R.C. 4123.65, *State ex rel. Johnston v. Ohio Bur. of Workers' Comp.*, 92 Ohio St.3d 463, 751 N.E.2d 974 (2001), *Estate of Orecny v. Ford Motor Co.*, 109 Ohio App.3d 462, 672 N.E.2d 679 (8th Dist. 1996)

May 7, 2001 Memo O2

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Settlement Policy Statement

O.R.C. 4123.65, as effective October 20, 1993, is applicable to all administrative and court settlements. All administrative and court settlements shall be filed with the Industrial Commission pursuant to O.R.C. 4123.65.

Once a settlement has become final pursuant to the provisions of O.R.C. 4123.65, the Industrial Commission does not have jurisdiction to issue a *Russell* order or to order the payment of compensation pursuant to the *Russell* decision.

Any requests (including referral letters, motions, objections, appeals, reconsideration requests, or other requests) relating to payment or reimbursement pursuant to the *Russell* decision in settled claims are to be referred to the office of Director of Hearing Services for further processing.

April 4, 2014 Memo O3

State of Ohio
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Staff Hearing Officers Review of Settlements

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 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.

May 7, 2001 Memo P1

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Mine Statutes Are Specific Safety Requirements

O.R.C. 1563.33 and 1563.35 are specific safety requirements enforceable under Article II Section 35 of the Ohio Constitution.

NOTE: *State ex rel. Six v. Industrial Commission*, (1984) 21 Ohio App. 3d 22

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Civil Penalty

When it has been determined that an employer has not corrected a previous violation as required by order, BWC will refer the matter for adjudication of the issues of the subsequent violation as provided in OAC 4121-3-20(G), as well as the civil penalty provided in OAC 4121-3-20(H). In adjudicating these issues, notice must be provided to all parties to the claim as well as the employer involved. In determining whether to assess a civil penalty, the staff hearing officer should ensure that an injury was the proximate result of the first VSSR violation within the twenty-four (24) month period required in OAC 4121-3-20(H).

December 17, 2003 Memo P3

State of Ohio
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VSSR Overpayment Due to Court Decision

When an injured worker has received a VSSR award pursuant to an order of the Industrial Commission and that award is overturned in Court, then the resulting overpayment shall not be recoupable. Subsequent to the court decision, the overpayment in question shall be charged to the surplus account of the State Insurance Fund.

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Corrective Orders

Pursuant to OAC 4121-3-20(G), every order which adjudicates a VSSR application and finds that a violation occurred must address the issue of correction of the violation. In no case should a VSSR grant order be silent on the issue of correction. If correction is unnecessary or impossible (for example, when a piece of equipment is no longer in service), the hearing officer should include such discussion in the order.

When BWC finds that the proper correction has not occurred, the matter will be referred to the Industrial Commission for processing pursuant to 4121-3-20(G) and (H). In that instance, the matter should be set on the issue of subsequent violation for failure to correct the previous violation, together with the issue of a civil penalty to be assessed pursuant to OAC 4121-3-20(H).

September 08, 2014 Memo Q1

State of Ohio
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Adjustments in Average or Full Weekly Wage

Where a motion or application for adjustment has been filed, there shall be no adjustment of previously awarded compensation more than two years prior to the filing date of the request for the change in the average or full weekly wage.

The aforementioned limitation applies whether the average or full weekly wage was originally set by formal order at the Industrial Commission, or by informal administrative action by BWC or a self-insuring employer.

Where the average weekly wage has been recalculated, retroactive adjustment of compensation is limited to two years prior to the claimant's recalculation motion or application.

The two year statute of limitation in R.C. 4123.52 requires an application to trigger continuing jurisdiction. Criteria to be examined to determine whether or not an application exists are (1) the document's contents, (2) the nature of the relief sought, (3) how the parties treated the document, and (4) the liberal construction mandate of R.C. 4123.95.

Where no application exists, R.C. 4123.52's two year statute of limitation is inapplicable. Absent an application, the Industrial Commission is not limited to a two year readjustment. In such a case, the Commission can readjust all compensation previously paid.

In all cases, the hearing officer shall clearly state in an order adjusting the full or average weekly wage whether prior compensation should be adjusted and, if so, over what period that adjustment is to be made.

NOTE: R.C. 4123.52, *State ex rel. Cobble v. Indus. Comm.*, 92 Ohio St.3d 22, 748 N.E.2d 29 (2001), *State ex rel. Drone v. Indus. Comm.*, 93 Ohio St.3d 151, 753 N.E.2d 185 (2001), *State ex rel. Gen. Refractories Co. v. Indus. Comm.*, 44 Ohio St.3d 82, 5451 N.E.2d 52 (1989), *State ex rel. The May Dept. Co. Cent. Regional Claims Office v. Indus. Comm.,* 10th Dist. No.93APD03-333, 1994 WL 16014828 (Jan. 27, 1994)

May 7, 2001 Memo R1

State of Ohio
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Commission Hearings Have Precedence When Conflict

Industrial Commission hearings take precedence over all other district and staff hearings. If a representative has two or more hearings at the same time, the representative is to appear before the Industrial Commission first. All Hearing Officers are to delay hearings where there is a conflict until the representative has completed the hearing before the Industrial Commission.

September 10, 2012 Memo R2

State of Ohio
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Commission Hearings – Court Reporters

Parties wishing to have a court reporter present for any Industrial Commission (IC) hearing shall notify the Hearing Administrator at least seven (7) days prior to hearing. Such party shall indicate the amount of extra time, if any, that the party expects the hearing to take.

If a party brings a court reporter to a hearing without prior notice to the IC, the Hearing Officer shall inquire as to the amount of extra time which may be necessary to complete the hearing. The Hearing Officer must decide whether to proceed as scheduled, hold the hearing at the end of the hour or at the end of the docket, or reset the hearing with appropriate hearing time. A Hearing Officer should not delay other scheduled hearings in order to proceed with a lengthy surprise court reporter hearing.

If a party brings a court reporter to an IC hearing, that party shall submit a copy of the transcript to the claim file. Such party is not obligated to provide a certified copy to the other side. If the other side requests a copy of the transcript, such copy shall be made by the submitting party from the transcript submitted to the file.

May 7, 2001 Memo R3

State of Ohio
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Administrator's Representative Appearance at Commission Hearings

O.R.C. 4123.511(G)(3) provides that "the administrator is a party and may appear and participate at all administrative proceedings on behalf of the state Insurance fund. However, in cases in which the employer is represented, the administrator shall neither present arguments nor introduce testimony that is cumulative to that presented or introduced by the employer or the employer's representative. The administrator may file an appeal under this section on behalf of the state insurance fund; however, except in cases arising under O.R.C. 4123.343, the administrator only may appeal questions of law or issues of fraud when the employer appears in person or by representative."

Whenever it is deemed appropriate, the adjudicator may compel testimony or the production of evidence from the attorney assigned to the BWC 's Law Section that identifies the cause of, or presents the circumstances of, the issue in controversy.

Attorneys assigned to the BWC 's Law Section that appear at hearings held by the Industrial Commission or its Hearing Officers are to be afforded no greater privileges than representatives of employees or employers and shall not be permitted to engage in conduct that results in actual, or the appearance of ex-parte communications with the Industrial Commission or its Hearing Officers.

R4 Rescinded 06/02/04

Pursuant to Industrial Commission Resolution R04-1-01, Hearing Officer Manual Memo R4, dated May 07, 2001, was rescinded on June 02, 2004.

May 7, 2001 Memo R5

State of Ohio
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Public Hearings – Witnesses

The hearings of the Industrial Commission are public hearings.

Observers are permitted in the room as space allows. Observers are not permitted to participate in any hearings. Questions about procedure asked by an observer in between hearings should be answered as time allows, and/or the observer should be directed to the nearest information desk maintained by the local BWC or Industrial Commission office.

Claim files are confidential records. No questions should be entertained regarding the records or contents of a file, unless the question comes from a party or authorized representative.

It is suggested that Hearing Officers introduce themselves to observers, ask the identity of observer and if they have a particular reason to be present, and then give a very brief explanation of the Industrial Commission policy on observers. This will also serve to explain to the parties why a "stranger" is sitting in their hearing.

Observers should not be noted on an order.

Parties may ask for separation of witnesses, or that a hearing room be cleared due to the alleged sensitive nature of a hearing. Hearing Officers should judge the propriety of such requests. Separation of witnesses is at minimum a professional courtesy to the requesting attorney and should be honored in all cases, barring a valid objection by opposing counsel.

November 5, 2005 Memo R6

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Interpreters for the Hearing Impaired or for Foreign Language

The service of interpreters will be secured for hearings, pre-hearing conferences, 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.

Roles of the interpreter in hearings:

- To facilitate the hearing process and to place the individual for whom services are provided in a position as close as linguistically possible to that of a similarly situated individual in the same legal setting
- Interpreters should only attend the hearing that they were notified to attend by the IC
- Render complete and accurate interpretation
- Avoid any conflict of interest, financial or otherwise
- Refrain from dispensing legal advice, communicating conclusions or expressing personal opinions to those for whom they are interpreting
- Maintain an impartial and neutral attitude

- Refrain from providing services if he or she has a stake in the outcome

Outside the hearing room:

- The interpreter may initially acknowledge the individual for whom services are provided to ensure successful communication
- Communication with the individual for whom interpretive services is provided is permissible by parties, through the interpreter, to clarify information prior to commencement of the hearing
- Interpreters should otherwise refrain from independent conversations with the parties or witness(es) prior to commencement of the hearing

The interpreters will submit a C-19 form for payment to the Office of Customer Service. The interpreting coordinator shall then submit the C-19 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)

April 4, 2014 Memo R7

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Use of Audiovisual Evidence

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.

May 7, 2001 Memo R8

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Ethical Conflicts for Hearing Officers

Hearing Officers may encounter hearings which the Hearing Officer cannot preside over due to ethical considerations as a consequence of a personal or professional relationship between the Hearing Officer and either party or representative. Examples of such a relationship would include, but not be limited to, a close relationship by blood or marriage.

In the event that a Hearing Officer concludes he has a relationship with a party or representative such that an ethical concern would be presented if the Hearing Officer presided over a hearing involving that party or representative, the Hearing Officer shall take action necessary to avoid the ethical problem with the least disruption of the normal flow of claims. In the event the hearing is to be conducted in an office where other Hearing Officers are present, the Hearing Officer with the claim presenting the ethical concern on his docket shall make arrangements for another available Hearing Officer to take the hearing presenting the ethical concern. This may involve Hearing Officers who are conducting simultaneous dockets trading dockets for the time necessary to resolve the potential ethical concern. Only in the event no other Hearing Officer is available shall the hearing be reset.

If a reset for this reason is necessary, it is expected that prior review will normally identify the concern and that the Hearing Officer will take steps necessary to notify parties and representatives prior to the scheduled day of hearing that the hearing will be continued.

May 7, 2001 Memo R9

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Hearing Officers Responsibility to Threats of Violence that May Be Made by Parties to a Contested Workers Compensation Claim

In rare cases Hearing Officers may receive information which discloses that a party to a case has exhibited violent behavior in the past and/or had made threats of violence directed toward Commission employees or other individuals involved in the hearing process.

If such a situation should arise, in order to diffuse a potentially explosive situation, the follow measures should be taken:

A. Prior knowledge of a threat:

1. The Hearing Officer or other individual receiving the information should immediately contact the supervisor in our local Industrial Commission office.
2. As soon as the Hearing Officer, or other individual receives information of a possible threat of violence, or a party with a history of violence, and the claim has been set for hearing, the Executive Director should be notified. Pertinent information including the nature of the threat, who was threatened, as well as information identifying the individual who has made the threat or exhibited prior violent behavior, should be shared with these two individuals. Internal Security may be asked to provide additional security.
3. The representatives of the parties to a claim that is scheduled for hearing should be contacted if there is reason to believe a participant in the hearing process may become violent during the hearing.

B. No prior knowledge of a threat:

1. In the event there is a threat of violence during a hearing, the Hearing Officer should alert the security guard discreetly, if possible, and avert further exposure to the situation.
2. The security measures taken will vary depending upon the circumstances of each case. However, for the safety of Hearing Officers as well as all other individuals involved in the hearing process, the aforementioned measures should be taken.
3. Any employee who has experienced any type of threat in the workplace must fill out an Incident Report. This report may be obtained through the office manager, who in turn will forward it to the Executive Director for review and possible action.

May 7, 2001 Memo R10

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Hearing Representative Schedule Conflicts

When representatives are scheduled for more than one hearing in the same hour and a scheduling conflict occurs, Hearing Officers should work with all of the parties, wherever and whenever possible, to attempt to accommodate the representative in question.

All representatives/parties are encouraged to notify the Hearing Officer(s) involved of any possible scheduling conflicts as soon as possible, but no later than the start of a given hour of hearings. This notification will allow the Hearing Officer(s) to adjust the order of his or her hearings within that given hour.

When a situation arises where a representative cannot attend a given hearing within the hour for which he or she has been docketed, Hearing Officers are to proceed with the hearing with all other available parties and their representatives. However, when a representative is unable to attend or be present for the hearing, the Hearing Officer should proceed only as the last resort.

The Hearing Officer should indicate in his or her order that a representative was unable to attend due to a scheduling conflict. The representative, who was unable to attend, if he or she so chooses, may place a written statement in the file describing the scheduling conflict.

Regardless of the conflict brought to the attention of the Hearing Officer, all hearings are to be held within the hour in which they are docketed. A hearing is not to be reset due to the fact that a representative was scheduled to cover multiple hearings during the same hour.

July 30, 2004 Memo R11

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Use of Cellular Phones, Pagers, Personal Computers and Other Audible Devices in the Hearing Area

Cellular phones, telephonic pagers, personal computers and other electronic devices must be placed in a silent/mute activation or vibrating mode while in the hearing room. Any electronic device which cannot be placed in a silent/mute activation or vibrating mode should be turned off out of courtesy to the parties involved in the hearing process and to ensure that all hearings go forward without distractions.

Personal computers may be used in the hearing room for the limited purpose of facilitating participation in the hearing process. Personal computers with wireless connectivity will enable parties to access claim information that resides in the Commission's computer system. Personal computers and other electronic devices brought into the hearing room shall not be employed to photograph, record (audio or video), broadcast, transmit, or televise any proceeding, scene, discussion, or event in the hearing room without first obtaining Commission permission pursuant to Commission policy.

Audible use of personal computers, cellular phones, telephonic pagers and any other electronic device may occur in the public area/section of an Industrial Commission office where hearing functions will not be disrupted. Should the facility at which the individual is working not have an area within the building where the audible use of an electronic device would not be disruptive, she or he should exit the building to use that device.

April 17, 2002 Memo R12

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Hearing Officer Complaint Procedure

An individual who wishes to file a formal complaint regarding a hearing officer of the Industrial Commission of Ohio should use the following procedure.

Anyone wishing to a file a formal complaint shall put his or her concern in writing and send the letter delineating the issues or concerns to the Director of Hearing Services, Industrial Commission of Ohio, 30 West Spring Street, Columbus, Ohio 43215.

The complainant should indicate in the letter the name of the hearing officer, the issue(s) or concern(s) being questioned, when and where they occurred and any other pertinent information of which the Commission should be aware.

When the Director of Hearing Services receives a formal written complaint, the Director will wait until the appeal period for the most current district or staff hearing has ended (which ever is last). After all hearing officer appeals have ended, he or she will address the issue(s) or concern(s) before him or her. After review, the Director will send a copy of the complaint to the hearing officer's regional manager. The regional manager will discuss the issue with the hearing officer and ask he or she to respond to the complaint in writing. The regional manager will then forward the written response to the Director of Hearing Services. He or she will review the hearing officer's written response and respond in writing to the complaining party. If remedial or corrective action is required, the Director of Hearing Services will work with the regional manager and the hearing officer to implement corrective action.

May 7, 2001 Memo S1

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Representation by Former Employees

Whenever representing any party before the Industrial Commission, no former employee of the Industrial Commission or BWC shall be permitted to defend or interpret a prior order that he or she made.

December 01, 2007 Memo S2

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Overpayment Policy

(1) When a decision at hearing will result in an overpayment, the Hearing Officer shall make a specific finding of overpayment and declare that the overpayment shall be collected pursuant to O.R.C. 4123.511(K).

(2) When at the time of the Industrial Commission adjudication there is already a court order directing repayment of the overpaid amount, the Industrial Commission order should remain silent as to the method of recoupment.

(3) When a decision at hearing results in an overpayment due to fraudulent activity, the Hearing Officer shall make a specific finding of fraud in his or her order. This finding must be supported by reliable, probative and substantial evidence. The evidence should demonstrate that the individual knowingly used deception to obtain the overpayment. The prima facie elements of fraud which <u>must</u> be established are: (1) a representation, or where there is a duty to disclose, concealment of fact; (2) which is material to the transaction at hand; (3) made falsely, with the knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred; (4) with the intent of misleading another into relying upon it; (5) justifiable reliance upon the representation or concealment; and (6) a resulting injury proximately caused by the reliance. All of the elements must be proven by a preponderance of the evidence and all evidence establishing fraud shall be specifically cited in the order. The Hearing Officer shall declare that the fraudulent overpayment be collected pursuant to the fraud provisions of O.R.C. 4123.511(K).

(4) When a decision at hearing will result in a Disabled Workers' Relief Fund (DWRF) overpayment, the Hearing Officer shall make a finding in his or her order that the overpayment is not to be collected pursuant to O.R.C. 4123.511(K).

A DWRF overpayment shall be collected from future increases in such payments, where permissible, and except where the Commission finds evidence of payments submitted fraudulently or resulting from misrepresentations by claimants or their representatives. This finding is necessary because DWRF monies are not deemed to be "compensation," as they provide supplemental benefits and come from a fund other than the general insurance fund.

In some instances, the Hearing Officer may find that the DWRF rate was initially calculated correctly, that DWRF payments were made in good faith to the claimant, that there was a good faith acceptance of the DWRF payment, but an overpayment in DWRF was found due to a subsequent retroactive adjustment of the Permanent Total Disability Rate. In such cases, pursuant to *Martin v. Connor*, no recoupment of DWRF monies is to be made, withheld or set-off from future DWRF benefits or other compensation that may be paid.

NOTE: O.R.C. 4123.511 (K) and O.R.C 2913.48 *State, ex rel. Short v. Industrial Commission*, No. 95APD05-611, (10th Dist. Ct. of App., Franklin Cty, 5-14-96), *State, ex rel. Koonce v. Industrial Commission* (1985), 18 Ohio St.3d 60, *Burr v. Board of Commissioners of Stark County*, (1986) 23 Ohio St.3d 69, Industrial Commission Resolution dated August 10, 1977, and Martin v. Connor (1984), 9 Ohio St. 3d 213.

May 7, 2001 Memo S3

State of Ohio
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Subpoenas – Compliance

In the event that a subpoena has been issued to produce specific records relating to a claim and at the hearing it is discovered that the subpoena has not been complied with, the matter pending should be continued and the claim file referred to Litigation Management in order that appropriate compliance measures (Motion to Compel) be initiated.

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Tampering with Claim File Documents

All Hearing Officers are to be aware of the provisions of O.R.C. 2921.12 which is captioned "Tampering with evidence."

The section provides that:

A. No person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall do any of the following:

1. Alter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation;

B. Whoever violates this section is guilty of tampering with evidence, a felony of the third degree.

"Official proceeding" is defined by O.R.C. 2921.01 (D) as "…any proceeding before a legislative, judicial, administrative, or other governmental agency or official authorized to take evidence under oath, and includes any proceeding before a referee, hearing examiner, commissioner, notary, or other person taking testimony or a deposition in connection with an official proceeding."

As of July 1, 1996, a third degree felony is punishable by a term of imprisonment not less than one year or more than five years and, in addition, a fine up to ten thousand dollars may be imposed. BWC /Industrial Commission claim file documents fall within the purview of these statutes.

Exercise the highest degree of care and judgment when processing submitted materials to a claim file and do not "alter, destroy, conceal, or remove" any materials which may be relevant to an "official proceeding or investigation" such as a hearing conducted by the Industrial Commission of Ohio.

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Burden of Proof

With the exceptions of the "firefighters' or police officers' presumption" found in O.R.C. 4123.68(W) and affirmative defenses such as incarceration as a ground for denial of temporary total disability compensation, the claimant has both the burden of proof and the burden of going forward on each element necessary to show his entitlement to the applied for compensation or benefit. The standard of proof (for all matters, including penalties), is preponderance of the evidence. Every determination on an "extent of disability" matter must be supported by "some evidence" which is referenced in the order unless the claimant has submitted "no evidence" to support payment of the requested compensation or benefit.

NOTE: O.R.C. 4123.10
Industrial Commission v. Davis, 119 O.S. 221 (1928)
Mitchell v. Robbin & Myers, 6 Ohio St.3d 481 (1983)

May 7, 2001 Memo S6

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Motions, Applications, and Appeals Not Filed by a Party in Interest

The Industrial Commission may exercise jurisdiction over any motion, application, or appeal which has been signed by a party in interest. The term "party in interest" is expressly limited to the claimant, his/her representative, the employer, the employer's representative, and the Administrator.

Any motion, application, or appeal which is signed by a person or entity other than those enumerated above, shall be dismissed.

May 7, 2001 Memo S7

State of Ohio
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Exclusion of the First Week of Compensation O.R.C. 4123.55

It is the policy of the Industrial Commission that O.R.C. 4123.55 which precludes compensation for the first week after injury does not apply to forms of compensation other than temporary total disability compensation pursuant to O.R.C. 4123.56.

May 7, 2001 Memo S8

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Jurisdiction over Differing Psychological Conditions

When an injured worker files a motion for a specific psychiatric condition based on a report which documents a psychological condition related to the injury, and other examining physicians diagnose conditions which are different from that stated in the motion, the following procedure will apply:

In evaluating such information, Hearing Officers are not limited to the specific psychiatric diagnosis requested or cited in the original motion. After considering all of the medical evidence, Hearing Officers have discretion to consider any psychiatric condition diagnosed, and related to the allowed injury, which he or she deems to be most appropriate.

S9 Rescinded 07/30/04

Pursuant to Industrial Commission action Hearing Officer Manual Memo S9, dated May 07, 2001, was rescinded on July 30, 2004.

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Formal Applications for Additional Conditions Not Required

A self-insuring employer or BWC may initiate the allowance of a subsequent additional condition in the absence of a C-86, C-85A, or other formal written request by a party to the claim. This may take place when the physician of record or other medical professional submits sufficient information to substantiate the additional allowance. When done by BWC, the claims representative shall issue an order notifying all parties to the claim that a condition has been additionally allowed. This will allow all parties to file an appeal if appropriate.

Neither self-insuring employers nor BWC may disallow an additional condition absent a formal request being made that the condition be additionally allowed in the claim.

This policy applies only to the issue of additional allowance.

NOTE: O.R.C. 4123.511
State, ex rel. Morrow v. Industrial Commission, 71 Ohio St.3d 236 (1994)

May 13, 2009 Memo S11

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Request for Allowance of a Condition by Either Direct Causation or by Aggravation/Substantial Aggravation and Jurisdiction to Rule at Hearing

If there is evidence on file or presented at hearing to support both the theories of direct causation, or aggravation (date of injury or disability prior to August 25, 2006)/substantial aggravation (date of injury or disability on or after August 25, 2006), a request to allow a condition in a claim is to be broadly construed to cover either theory of causation (i.e. direct vs. aggravation/substantial aggravation). The Hearing Officer must address the origin of the condition under both theories of causation without referring the claim back to the prior hearing level or the BWC. Where new evidence regarding an alternative theory of causation is submitted by any party, Hearing Officers and/or Hearing Administrators shall ensure that all parties are given adequate opportunity to obtain evidence in support of their position by continuing the hearing for a period of at least thirty (30) days, unless the parties agree that less time is sufficient for obtaining the necessary evidence. The Hearing Officers and/or Hearing Administrators shall state in their compliance letter or order the period of time required to obtain the necessary evidence.

NOTE: O.A.C. 4121-3-09 (A) (1) (b).

April 17, 2002 Memo S12

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Role of Sureties in Hearings

Pursuant to the case of *Holben v. Interstate Motor Freight System* (1987), 31 Ohio St.3d 152, sureties for an insolvent self-insuring employer are included within the definition of employer for the limited purposes of participating in the workers' compensation benefit determination proceedings. *Holben* deals specifically with the surety's ability to appeal decisions of the Industrial Commission to court. It is the Commission's position that the rights of the sureties are somewhat broader than just being able to appeal to court. However, prior to being found to be financially responsible for a claim, the sureties do not have the right to actively participate in the defense of the claim.

Therefore, prior to a time when a surety has either voluntarily accepted responsibility for a claim, or when the surety has been adjudicated to be financially responsible for a claim, a surety does not have the right to have injured workers examined, conduct depositions or submit interrogatories, etc. The Industrial Commission will, however, provide notice to all potential sureties and their representatives so that the sureties are aware of all Industrial Commission hearings which will be conducted on claims involving the insolvent self-insuring employer.

A representative of a potentially responsible surety company that receives notice of an Industrial Commission hearing may participate in the Industrial Commission hearing to the limited extent of providing information that will assist the adjudicator in identifying the surety or other entity that is responsible for the cost of a claim of an insolvent self-insuring employer.

May 7, 2007 Memo S13

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Scheduling IC and BWC Employees, Relatives, and Significant Others for Hearing

It is important for the Industrial Commission (IC) to avoid the appearance of a conflict of interest or impropriety when scheduling an IC or Bureau of Workers' Compensation (BWC) employee, employee relative, or person with a significant relationship to the employee for hearing.

In order to avoid any conflict, all claims for a current or former IC or BWC employee, IC or BWC current or former employee relative, or individual with a significant relationship to a current or former IC or BWC employee will be scheduled for hearing in an office outside of the IC or BWC employee's region. Such individuals will be scheduled for hearing in the next closest regional office adjoining the region in which he or she is employed.

May 7, 2007 Memo S14

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Dual Causation

The concept of dual causation does not apply to disability determinations. When adjudicating issues of Temporary Total Disability or Permanent Total Disability, the allowed conditions in the claim must be the disabling condition(s). Other non-allowed conditions may be present, but if those conditions contribute to the disability in a way that the allowed conditions are not independently disabling, then disability compensation is not proper.

However, dual causation does apply to the allowance of claims in both injury and occupational disease situations, as well as the allowance of additional conditions in those claims. The standard for these issues is whether the work related hazard is a proximate cause of the condition(s). If so, it does not matter that other hazards might also be proximate causes of the condition(s). A common example of this is occupational disease cases involving lung conditions where the injured worker is also a smoker. So long as the work related hazard is a proximate cause of the diagnosis, then the claim may be allowed despite the fact that smoking also is a proximate cause of the diagnosis.