

4121-3-20 Additional awards by reason of violations of specific safety requirements**Effective: July 1, 2011**

(A) An application for an additional award of compensation founded upon the claim that the injury, occupational disease, or death resulted from the failure of the employer to comply with the specific requirement for the protection of health, lives, or safety of employees, must be filed, in duplicate, with the commission, within two years of the injury, death, or inception of disability due to occupational disease. The commission shall make available a form with which an application for an additional award by reason of a violation of a specific safety requirement may be made. Such applications should set forth the facts which are the basis of the alleged violation and shall cite the section or sections of the law or code of specific safety requirements which it is claimed have been violated. Such applications shall contain the claim number assigned by the bureau to the claim for compensation or benefits under Chapters 4123. and 4131. of the Revised Code. The settlement of the underlying claim from which an application for additional award by reason of a violation of a specific safety requirement has been or may be filed abates any action on that application.

(B) For the purpose of this rule "employer" shall be defined to include the customer employer of a temporary service agency or the client employer of a professional employer organization where the customer employer or client employer has the right of control as to the manner or means of performing the work.

(C)

(1)

(a) The claimant or the claimant's representative may amend the application to include any additional or alternative violation, provided the amendment is filed within two years following the date of injury, disability or death.

(b) The claimant or the claimant's representative may submit an amendment of the application for additional award for violation of a specific safety requirement beyond the expiration of two years following the date of injury, disability or death. Any such amendment must be submitted within thirty days of the receipt by the claimant or his counsel of the report of the investigation by the bureau into the alleged specific safety requirement violation. The claimant or the claimant's counsel may request an extension of this period for an additional thirty days. Such request must be submitted in writing within the original thirty-day period. If properly submitted, the commission shall notify both parties and their representatives of the granting of such request by mail. Such amendment shall set forth all specific safety requirements omitted from the application made prior to the expiration of the two-year period which the claimant alleges were the cause of the injury, disease or death, but which were omitted by reason of mistake or incompleteness. Copies of any such amendments shall be forwarded to the employer and its representatives as required by paragraph (B) (D) of this rule. Any such amendment shall not raise any unstated claim, but shall merely clarify a previously alleged violation.

(2)

(a) All amendments to an application for additional award for violation of a specific safety requirement filed after the investigation by the bureau shall be reviewed to determine if the amendment requires further investigation.

(b) The employer or its representative may object to an amendment to the application for additional award for violation of a specific safety requirement, which was filed beyond the two-year period on the grounds that the amendment raises a previously unstated claim. If such objection is filed within thirty days of the employer's receipt of the amendment, a staff hearing officer shall review the amendment, to determine the need for a re-investigation if the original investigation was conducted prior to the amendment.

(3) Whenever further investigation is performed by the bureau regarding an alleged safety violation, the receipt by the claimant or his counsel of such report shall commence the running of a further period for submission of amendment or new evidence as if the re-investigation were the first investigation subject to the aforementioned provisions.

(D) Processing of applications for an additional award.

(1) Upon the filing of an application for an additional award with the commission, the commission shall send a copy of the application to the employer, customer employer of a temporary service agency or client employer of a professional employer organization and to its authorized representatives by mail.

(2) The commission shall notify the employer that this application, if granted, will result in the employer being billed directly for the amount of the award. The commission shall also notify the appropriate section of the bureau of the filing of the application. The employer has thirty days in which to file an answer unless the time is extended, for good cause shown, by a staff hearing officer for a period not to exceed an additional thirty days.

(3) The commission may assign an application for such award for investigation or for hearing without investigation. In the event that the application or answer raises legal issues the decision of which would dispose of the application (e.g., did the application cite a specific safety requirement, or was the application timely filed) the commission will assign the application for hearing without investigation. In the event that the claim is referred for investigation, after the investigation report is completed, the commission shall mail a copy of such report to each of the parties and their authorized representatives. At that time, the commission shall advise the parties that they have a designated period of time, not to exceed thirty days, in which to furnish additional proof that they may desire to offer. Within this period, either party may request in writing an extension of the time within which he may submit additional proof. Such requests shall be considered by a staff hearing officer and, if granted, written notice of the extension, not to exceed an additional thirty days, shall be sent to both parties and their representatives. Any such extension shall extend the time available for submission of additional proof equally to both parties, but there can only be one such extension.

(4) Unless otherwise directed by a staff hearing officer, at the end of the thirty day period after the mailing of the investigation report, or the sixty day period if an extension had been granted, all applications for an additional award shall be scheduled for a pre-hearing conference, with written notice provided to all parties of record and their representatives no less than fourteen days prior to the pre-hearing conference. Items the parties should be prepared to discuss at the pre-hearing conference include, but are not limited to:

- (a) Have the names and addresses for all parties and their representatives been listed correctly;
- (b) Have all parties received copies of the relevant documentary evidence on file;
- (c) Has either party requested a record hearing;
- (d) Has either party previously requested the issuance of a subpoena, and are there pending subpoena requests;
- (e) Are the parties considering or engaged in settlement negotiations;
- (f) Is an intentional tort court case pending; and
- (g) Any other procedural matter which needs to be addressed

The pre-hearing conference will conclude with the parties agreeing to the date and time for the scheduling of the merit hearing within the time frame specified by the staff hearing officer conducting the pre-hearing conference.

(5) Either party may request a record hearing but the request shall only be made from the date of filing of the application through the date of the pre-hearing conference. If a record hearing is held, the requesting party is responsible for securing the attendance of a court reporter. A stenographic transcript of any testimony offered shall be taken at the record hearing. The party requesting a record hearing shall pay for the stenographic services and shall submit a copy of the transcript to the commission, as well as to the opposing party, within thirty days of the date of the hearing. Failure to file a copy of the transcript of the proceedings within the thirty-day period, or within such an extended period as may be granted by the staff hearing officer for good cause shown, shall not delay the rendering of the decision. If the party that requests a record hearing decides not to proceed with the record hearing, subsequent to the date that the request for record hearing was granted, that party shall promptly notify the opposing party and their representative, to avoid unfair surprise. If desired, the opposing party may then secure its own court reporter, so that the hearing may proceed as a record hearing. If a record hearing is held, both parties will be permitted to introduce new evidence at the hearing on the application. If no request is made for a record hearing, no new documentary evidence or testimony will be accepted at the hearing on the merits.

(6) Subpoena requests should be filed no later than the date of the pre-hearing conference. If a request for subpoena to obtain documents or information has been granted, copies of all the information obtained by the subpoena are to be submitted immediately to the commission upon its receipt by the party requesting the subpoena.

(7) Except for the initial processing, investigation and prehearing conference of the claim as described in paragraphs (D)(1) to (D)(4) of this rule, if an intentional tort or other court action, is pending in court, and if all parties agree and make a request, the commission may hold further processing of the application for an additional award in abeyance, until one of the parties requests that processing be reinstated. If both parties do not agree, processing of the application will continue.

(8) Subsequent to the prehearing conference, or in cases where no prehearing conference is held, the claim shall be set for hearing with notices to the parties, their representatives and the bureau, at which time the arguments in favor of and opposed to granting the application will be heard.

(9) If, at any time, the staff hearing officer determines further investigation is necessary, the staff hearing officer will refer the claim for investigation requesting the specific data needed and notify the parties of the further investigation. When the supplemental investigation report is in the file, copies are to be mailed to each of the parties and their authorized representatives.

(10) Following the hearing, the staff hearing officer shall issue an order in conformity with rule 4121-3-09 of the Administrative Code.

(E) Within thirty days of the receipt of the order of the staff hearing officer deciding the issues presented by the application, either party has the right to file a motion requesting a rehearing. The party requesting a rehearing shall provide a copy of the motion for rehearing to the opposing party and its representative. The opposing party has thirty days in which to file an answer. A motion for rehearing is not to be adjudicated until the answer has been received or the expiration of the thirty-day period.

(1) If the motion for rehearing is filed, a staff hearing officer, after the expiration of the answer time, shall review the motion for rehearing under the following criteria:

(a) In order to justify a rehearing of the staff hearing officer's order, the motion shall be accompanied by new and additional proof not previously considered and which by due diligence could not be obtained prior to the prehearing conference, or prior to the merit hearing if a record hearing was held and relevant to the specific safety requirement violation.

(b) A rehearing may also be indicated in exceptional cases where the order was based on an obvious mistake of fact or clear mistake of law.

(2) If the motion for rehearing does not meet the criteria as outlined in paragraph (E)(1)(a) or (E)(1)(b) of this rule, the motion shall be denied without further hearing.

(3) If the motion for rehearing is granted, the staff hearing officer shall either:

(a) Set the claim for a hearing with notices on the merits of the application; or

(b) Refer the claim for investigation and after the report of investigation is filed then set the claim for a hearing on the merits of the application.

(4) Following the hearing the staff hearing officer shall follow the same procedure pertaining to the order as outlined in paragraph (D)(9) of this rule. Such order, shall be final. In no case shall a rehearing be granted from an order adjudicating a rehearing.

(5) The payment of the additional award shall be stayed during the pendency of the motion for rehearing.

(F)

(1) Joint application of the claimant and the employer, or the administrator in a case where the settlement proceeds are to be paid from the state insurance fund, on an agreed settlement shall be considered by a staff hearing officer without hearing. Such an application to settle a violation application shall be considered by a staff hearing officer either prior to the determination of the application for an additional award for violation of a specific safety requirement, or after such an application has been adjudicated, and such agreed settlements shall be processed in the same manner. If the staff hearing officer finds that the settlement is appropriate, the staff hearing officer shall issue an order approving it. If the staff hearing officer does not find the settlement to be appropriate in its present form, the staff hearing officer shall schedule a hearing with notices to all parties and their representatives where the matter of the proposed settlement is to be considered. Following the hearing, the staff hearing officer shall issue an order either approving or disapproving the settlement, and the order shall be final.

(2) When a state fund employer desires to settle its liability, which may include its future liability, for the violation of a specific safety requirement, the employer shall file an application for settlement with the adjudicating committee of the bureau of workers' compensation. The bureau shall process the application in the same manner as if an application to settle the liability of a noncomplying employer pursuant to rule 4123-14-05 of the Administrative Code had been filed.

(G) Every order adjudicating an application for additional award for violation of a specific safety requirement which finds such a violation against an employer still in business in Ohio, shall direct that the violation be corrected within a time period which the order shall specify. An employer which fails to comply with such a corrective order within the specified time shall be deemed to have violated a specific safety requirement for the purposes of section 4121.47 of the Revised Code.

(H) The commission shall maintain a list of additional awards granted, including findings of failure to comply with a corrective order. In the event of two such findings of violations of specific safety requirements during the same twenty-four month period, the staff hearing officer shall assess a civil penalty appropriate in light of the circumstances of the individual case in an amount not to exceed fifty thousand dollars. Among the factors the staff hearing officer shall consider in determining the amount of any such civil penalty are the size of the employer as measured by the number of employees, assets and earnings of the employer.

(1) If the two violations of specific safety requirements occur at the same workplace, the violations need not be of the same type or kind for a penalty to be assessed. However, if the two violations of specific safety requirements occur at two different workplaces owned, operated, managed, leased or otherwise controlled by the same individual, company or corporation, the violations must be for the same specific safety requirements.

(2) A penalty shall not be assessed solely for multiple violations which caused the same incident, nor for incidents where more than one employee was injured or killed, nor for a finding of a violation of a specific safety requirement which was settled before the order became final because of the granting of a rehearing or during the pendency of a motion for rehearing.

(3) For the purpose of paragraph (H) of this rule: "workplace" shall mean all of a single contiguous fixed situs under the control of the employer where work is performed; or, if the violation took place at or en route to or from a work site to which the employer sent employees to perform work but which was not expected to remain indefinitely under the control of the employer, any work site or travel route to or along which employees based or supervised from the same site have been sent to perform work, including such base site.

(4) For purpose of paragraphs (G) and (H) of this rule, "specific safety requirement" shall mean the identical requirement, but this exception shall not prevent a penalty where the employer is found to have violated the provisions of two requirements in effect for different periods of time which cover the same matters, even though one of the requirements is stricter than the other.