



# ADJUDICATIONS

BEFORE THE OHIO INDUSTRIAL COMMISSION



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UPDATED JULY 2022

 **Ohio** | Industrial Commission

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# FOREWORD

The intent of the new edition of the *Adjudications before the Ohio Industrial Commission* is to set forth the Industrial Commission's adjudicatory policies and procedures. The contents of this manual provide direction to the hearing administrators, hearing officers, and members of the Industrial Commission who adjudicate issues pending in workers' compensation claims. The policies and procedures in this manual are mandatory and Industrial Commission adjudicators are required to comply with these policies and procedures.

In addition to its internal use, the Industrial Commission intends the manual to be a reference source for claimants, employers, Bureau of Workers' Compensation 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 Ohio Revised Code 4121.32(D). It also adopted one of the recommendations from the *Report of the Select Committee on Workers' Compensation*. The Industrial Commission released the second version of the manual in 2001 and addressed the multiple issues adjudicated by the courts in the 1990s.

This 2016 version of the manual also speaks to issues addressed by the courts since the manual's last revision as well as the vast technological advances that have been made since the manual was first published.

The manual can be easily viewed or printed through the Internet at <http://www.ic.ohio.gov>. The PDF contains a search function under the "Edit" menu along with bookmarks that allow the user to navigate quickly to each section. The manual can be printed in its entirety or in sections by entering in page numbers in the print dialog box.

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 *Adjudications Before the Ohio Industrial Commission* can be updated to provide the user with the most current and accurate reflection of Commission adjudication procedure and policy. Suggested changes and comments are welcome.



# SECTION A: EMPLOYEE AND EMPLOYER

## Memo A1 | Post-Exposure Medical Diagnostic Services

Peace officers, firefighters, emergency medical workers, and for exposures on or after September 15, 2020, detention facility employees, including corrections officers, are the only employees eligible for post-exposure medical diagnostic services, consistent with the standards of medical care existing at the time of the exposure, following exposure to blood, or other body fluid of another person.

On and after September 15, 2020, peace officers, firefighters, emergency medical workers, and detention facility employees, including corrections officers, are the only employees eligible for post-exposure medical diagnostic services, consistent with the standards of medical care existing at the time of the exposure, following exposure to a drug or other chemical substance.

For the purposes of R.C. 4123.026, a peace officer is defined in R.C. 2935.01.

An emergency medical worker is defined as a first responder or an emergency medical technician (basic, intermediate, or paramedic) certified under R.C. Chapter 4765, whether as a paid worker or serving as a volunteer.

A firefighter is defined as a firefighter of a lawfully constituted fire department, whether as a paid member of a fire department under section R.C. 742.01 or serving as a volunteer as defined in R.C. 146.01.

A corrections officer means a person employed by a detention facility as a corrections officer as defined in R.C. 4123.026.

A detention facility means any public or private place used for the confinement of a person charged with or convicted of any crime in this state or another state or under the laws of the United States or alleged or found to be a delinquent child or unruly child in this state or another state or under the laws of the United States as defined in R.C. 4123.026.

**NOTE:** *Adjudications before the Ohio Industrial Commission* Memo M3.

## **Memo A2 | Professional Employer Organizations and Alternate Employer Organizations**

For the purposes of providing notice to the proper employer, professional employer organization, or alternate employer organizations, the Industrial Commission shall provide notice to all employers, professional employer organizations, and alternate employer organizations identified in the claim file. The Industrial Commission will not remove an employer, professional employer organization, or alternate employer organization from the parties identified to receive notice due to a change in risk status. It is not necessary to investigate or determine at hearing which risk will be affected by the order.

### **Memo A3 | Contract for Coverage – Special Services**

R.C. 4123.03 authorizes the Bureau of Workers' Compensation to offer the state and any political subdivision workers' compensation contract coverage for individuals who may not normally be considered employees under R.C. 4123.01. This coverage is optional, not mandatory, and can be used to cover non-emergency volunteers and probationers who are injured while providing services, as well as individuals injured while participating in an inmate worker program. If the state or other political subdivision alleges contract coverage under R.C. 4123.03, a valid contract must exist and be on file.

These claims should not be confused with public works relief employee claims, which are processed pursuant to R.C. Chapter 4127.

## **Memo A4 | Public Works Relief Compensation Contract for Coverage – Special Services**

R.C. Chapter 4127 creates a public works relief fund, as well as provides direction as to the processing of claims filed by public work-relief employees. Hearing officers should review the Revised Code when hearing a matter that involves a public works-relief employee in order to become familiar with some of the unique issues that may arise in those claims. It must be noted the specific calculation method for determining the average weekly wage provided in R.C. 4127.04 has been found unconstitutional, and the average weekly wage shall be set in the same manner as all other claims.

**NOTE:** State ex rel. Patterson v. Indus. Comm., 77 Ohio St.3d 201, 672 N.E.2d 1008 (1996).

# SECTION B: INJURY

## **Memo B1 | Disability Relief v. Additional Allowance**

The granting of disability relief does not constitute an automatic additional allowance in the claim. Instead, the determination of whether 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 disability relief may or may not have been granted.

The evidence used to support a disability relief application may be relevant to the determination of whether an additional condition should be allowed.

It is the hearing officer's responsibility to determine whether the additional condition is causally related to the underlying industrial injury or occupational disease.

**NOTE:** R.C. 4123.343.

## **Memo B2 | 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 shall clearly 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 finding shall 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 shall cite in the order evidence that 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, although it is necessary that the hearing officer rely on medical evidence that 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.

A finding that a substantially aggravated condition has abated, or returned to baseline, has no impact on the allowed conditions in the claim. The claim remains allowed for the substantially aggravated condition. A decision that the substantial aggravation of a preexisting condition has abated involves the extent of an injured worker’s disability, in that it is a decision to not compensate or authorize treatment for that condition at that time. Hearing officers are to handle requests for additional compensation or treatment after an abatement finding as they do requests for a new period of temporary total disability compensation after a finding of maximum medical improvement.

**NOTE:** R.C. 4123.01; Clendenin v. Girl Scouts of W. Ohio, 150 Ohio St.3d 300, 2017-Ohio-2830, 81 N.E.3d 438.

## **Memo B3 | Injuries Caused by Idiopathic Causes**

When a fall is unexplained, the claimant has the burden of eliminating idiopathic causes. In order to meet that burden, the claimant must present persuasive proof the fall was not caused by a pre-existing physical weakness, condition, or disease. Once a claimant eliminates idiopathic causes, an inference arises that the fall is traceable to an ordinary risk, albeit unidentified, to which the claimant was exposed on the employment premises.

Furthermore, a claimant's statement of general good health prior to the fall may be sufficient to meet the burden of elimination – expert testimony and/or medical evidence may be considered, but is not required.

**NOTE:** Waller v. Mayfield, 37 Ohio St.3d 118, 524 N.E.2d 458 (1988); Smith v. Apex Div., Cooper Indus., Inc., 88 Ohio App.3d 247, 623 N.E.2d 700 (2d Dist.1993).

# SECTION C: OCCUPATIONAL DISEASE

## Memo C1 | Firefighters' and Police Officers' Occupational Disease

### Cardiovascular, Pulmonary, or Respiratory Diseases

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

A pre-existing cardiovascular, pulmonary, or respiratory disease aggravated by exposure to heat, smoke, toxic gases, chemical fumes, or other toxic substances in the performance of the duties of a police officer or firefighter is the result of such exposure(s) and is a compensable occupational disease.

### Cancer

Pursuant to R.C. 4123.68(X), once a firefighter who has been assigned to at least six years of hazardous duty presents evidence that he or she has been exposed to an agent classified by the International Agency for Research on Cancer (or its successor organization) as a group 1 or 2A carcinogen, and that he or she suffers from cancer, it shall be presumed the cancer he or she suffers from was contracted in the course of and arising out of employment and, therefore, is compensable.

This presumption may be rebutted by affirmative evidence that: (1) the firefighter's exposure, outside the scope of their official duties, to cigarettes, tobacco products, or other conditions presenting an extremely high risk for the development of the cancer alleged was probably a significant factor in the cause or progression of the cancer; (2) the firefighter was not exposed to a group 1 or 2A carcinogen; (3) the firefighter incurred the type of cancer alleged before becoming a member of the fire department; or (4) the firefighter is 70 years of age or older. In claims arising on or after 09/29/2017, the presumption may also be rebutted by a preponderance of competent scientific evidence the exposure to the type of carcinogen alleged did not or could not have caused the cancer being alleged.

In claims arising before 09/29/2017, the presumption does not apply if it has been more than 20 years since the firefighter was last assigned to hazardous duty as a firefighter. In claims arising on after 09/29/2017, the presumption does not apply if it has been more than 15 years since the firefighter was last assigned to hazardous duty as a firefighter.

"Hazardous duty" means duty performed under circumstances in which an accident could result in serious injury or death, such as duty performed on a high structure where protective facilities are not used or on an open structure where adverse conditions such as darkness, lighting, steady rain, or high wind velocity exist. See 5 C.F.R. 550.902, as amended.

R.C. 4123.68(X) applies to applications filed on or after April 6, 2017 and to workers' compensation claims arising on or after that date.

Nothing in R.C. 4123.68(X) prohibits a firefighter from seeking allowance under the provisions of R.C. 4123.68(W) if a cancer meets those requirements. The firefighter has the election to seek allowance under either section.

NOTE: *Falcony v. City of Youngstown*, Mahoning C.P. No. 88 C.A. 56, 1989 WL 10300 (Feb. 6, 1989).

## **Memo C2 | Processing of Claims for Mesothelioma**

Pursuant to State ex rel. Hubbard v. Indus. Comm., 96 Ohio St.3d 336, 2002-Ohio-4795, 774 N.E.2d 1206, claims for mesothelioma are to be processed as any other occupational disease claim and are not subject to the requirements of Industrial Commission Resolution R15-1-01.

### **Memo C3 | R.C. 4123.85 and White v. Mayfield**

Pursuant to White v. Mayfield, the disability date necessary for the application of the statute of limitations contained in R.C. 4123.85 occurs when the injured worker first became aware through medical diagnosis that he or she was suffering from such disease, the date on which the injured worker first received medical treatment for such disease, or the date the injured worker first quit work on account of such disease, whichever date is the latest. It is the Industrial 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, the claim is timely filed.

Claims arising before September 28, 2021 are only untimely filed pursuant to White where the claim has been filed more than two years after diagnosis and first medical treatment **and** two years after the injured worker quit work on account of the disease. Claims arising on or after September 28, 2021 are only untimely filed pursuant to White where the claim has been filed more than one year after diagnosis and first medical treatment and one year 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 applicable period has not begun to run. The filing period may be extended beyond the applicable period after the disability began, if that time period does not exceed six months after licensed physician diagnoses the disease as occupational in origin.

This position is consistent with R.C. 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, R.C. 4123.85 has not begun to run. Therefore, the claim application is to be found timely filed.

**NOTE:** White v. Mayfield, 37 Ohio St.3d 11, 523 N.E.2d 497 (1988).

# **SECTION D: TEMPORARY TOTAL DISABILITY, WAGE LOSS, AND SALARY CONTINUATION**

## **Memo D1 | Vacation, Holiday, and Hostage 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 and hostage pay.

## **Memo D2 | Jurisdiction over the Issue of Maximum Medical Improvement**

In order for a hearing officer to proceed on the issue of maximum medical improvement, 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 maximum medical improvement when the injured worker is on temporary total disability compensation, or is requesting temporary total disability compensation, at the time a party files a request that the injured worker be found to have reached maximum medical improvement; and/or 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 maximum medical improvement.

When terminating ongoing temporary total disability compensation due to a finding of maximum medical improvement, temporary total disability compensation shall be paid through the date of the hearing at which the compensation is being terminated.

**NOTE:** State ex rel. Russell v. Indus. Comm., 82 Ohio St.3d 516, 696 N.E.2d 1069 (1998).

## Memo D3 | Salary Continuation

The following is a variety of circumstances with a discussion of how hearing officers should handle salary continuation and its impact on temporary total disability compensation:

1. **Wage Agreements:** Salary continuation is not the same thing as a wage agreement. Wage agreements are provided for in Ohio Adm.Code 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 shall state that temporary total disability compensation is to be paid less wages received. Also, hearing officers shall 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 shall be ordered paid in temporary total disability compensation to the injured worker so that the injured worker receives the same net amount of money as he or she would have received if he or she were paid only temporary total disability compensation. The after-tax amount shall be measured against 72% of the full weekly wage for the first 12 weeks of disability, and 66 2/3% of the average weekly wage 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 shall be measured against 72% of the full weekly wage, and six weeks of temporary total disability compensation shall then be ordered paid at 72% of the full weekly wage.
3. **Termination of Benefits/Maximum Medical Improvement:** 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 R.C. 4123.56.
4. **Waiting Period for Permanent Partial Disability:** Prior to June 30, 2006, R.C. 4123.57 required that an injured worker wait 40 weeks from the last payment of compensation under R.C. 4123.56, or 40 weeks from the date of injury or contraction of an occupational disease, before applying for permanent partial disability compensation. If the injury occurred on or after June 30, 2006 or the occupational disease was contracted on or after June 30, 2006, R.C. 4123.57 requires that the injured worker wait 26 weeks from the last payment of compensation under R.C. 4123.56, or 26 weeks from the date of injury or date the occupational disease was contracted. Effective September 28, 2021, the applicable waiting period also applies to the payment of wages in lieu of temporary total disability compensation (i.e. salary continuation) for all claims pending on or arising after September 28, 2021.

## Memo D3 Continued

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 compensation is not being paid due to salary continuation benefits being paid by the employer, and the salary continuation benefits cease, temporary total disability compensation shall commence or be ordered to commence. If a request is filed to declare the injured worker at maximum medical improvement, Crabtree/Russell applies, and the period of disability shall be deemed continuous and not a new period of disability. Therefore, termination of temporary total disability compensation based upon a finding of maximum medical improvement shall be effective on the date of hearing at which compensation is being terminated.
6. **Violation of Specific Safety Requirement Awards:** If a violation of specific safety requirement award is made in a claim where salary continuation was paid for some period of time, the violation of specific safety requirement award shall be applied to the amount of temporary total disability compensation that would have been paid had salary continuation not been paid.

**NOTE:** State ex rel. Crabtree v. Ohio Bur. of Workers' Comp., 71 Ohio St.3d 504, 644 N.E.2d 361 (1994); State ex rel. Russell v. Indus. Comm., 82 Ohio St.3d 516, 696 N.E.2d 1069 (1998).

## **Memo D4 | State and Federal Unemployment Funds**

When an injured worker is awarded temporary total disability compensation for a period during which the employee has received benefits under R.C. Chapter 4141, hearing officers shall offset the award of temporary total disability compensation for the unemployment compensation received during the same period.

Federal unemployment funds, despite being administered by the Ohio Department of Jobs and Family Services, are not awarded pursuant to R.C. Chapter 4141. Therefore, where an injured worker's unemployment compensation is federally-funded and not state-funded, temporary total disability compensation shall not be offset in accordance with R.C. Chapter 4141.

**NOTE:** R.C. 4123.56(A); State ex rel. Timken v. Indus. Comm., 10th Dist. No. 11AP-1095, 2012-Ohio-5087.

## **Memo D6 | Eligibility for Temporary Total Disability Compensation after a Refusal of a Job Offer of Suitable Employment**

In cases where an injured worker has refused a job offer of suitable employment, the injured worker can re-establish eligibility for temporary total disability compensation by presenting evidence that his or her employment situation has changed since his or her refusal. Evidence of a return to work since the refusal can demonstrate that a loss of wages is causally related to the claim and justify the exercise of continuing jurisdiction to award a new period of temporary total disability compensation.

**NOTE:** R.C. 4123.56; State ex rel. Akron Paint & Varnish, Inc. v. Gullotta, 131 Ohio St.3d 231, 2012-Ohio-542, 963 N.E.2d 1266.

## **Memo D7 | Application of the Wage Loss Rule**

Ohio Adm.Code 4125-1-01 applies to all applications for wage loss compensation filed on or after 02/13/2014.

## **Memo D8 | Temporary Total Disability Certification for Physical and Psychological Conditions**

During the first six weeks after the date of injury, temporary total disability can be certified by a physician, certified nurse practitioner, clinical nurse specialist, psychologist, or physician assistant who has examined the injured worker.

Both during and after six weeks from the date of injury, certification of temporary total disability for physical conditions may be submitted by a Medical Doctor, Doctor of Osteopathy, Doctor of Podiatric Medicine, or Chiropractor.

Both during and after six weeks from the date of injury, certification of temporary total disability for psychological conditions may only be submitted by a Psychologist, Medical Doctor, or Doctor of Osteopathy.

**NOTE:** *Adjudications Before the Ohio Industrial Commission* Memo M5.

# SECTION E: PERMANENT PARTIAL DISABILITY

## **Memo E1 | Award Based Only upon Allowed Conditions**

Prior to granting a permanent partial disability award or increase in permanent partial disability award, hearing officers shall carefully review the medical evidence on file in order to ensure the decision will be based only upon the allowed conditions in a claim.

## **Memo E2 | Permanent Partial Disability – Hearing Officer Discretion**

Hearing officers shall be limited in their determinations of disability under R.C. 4123.57 to the percentage of permanent partial disability based on the medical or clinical findings specifically expressed in a doctor's report. When a hearing officer determines the medical or clinical findings reasonably demonstrate 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 that is within the range of impairment ratings as given by the doctors, even though such percentage of permanent partial disability is not the same as any of the doctors' impairment ratings.

The hearing officer shall note in the order that the determination is based upon the medical or clinical findings of a particular doctor or doctors. Also, hearing officers shall note the reports of additional doctors, if appropriate.

It is the duty of the hearing officer to evaluate the doctors' ratings of impairment and issue the determination as provided by R.C. 4123.57.

A review prepared by a nurse that applies the Combined Values Chart is evidence that may be considered in conjunction with the doctors' reports so long as it utilizes the impairment ratings determined by the doctors.

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

**NOTE:** Industrial Commission Resolution R81-7-30.

### **Memo E3 | Injured Worker Must File an Application**

In order to be eligible for an award under R.C. 4123.57(B), an injured worker must file an application. The Bureau of Workers' Compensation has no affirmative duty to file an application on behalf of an injured worker, regardless of whether the Bureau of Workers' Compensation has known or has reason to know that the injured worker may be entitled to an award under R.C. 4123.57(B).

**NOTE:** State ex rel. Sziraki v. Adm. Bur. Of Workers' Comp., 137 Ohio St.3d 201, 2013-Ohio-4007, 998 N.E.2d 1074.

**Memo E4 | Processing C-92 Applications for Determination of Percentage of Permanent Partial Disability or Increase of Permanent Partial Disability in Claims in which Permanent Total Disability Compensation has been Previously Granted**

The Industrial Commission does not have statutory authority to award permanent partial disability compensation under R.C. 4123.57(A) when it has previously awarded permanent total disability compensation in the same claim.

**NOTE:** State ex rel. Ohio Presbyterian Retirement Servs., Inc. v. Indus. Comm., Slip Opinion No. 2017-Ohio-7577.

## **Memo E5 | Permanent Partial Disability – Payment over Omitted Periods**

Hearing officers shall adjudicate an Application for Determination of Percentage of Permanent Partial Disability or Increase of Permanent Partial Disability to determine a percentage of disability without consideration of whether the award is payable. It is the responsibility of the Bureau of Workers' Compensation or the self-insuring employer to determine the period over which an award of permanent partial disability will be paid.

**Memo E6 | Processing C-92 Applications for Determination of Percentage of Permanent Partial Disability or Increase of Permanent Partial Disability while Temporarily and Totally Disabled in Another Claim**

In cases where an injured worker has two claims involving the same body part(s) and the injured worker is currently receiving temporary total disability compensation (or wages in lieu of temporary total disability compensation) in one claim while a C-92 Application is pending in the second claim, the hearing officer shall process the C-92 Application even though the injured worker may be receiving temporary total disability compensation (or wages in lieu of temporary total disability compensation) in the second claim involving the same body part(s). Should the examining doctor(s) be unable to render an opinion as to permanent partial impairment 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 doctor(s) not have a problem in splitting the evaluations between the claims, the processing of the C-92 Application shall continue to go forward and not be delayed awaiting termination of the payment of temporary total disability compensation (or wages in lieu of temporary total disability compensation) in the other claim.

**NOTE:** State ex rel. Gen. Motors Corp. v. Indus. Comm., 50 Ohio St.2d 155, 363 N.E.2d 737 (1977).

**Memo E7 | Processing Applications for Compensation Pursuant to R.C. 4123.57(A)  
when Allowance Question is in Court**

The Industrial Commission shall not process a C-92 Application for Determination of Percentage of Permanent Partial Disability or Increase of Permanent Partial Disability during the pendency of the employer's appeal of the original allowance in court under R.C. 4123.512. However, if the injured worker dismisses the complaint with the consent of the employer pursuant to Civil Rule 41(A), the C-92 Application shall be processed.

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 condition(s) allowed in the claim that are not being contested in court. If the injured worker files an appeal to the disallowance of a condition(s) into court, the Industrial Commission shall process a C-92 Application that is based only on the condition(s) that the Industrial Commission allowed in its final administrative order.

Please see *Adjudications before the Ohio Industrial Commission* Memo 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 Ohio Atty. Gen. Ops. No. 2794; R.C. 4123.512(H)

# SECTION F: SCHEDULED LOSS

## Memo F1 | 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.

In addition, a diagnosis of “legally blind” (20/200) by a doctor is sufficient to find that an injured worker has suffered the loss of sight of an eye under R.C. 4123.57(B).

**Example:** Assume an injured worker 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 injured worker compared to the actual vision before the injury. Here, the injured worker had lost 75% of the uncorrected vision the injured worker had before the injury. Hence, the injured worker would be entitled to an award of 75% for loss of partial vision.

**NOTE:** State ex rel. Spangler Candy Company v. Indus. Comm., 36 Ohio St.3d. 231, 522 N.E.2d 1078 (1988); Berchie Layne v. Elmer Keller, 10th Dist. No. 8634 (1968); Swander v. Indus. Comm., 10th Dist. No. 82 AP-737(1983); State ex rel. AutoZone, Inc. v. Indus. Comm., 117 Ohio St.3d 186, 2008-Ohio-541, 883 N.E.2d 372.

## **Memo F2 | Loss of Vision – Corneal Transplants and Corneal Implants**

The improvement of vision resulting from a corneal transplant or corneal implant is a correction of vision and shall not be taken into consideration in determining the percentage of vision actually lost pursuant to R.C. 4123.57(B). 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, 31 Ohio St.3d 229, 510 N.E.2d 356 (1987); State ex rel. Gen. Elec. Corp. v. Indus. Comm., 103 Ohio St.3d 420, 2004-Ohio-5585, 816 N.E.2d 588; State ex rel. Baker v. Coast to Coast Manpower, L.L.C., 129 Ohio St.3d 138, 2011-Ohio-2721, 950 N.E.2d 924.

### **Memo F3 | Ankylosis of Finger Joints**

The injured worker is entitled to an award for total loss of use of a finger when the hearing officer finds that the injured worker 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:** R.C. 4123.57; State ex rel. Glower v. Indus. Comm., 10th Dist. No. 86AP-1026, 1988 WL 92441 (Sept. 1, 1988).

**Memo F4 | Loss of Use of Vision and/or Hearing Secondary to a Traumatic Brain Injury**

R.C. 4123.57(B) does not permit an award for loss of vision or hearing resulting from the loss of brain stem functioning. To be entitled to an award for loss of vision or hearing, evidence must demonstrate an actual loss of function of the eyes or ears.

**NOTE:** State ex rel. Smith v. Indus. Comm., 138 Ohio St.3d 312, 2014-Ohio-513, 6 N.E.3d 1142.

## **Memo F5 | Loss of Use Need Not be Absolute**

An award for loss of use is appropriate where the injured worker has suffered the permanent loss of use of an injured bodily member for all practical intents and purposes. This legal standard does not require the injured bodily member be of absolutely no use in order to establish eligibility for a loss of use award.

**NOTE:** R.C. 4123.57; State ex rel. Alcoa Bldg. Products v. Indus. Comm., 102 Ohio St.3d 341, 2004-Ohio-3166, 810 N.E.2d 946; State ex rel. Wyrick v. Indus. Comm., 138 Ohio St.3d 465, 2014-Ohio-541, 8 N.E.3d. 878.

## **Memo F6 | Orders Awarding Scheduled Losses**

When awarding compensation for a scheduled loss, hearing officers shall provide a start date for the award. In the case of amputation or actual loss, the start date is the date of amputation or loss. In the case of a loss of use, the start date is the date of the earliest medical evidence being relied upon to make the award. However, pursuant to R.C. 4123.52, in no case shall the start date be earlier than two years prior to the filing of the application seeking the award.

**NOTE:** State ex rel. Estate of Sziraki v. Adm. Bur. of Workers' Comp., 137 Ohio St.3d 201, 2013-Ohio-4007, 998 N.E.2d 1074.

# SECTION G: PERMANENT TOTAL DISABILITY

## Memo G1 | Request for Readjustment of Starting Date and/or Request for Reallocation of Permanent Total Disability Award

1. If a written request for readjustment of a starting date and/or a written request for reallocation of a permanent total disability award from an order issued by a staff hearing officer is filed, within 30 days of the receipt of that order, such request is to be referred to the hearing administrator. Every request for adjustment of the permanent total disability starting date and/or reallocation of the permanent total disability award shall be accompanied by an explanation supporting why such relief should be granted and the evidence relied upon to support the request.
2. 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 the permanent total disability starting date and/or reallocation of the permanent total disability award is uncontested or contested.

If the opposing parties and the Bureau of Workers' Compensation in state fund claims do not contest the request for adjustment of the permanent total disability starting date and/or reallocation of the permanent total disability award 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 an order that conforms to the requirements of Mitchell.

If the hearing administrator finds the request is contested, or the staff hearing officer after review determines the requested relief is not appropriate, the request is to be scheduled for hearing before a staff hearing officer. This hearing is limited to only the issue that is being placed into controversy, whether it is readjustment of the permanent total disability starting date or reallocation of the permanent total disability award. The staff hearing officer is not to reconsider the merits of the original determination that the injured worker is permanently and totally disabled.

**NOTE:** State ex rel. Mitchell v. Robbins & Myers, Inc., 6 Ohio St.3d 481, 453 N.E.2d 721, 6 O.B.R. 531 (1983).

**Memo G2 | Submission of Medical Evidence or Vocational Evidence for Permanent  
Total Disability That is Not Timely Filed per Ohio Adm.Code 4121-3-34**

Hearing officers shall not consider medical or vocational evidence that has not been timely filed per Ohio Adm.Code 4121-3-34 unless prior approval of the hearing administrator has been given.

## **Memo G3 | 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;
- 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;
- 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 perform any sustained remunerative employment based upon the allowed conditions.

Remember, the permanent total disability tentative order process for grants is for those claims where the granting of the application is obvious even if based on one condition only.

When considering a subsequent application for permanent total disability compensation, in any claim pending on or arising after September 28, 2021, if the Industrial Commission had previously denied an application for permanent and total disability compensation based on the same injury or occupational disease, Hearing Officers shall include a finding of new and changed circumstances in the permanent total disability tentative grant order.

### **Objections:**

A party may file an objection to the tentative order within 14 days of receipt of the tentative order. If a party files an objection, a hearing will be scheduled before a Staff Hearing Officer on the issue of the appropriateness of the tentative order. If the SHO finds that the granting of permanent total disability was inappropriate due to a colorable legal issue that would preclude the granting of permanent total disability, the tentative order shall be vacated and the IC-2 Application returned for continued processing in accordance with the rules. If the SHO finds that the tentative order was inappropriate because relevant medical evidence was not considered by the IC, the tentative order shall be vacated and the IC-2 application shall be referred to the Hearing Administrator for continued processing in accordance with the rules. Otherwise, the tentative order shall be affirmed.

## **Memo G4 | Permanent Total Disability Based Solely upon Medical or Psychological Impairment**

If a hearing officer determines that an injured worker is unable to perform any sustained remunerative employment based solely upon the medical or psychological impairment resulting from the allowed condition(s) in a claim(s), the hearing officer shall not discuss or analyze the injured worker's non-medical disability factors.

**NOTE:** State ex rel. Speelman v. Indus. Comm., 73 Ohio App.3d 757, 598 N.E.2d 192 (10th Dist.1992).

# SECTION H: DEATH CLAIMS

## **Memo H1 | Death Benefits – Eligibility for Maximum Benefits**

Pursuant to 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 two thirds of the decedent's 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., 37 Ohio St.3d 202, 525 N.E.2d 9 (1988); State ex rel. Pickrel v. Indus. Comm., 43 Ohio St.3d 128, 539 N.E.2d 623 (1989).

## **Memo H2 | Eligibility for Death Benefits and Accrued Compensation**

The Supreme Court of Ohio has determined the portion of 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. Indus. Comm., 2 Ohio St.3d 173, 443 N.E.2d 962 (1983).

### **Memo H3 | 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 of the 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:** R.C. 4123.59; State ex rel. Kenneth Endlich, Deceased v. Indus. Comm., 16 Ohio App.3d 309, 475 N.E.2d 1309 (1984).

#### **Memo H4 | Appeal Abated by Death**

An appeal filed by the claimant/injured worker is abated by the death of the claimant/injured worker.  
An appeal filed by the employer is not abated by the death of the claimant/injured worker.

**NOTE:** Seabloom Roofing & Sheet Metal Co. v. Mayfield, 35 Ohio St.3d 108, 519 N.E.2d 358 (1988) overruled on other grounds by Afrates v. Lorain, 63 Ohio St.3d 22, 584 N.E.2d 1175 (1992).

## **Memo H5 | 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 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 Industrial 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 where the death is unrelated to the claim, and a C-6 Application is filed with no dependents, 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 Bureau of Workers' Compensation or self-insuring employer.

For example, an injured worker is temporarily and totally disabled at the time of death due to a herniated disc. During surgery, the injured worker is found to have unrelated carcinoma and expires on November 15, 2014, the day after surgery. The injured worker was injured on September 13, 2014 and no compensation had been paid. The order in this case would direct, that "the C-6 Application filed 01/04/2015 is granted; temporary total disability compensation is paid for the period 09/14/2014 to 11/15/2014. As there are no dependents, the Bureau of Workers' Compensation or self-insuring employer is directed to expend this compensation solely for payment of or reimbursement for medical or funeral bills on account of the last illness and death, such bills as are submitted within the rules of the Industrial Commission/Bureau of Workers' Compensation."

## Memo H5 Continued

This order will have the effect of paying carcinoma bills or funeral bills until the award is exhausted. This order shall 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., 86 Ohio St.3d 175, 712 N.E.2d 747 (1999); State ex rel. Liposchak v. Indus. Comm., 90 Ohio St.3d 276, 737 N.E.2d 519 (2000).

## **Memo H6 | 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% 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 the decedent was receiving compensation as of the date of death.

**NOTE:** State ex rel. Doersam v. Indus. Comm., 45 Ohio St.3d 115, 543 N.E.2d 1169 (1989).

**Memo H7 | Payment of Death Benefits Following a Trial Court Judgment Entry Granting a Surviving Spouse and/or Dependents the Right to Participate in the Workers' Compensation Fund**

Hearing officers shall order payment of death benefits to a surviving spouse and/or decedent's dependents when the finding of a trial court or the verdict of a jury is in favor of that party's right to participate. This right to receive death benefits is not suspended during the pendency of an employer's appeal regarding the issue of death allowance through the appellate process.

**NOTE:** R.C. 4123.512(G); R.C. 4123.512(H); State ex rel. Davey v. Indus. Comm., 6 Ohio St.2d 207; 217 N.E.2d 207 (1966).

# SECTION I: JURISDICTION

## **Memo I1 | Continuing Jurisdiction – Ten Years and Five Years**

When the date of injury or disability is prior to August 25, 2006, and there has been a payment of compensation under 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 and on or before June 30, 2020, 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.

When the date of injury or disability is on or after July 1, 2020, the claim is active for five years from the date of the last payment of compensation or five years from the last date of medical services rendered, whichever is later.

When determining the date of last payment of compensation for purposes of R. C. 4123.52, use the date that 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 or electronic benefits transfer in payment of compensation.

When determining the date of the last payment of a medical bill for purposes of R.C. 4123.52, use the date on the face of the warrant issued in payment of the bill, or the date of the transfer made by electronic funds transfer or electronic benefit transfer in payment of the bill.

**NOTE:** Cocherl v. Ohio Dept. of Transp., 10th Dist. No. 06AP-1100, 2007-Ohio-3225.

## **Memo I2 | Two Year Limit and R.C. 4123.52, Application for Compensation Construed and Additional Conditions**

R.C. 4123.52, states in part, that “The commission shall not make any 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 therefor.”

An attending doctor’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 injured worker or his authorized representative. An attending doctor’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 Bureau of Workers’ Compensation 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 R.C. 4123.52. Hearing officers must distinguish between what is an apparent request for compensation as opposed to merely supporting evidence.

A First Report of Injury, Occupational Disease, or Death (FROI) is an application 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 an injured worker applies for a residual or flow-through condition as an additional allowance, “the two-year notice requirement in R.C. 4123.84(A) does not apply \* \* \* and these claims must be considered within the commission’s continuing jurisdiction under R.C. 4123.52.”

**NOTE:** Specht v. BP Am., Inc., 86 Ohio St.3d 29, 711 N.E.2d 225 (1999).

### **Memo I3 | Processing of Claims Where the Same Injury Results in an Ohio Claim and a Foreign Claim**

When the hearing officer determines that an injured worker or the injured worker's dependent(s) have received workers' compensation benefits and received a decision adjudicating the compensability of a claim under the laws of another state for the same injury, occupational disease or death for which an Ohio claim has been filed, the hearing officer shall deny the Ohio claim.

When the evidence shows that an injured worker or the injured worker's dependent(s) have received workers' compensation benefits under an Ohio claim and subsequently pursue or accept workers' compensation benefits under the laws of another state for the same injury, occupational disease or death, the hearing officer shall deny the Ohio claim.

Out-of-state residents are not entitled to receive workers' compensation benefits in Ohio if they are insured under the workers' compensation law or similar laws of another state and are injured while only temporarily in Ohio. If an employer insures its out-of-state employees under an occupational insurance policy, the hearing officer shall determine whether that policy provides coverage similar to the laws of another state. If the coverage is not similar, the hearing officer shall order that the injured worker is entitled to coverage under the Ohio workers' compensation system.

**NOTE:** R.C. 4123.54.

## **Memo I4 | Computation of Time Limitations**

R.C. 1.14 provides the following: "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 that is not a Sunday or a legal holiday.

## **Memo 15 | Processing Compensation and Medical Benefits Issues in Claims When an Original Allowance or Additional Allowance Issue is in Court**

The chart on the next page delineates how compensation and medical benefits issues shall be handled and processed when an appeal is pending in court. Column one identifies the compensation or medical benefits issue. Column two indicates whether the compensation or medical benefits issue can be considered for adjudication when the original allowance issue is on appeal to court pursuant to R.C. 4123.512. Column three indicates whether the compensation or medical benefits issue can be considered for adjudication when an additional allowance issue is on appeal to court pursuant to R.C. 4123.512.

**NOTE:** *Adjudications Before the Ohio Industrial Commission* Memo E7 also addresses related issues.

“Yes” – Process or adjudicate the request for compensation or benefits.

“No” – Do not process or adjudicate the request for compensation or benefits.

(See chart on next page)

**Memo I5 Continued**

<b>Issue in Question</b>	<b>Original Allowance and R.C. 4123.512 Appeals to Court</b>	<b>Additional Allowance and R.C. 4123.512 Appeals to Court</b>
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
Wage Loss Compensation	Yes	Yes
Motion for Additional Condition	Yes	Yes
Living Maintenance	Yes	Yes
Living Maintenance Wage Loss	Yes	Yes
Disability Relief (CHP-4)	Yes	Yes
Violation of Specific Safety Requirement	Yes	Yes

## **Memo I6 | Professional Sports Claims**

Professional athletes and coaches are not entitled to compensation and benefits under R.C. Chapters 4121 and 4123 in either of the following circumstances:

1. The employer administers the payroll and workers' compensation insurance for a professional sports team pursuant to the provisions of a collective bargaining agreement; or
2. The employer is a professional sports league, or a member team of such a league, and the players and coaches are employees of the league, the league maintains workers' compensation insurance for the players and coaches, and each member team is obligated to pay to the league any workers' compensation claims that are not covered by the league's workers' compensation insurance.

**NOTE:** R.C. 4123.54.

# SECTION J: APPEALS

## **Memo J1 | Signing of Notice of Appeals**

The hearing officer conducting the hearing may consider whether there has been substantial compliance with Ohio Adm.Code 4121-3-18, which requires that appeals be signed by the party appealing or the authorized representative.

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

## **Memo J2 | 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 the Bureau of Workers' Compensation has not made a decision or taken some action that is mandated by law, i.e., a specialist examination under 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 shall proceed on all issues that have been properly noticed to the parties. All issues raised in the application or motion(s) that are the subject of the hearing shall be considered regardless of whether they were addressed by the lower tribunal (District Hearing Officers/ Bureau of Workers' Compensation).

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 a district hearing officer.

## **Memo J3 | Handling Subrogation Motions**

Where the Bureau of Workers' Compensation and the injured worker have executed and entered into a full and final subrogation settlement agreement, Bureau of Workers' Compensation policy is that the agency is not required to reimburse the injured worker for subrogation recoveries. Bureau of Workers' Compensation/Holeton subrogation issues shall 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 claim matter affecting compensation and benefits under R.C. Chapter 4123.

If a motion requesting reimbursement of past subrogation payments reaches the Industrial Commission, the issue shall be referred to the hearing administrator. The hearing administrator will need to review each claim to determine if a contested claim 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 shall be issued indicating that the Industrial Commission lacks jurisdiction in the matter. The following language shall be used in the *ex parte* order:

The Industrial Commission lacks jurisdiction to consider the merits of the injured worker's motion, filed 00/00/0000, for the reason that any funds recovered by the Bureau of Workers' Compensation through subrogation are not a contested claim matter and did not affect the amount of compensation or benefits the injured worker received as a result of the industrial injury.

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

**NOTE:** Holeton v. Crouse Cartage, 92 Ohio St.3d 115, 748 N.E.2d 1111 (2001); R.C. 4123.93; R.C. 4123.931.

# SECTION K: ORDER WRITING

## Memo K1 | Allowance – Dismissal Order v. Merits

- A. In allowance determinations, once the parties have discussed the merits at issue, the allowance shall be either allowed or disallowed. The published order shall contain express allowance or denial language. Decisions may not, in order to comply with 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 condition(s) that is being allowed in the claim. In addition, the hearing officer shall include the name of the doctor(s) authoring the report(s) and the date(s) of the report(s) upon which the hearing officer is relying. The hearing officer shall not include the International Classification of Diseases code for the condition(s) being allowed in his or her order.

- B. Should a party that appealed an order of the Administrator of the Bureau of Workers' Compensation or district hearing officer request dismissal of that appeal prior to hearing, the request shall be granted. If the request for dismissal is made after a discussion of the merits of the appeal, the hearing officer shall 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 shall be dismissed rather than disallowed.

In allowance determinations, hearing officers shall not use terms such as "dismissed with prejudice" or "dismissed without prejudice" in their orders.

**NOTE:** R.C. 4123.343; R.C. 4123.54; R.C. 4123.80.

## **Memo K2 | Precise Order Writing**

Every order shall clearly state the action taken. (For example: deny the C-9; pay temporary total disability compensation from 01/01/2015 to 02/12/2015; authorize ten physical therapy treatments.) Hearing officers shall aim for condensed, precise reasoning in their orders. The orders must delineate the 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.

Any issue or issues under review at any level of the hearing process shall be addressed and considered independently on its merits. Hearing officers shall not use the terminology “deny and affirm” to deal with issues that 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 that was relied upon.

Hearing officers are not to “cut and paste” language from underlying orders or proposed draft orders provided by either party’s representatives into their final orders. Should a hearing officer wish to adopt or incorporate language from the underlying order or proposed draft orders provided by either party’s representatives, he or she shall paraphrase the language or use similar language in his or her decision. If the concepts and thoughts in the underlying order or proposed draft order provided by either party’s representative 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 first referring to a doctor and a report, hearing officers shall use “John Doe, M.D., dated 00/00/0000,” not “Dr. Doe, dated 00/00/0000.” Hearing officers shall not use “Dr. John Doe, M.D.,” as it is redundant. Further references to the same doctor and report shall be listed as “Dr. Doe, dated 00/00/000.”

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

### **Memo K3 | Orders on Coverage – No Jurisdiction to Address Risk Matters**

Hearing officers have no jurisdiction to address risk matters.

Hearing officers cannot grant coverage, transfer coverage, credit risks, or invent risks.

In an order in which a hearing officer is to determine the proper employer, the hearing officer shall make that finding by employer name. Use of the word "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 the injury and the hearing. Even in that type of case, the order shall name the proper employer, but never state anything about charges to risks. A finding shall never be made against a party unless they have had notice of hearing.

Risks and claims experience are a Bureau of Workers' Compensation matter, decided by the Adjudicating Committee, if necessary. Parties in need of assistance should be verbally directed to contact the Bureau of Workers' Compensation. Do not add "helpful" language to an order, as it creates confusion that causes delay.

## **Memo K4 | Overpayments, Reimbursement from the Surplus Fund and Recoupment Pursuant to 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 or Bureau of Workers' Compensation 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, hearing officers shall order the amount paid charged to the Surplus Fund. The amount of overpayment shall not be ordered 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 Bureau of Workers' Compensation to pay compensation and benefits, and not determined based on the date that the vacating order was issued, or the date of the final administrative or judicial action. R.C. 4123.511(K) shall 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 Bureau of Workers' Compensation 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 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 Serv. of Cleveland, Inc. v. Indus. Comm., 89 Ohio St.3d 612, 734 N.E.2d 361 (2000); State ex rel. Roadway Express, Inc. v. Indus. Comm., 82 Ohio St.3d 510, 696 N.E.2d 1064 (1998); Cooper Tire & Rubber Co. v. Indus. Comm., 10th Dist. No. 97APD04-591 (June 25, 1998); State ex rel. Complete Auto Transit, Inc. v. Ohio Bur. of Workers' Comp., 10th Dist. No. 97APD04-463 (May 19, 1998); Cable v. Indus. Comm., 10th Dist. No. 95APD06-737 (Oct. 22, 1996).

## **Memo K5 | Timely Completion of Orders**

Hearing officers are to complete and sign their orders in a timely fashion. The hearing officer must issue an interlocutory advisement order if he or she will not be able to sign a final order within 72 hours of the conclusion of the hearing. The advisement order shall 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 72 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 sign a final "*Mitchellized*" order within 7 calendar days of the hearing. If a final "*Mitchellized*" order is not expected to be signed within 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 completed. In no case will an order be signed more than 14 calendar days after the hearing, absent consent of the regional manager.

**NOTE:** State ex rel. Mitchell v. Robbins & Myers, Inc., 6 Ohio St.3d 481, 453 N.E.2d 721, 6 O.B.R. 531 (1983).

## **Memo K6 | Corrected Orders**

Corrected orders are intended to correct typographical or other minor errors that may be necessary and may be requested on an IC-13 Request for Corrected Order form. Corrected orders are not intended to change the decision that was made involving the merits of the issue(s) that came to hearing. Hearing officers shall review requests for corrected orders and determine whether such corrected orders 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 corrected orders that are filed outside of the appeal period for orders that have already become final shall 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.

# SECTION L: HEARING OFFICER DUTIES

## **Memo L1 | Hearing Room Demeanor**

Hearing officers shall wear proper attire while conducting hearings. "Proper attire" implies a degree of formality that 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 directive 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 shall strive to avoid the unprofessional appearance created by an obviously unprepared hearing officer.

## **Memo L2 | 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 shall enter an order with the agency named 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 a customer company employs an employee with the understanding that the employee is to be paid only by the temporary or employee leasing agency and at a certain hourly rate to work for a customer company of the temporary or employee leasing agency and where it is understood that the customer company is to have the right to control the manner or means of performing the work, such customer company is the employer for purposes of claims for violations of specific safety requirements within the meaning of the Workers' Compensation Act.

### **Memo L3 | Signing of Orders**

Hearing officers shall sign their orders within 72 hours of the conclusion of the hearing. When schedules or traveling do not permit hearing officers to sign their orders, regional managers will be designated to sign the orders.

Hearing officers and regional managers must carefully proofread all orders that they sign. The hearing officer or regional manager who signs the order is charged with the responsibility of discovering typographical errors and ensuring that such errors are corrected prior to publishing the order.

Regional managers shall ensure that they do not sign an order in a claim in which they have a conflict of interest with the parties in the claim.

The regional manager shall ensure that the order conforms to the hearing worksheet of the hearing officer who made the decision.

If a regional manager 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.

## **Memo L4 | *Ex-Parte* Discussions**

Hearing officers shall not engage in *ex parte* discussions on the merits of any claim. Furthermore, hearing officers shall take great care to avoid discussions that could appear *ex parte* or situations that could appear as if a hearing officer and an outside representative are having an *ex parte* discussion.

## **Memo L5 | Informing Injured Workers about Payment**

Hearing officers should be very careful when responding to an inquiry regarding when an injured worker will receive a warrant, electronic funds transfer, or electronic benefits transfer. There are many variables that affect the issuance of warrants, electronic funds transfer or electronic benefits.

There are several steps after the file leaves a hearing officer's office. The Bureau of Workers' Compensation and self-insuring employer issue payment and are the proper entities to address questions regarding same. Each Bureau of Workers' Compensation Service Office has public inquiry assistants at the front counter available to answer such questions.

**Memo L6 | Hearing Officer Schedule Sheets Not Public**

Schedule sheets and printed or verbal information concerning hearing officer identity are not for general circulation. Inquiries should be referred to the Director of Adjudicatory Services.

# SECTION M: MEDICAL ISSUES

## **Memo M1 | Psychiatric and Psychological 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 a pre-operative work-up, or is to be used by the attending doctor as an instrument in the planning of a future course of treatment.

**Memo M2 | No Communication with Doctors Examining for the Industrial Commission**

No person or party other than Industrial Commission employees shall communicate with a doctor 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 a doctor selected by the Industrial Commission, 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 Ohio Adm.Code 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.

**Memo M3 | Adjudication of Claims with the Issue of Exposure to Blood, Other Body Fluids, Drug, or Other Chemical Substance as Delineated by R.C. 4123.026**

When an issue involving an exposure to blood, other body fluid, drug, or other chemical substance, as delineated in R.C. 4123.026, is set for hearing before a hearing officer, that hearing officer shall apply the statutory criteria to the issue(s) before him or her.

The hearing officer shall describe, in detail, in his or her order the issue(s) before him or her. The hearing officer's decision shall set forth the reasons for granting or denying payment for the post-exposure medical diagnostic services and/or medical care that is before him or her, including a discussion of the circumstances surrounding the exposure. Medical reports, bills, and other documents specifying post-exposure medical diagnostic and treatment services and supporting payment or non-payment shall be identified.

The following language shall be used when granting payment for post-exposure medical diagnostic services and/or medical care:

This claim is allowed for exposure to blood, other body fluid, drug, or other chemical substances for the limited purpose provided by R.C. 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 an 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, other body fluid, for peace officers, firefighters, emergency medical workers, occurring on or after March 14, 2003, as described and delineated in R.C. 4123.026. This policy is applicable to all exposures to blood, other body fluid, drug, or other chemical substance for peace officers, firefighters, emergency medical workers, detention facility employees, including corrections officers, occurring on or after September 15, 2020, as described and delineated in R.C. 4123.026.

**NOTE:** R.C. 4123.01, *Adjudications Before the Ohio Industrial Commission* Memo A1.

## **Memo M4 | 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 doctor and shall be treated as any licensed practitioner.

**NOTE:** R.C. 4731.151.

## **Memo M5 | Documentation Submitted by Physician Assistants, Advanced Practice Nurses, Certified Nurse Practitioners, and Clinical Nurse Specialists**

Medical documentation submitted by an Advanced Practice Nurse, a Certified Nurse Practitioner, a Clinical Nurse Specialist operating within the scope of his or her standard care arrangement, or by a Physician Assistant who is practicing under an approved supervision agreement is evidence to be considered by a hearing officer. An Advanced Practice Nurse, a Certified Nurse Practitioner, or a Clinical Nurse Specialist, depending upon his or her area of specialization, may submit documentation regarding the evaluation of the injured worker's wellness, preventive or primary care services required by the injured worker, and care for the injured worker's complex health problems. Under an approved supervision agreement, a Physician Assistant may submit documentation assessing injured workers and developing and implementing treatment plans for injured workers that are within the supervising physician's normal course of practice and expertise, and that are consistent with the approved physician supervisory plan or the policies of the health care facility in which the Physician Assistant is practicing.

Medical evidence submitted by an Advanced Practice Nurse, a Certified Nurse Practitioner, a Clinical Nurse Specialist, or a Physician Assistant is not sufficient evidence, in and of itself, to justify the payment or non-payment of compensation under the provisions of R.C. 4123.56 through R.C. 4123.60, except as provided for in Ohio Adm.Code 4123-5-18 and *Adjudications before the Ohio Industrial Commission* Memo D8.

Prescription drug and therapeutic device documentation submitted by a Physician Assistant, Advanced Practice Nurse, Certified Nurse Practitioner, and Clinical Nurse Specialist, who has been granted prescriptive authority under the provisions of R.C. Chapters 4723 or 4730 or Ohio Adm.Code Chapters 4723 or 4730, is evidence to be considered by a hearing officer.

Documentation may be submitted by an Advanced Practice Nurse, a Certified Nurse Practitioner, Clinical Nurse Specialist, or a Physician Assistant on office letterhead, appropriate Bureau of Workers' Compensation forms and other similar evidence. Documentation must be signed by the Advanced Practice Nurse, the Certified Nurse Practitioner, or the Clinical Nurse Specialist authorized to treat in a standard care agreement, or by the Physician Assistant practicing under an approved supervision agreement.

## **Memo M6 | Documentation Submitted by Licensed Professional Clinical Counselors and Licensed Independent Social Workers**

A Licensed Professional Clinical Counselor and Licensed Independent Social Worker, 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 psychological condition.

Medical documentation submitted by a Licensed Professional Clinical Counselor or a Licensed Independent Social Worker is to be considered by the hearing officer for recognition of the allowance of a condition(s). Documentation must be signed by the Licensed Professional Clinical Counselor or the Licensed Independent Social Worker authorized to treat the injured worker.

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 Licensed Professional Clinical Counselor or a Licensed Independent Social Worker is not sufficient evidence, in and of itself, to support an award of compensation under the provisions of R.C. 4123.56 through R.C. 4123.60.

**NOTE:** R.C. 4757.01; R.C. 4757.02; R.C. 4757.21; R.C. 4757.22; R.C. 4757.26; R.C. 4757.27; R.C. 4757.42; Ohio Adm.Code 4757-3-02; Ohio Adm.Code 4757-5-01(F)(5); Ohio Adm.Code 4757-15-02; Ohio Adm.Code 4757-21-03; Ohio Adm.Code 4121-3-34.

## **Memo M7 | Treatment Requests**

Treatment requests for physical conditions may be submitted by a Medical Doctor, Doctor of Osteopathy, Chiropractor, Advanced Practice Nurse, Nurse Practitioner, Clinical Nurse Specialist, Mechanotherapist, Physician Assistant, Physical Therapist, Occupational Therapist, Optometrist, or Audiologist.

Treatment requests for psychological conditions may be submitted by a Psychologist, Medical Doctor, Doctor of Osteopathy, Licensed Professional Clinical Counselor, or Licensed Independent Social Worker.

## **Memo M8 | Adjudication of Treatment Issues**

When adjudicating medical treatment issues, hearing officers shall rely on one of the medical opinions on file and render a decision based on that opinion. Unlike in permanent partial determinations, hearing officers do not have the expertise to determine proper medical treatment independent of the medical opinions available. Therefore, hearing officers shall not render decisions based on a “compromise” of the medical opinions on file. For example, if one opinion requests an MRI and another opinion opines that the MRI is unnecessary, hearing officers must either grant or deny the MRI, and not issue a decision that permits an x-ray rather than the requested MRI. Alternatively, if a chiropractor is requesting 12 treatments over a 6-week period, the hearing officer shall not arbitrarily allow 6 treatments over the 6 week period. The order must mirror the medical evidence upon which it is based.

**NOTE:** State ex rel. Yellow Freight Sys., Inc. v. Indus. Comm., 81 Ohio St.3d 56, 689 N.E.2d 30 (1998); State ex rel. Daimler Chrysler Corp. v. Indus. Comm., 10th Dist. No. 13AP-306, 2014-Ohio-2072.

# SECTION N: DISABILITY RELIEF

## **Memo N1 | Final Settlement – Pending or Subsequent Application for Disability Relief**

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

## **Memo N2 | All Parties May Appear at Hearings**

All parties and their representatives may appear at and present evidence that speaks to the issue of disability relief at the hearings on this issue.

### **Memo N3 | No Relief for Surety Companies**

Disability relief is not to be awarded to surety companies for non-complying, self-insuring employers.

**NOTE:** Holben v. Interstate Motor Freight Sys., 31 Ohio St.3d 152, 509 N.E.2d 938, 31 O.B.R. 318 (1987).

# SECTION O: SETTLEMENTS

## Memo 01 | Settlements – Finality, Abatement, and Withdrawal

A settlement is final upon the expiration of 30 days after the Administrator of the Bureau of Workers' Compensation approves the settlement for state fund claims, or 30 days after the self-insuring employer and injured worker or dependent(s) of a deceased 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 re-opened as it has been settled. This is irrespective of whether the injured worker or dependent(s) of a deceased 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 of the Bureau of Workers' Compensation in state fund claims or has been signed by both the self-insuring 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 of the Bureau of Workers' Compensation 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 of the Bureau of Workers' Compensation.

However, the abatement provisions of Ohio Adm.Code 4123-5-21(A) are nullified and not applicable in circumstances where the Administrator of the Bureau of Workers' Compensation 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:** 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 (8<sup>th</sup> Dist.1996).

## Memo 02 | Staff Hearing Officers Review of Settlements

R.C. 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. The 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 Adm.Code 4125-1-02 are met. An e-mail is insufficient to constitute an e-signature. Also, the 30-day period provided to the parties to withdraw from the settlement agreement as described in R.C. 4123.65(C) cannot be waived by the parties.
2. In state fund claims, the Bureau of Workers’ Compensation 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 that justifies the reasoning for the settlement as required by R.C. 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 the Bureau of Workers’ Compensation 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 Bureau of Workers’ Compensation approval order matches the amount contained in the settlement agreement, it is not necessary for the Bureau of Workers’ Compensation 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 upon to support the Bureau of Workers’ Compensation 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 shall 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 shall be given the opportunity to cure any defect prior to the staff hearing officer completing the review of the settlement. In such event, the Industrial Commission 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 Industrial Commission 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 30-day “cooling off” period.

**NOTE:** Gibson v. Meadow Gold Dairy, 88 Ohio St.3d 201, 724 N.E.2d 787; Jones v. Action Coupling & Equip., Inc., 98 Ohio St.3d 330, 2003-Ohio-1099, 784 N.E.2d 1172; Emmer v. N. Cent. State Coll., 164 Ohio App.3d 491, 2005-Ohio-6339, 842 N.E.2d 1092 (5th Dist.).

# SECTION P: VIOLATIONS OF SPECIFIC SAFETY REQUIREMENTS

## Memo P1 | Mine Statutes Are Specific Safety Requirements

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

**NOTE:** State ex rel. Six v. Indus. Comm., 21 Ohio App.3d 22, 486 N.E.2d 125, 21 O.B.R. 24 (10th Dist.1984).

## **Memo P2 | Civil Penalty**

When it has been determined that an employer has not corrected a previous violation as required by order, the Bureau of Workers' Compensation will refer the matter for adjudication of the issues of the subsequent violation as provided in Ohio Adm.Code 4121-3-20(G), as well as the civil penalty provided in Ohio Adm.Code 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 shall ensure that an injury was the proximate result of the first specific safety requirement violation within the 24-month period required in Ohio Adm.Code 4121-3-20(H).

### **Memo P3 | Violation of Specific Safety Requirement Overpayment Due to Court Decision**

When an injured worker has received a violation of specific safety requirement award pursuant to an order of the Industrial Commission and that award is overturned in court, 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.

## **Memo P4 | Corrective Orders**

Pursuant to Ohio Adm.Code 4121-3-20(G), every order that adjudicates a Violation of Specific Safety Requirement Application and finds a violation(s) occurred must address the issue of correction of the violation(s). In no case should an order granting a Violation of Specific Safety Requirement Application be silent on the issue of correction of the violation(s). If correction of the violation(s) is unnecessary or impossible (for example, when a piece of equipment is no longer in service), the hearing officer shall include such discussion in the order.

If the Bureau of Workers' Compensation finds that the proper correction has not occurred, the matter will be referred to the Industrial Commission for processing pursuant to Ohio Adm.Code 4121-3-20(G) and (H). In that instance, the matter shall be set on the issue of subsequent violation for failure to correct the previous violation(s), together with the issue of a civil penalty to be assessed pursuant to Ohio Adm.Code 4121-3-20(H).

# SECTION Q: AVERAGE WEEKLY WAGE AND FULL WEEKLY WAGE

## Memo Q1 | Adjustments in Average or Full Weekly Wage

Where a motion or application for adjustment of the average weekly wage and/or full weekly wage 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 and/or full weekly wage.

The aforementioned limitation applies whether the average or full weekly wage was originally set by formal order of the Industrial Commission, or by informal administrative action by the Bureau of Workers' Compensation or self-insuring employer.

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 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 adjustment. In such a case, the Industrial Commission can adjust all compensation previously paid.

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

**NOTE:** 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, 541 N.E.2d 52 (1989); State ex rel. The May Dept. Co. Cent. Reg'l Claims Office v. Indus. Comm., 10th Dist. No.93APD03-333, 1994 WL 16014828 (Jan. 27, 1994).

# SECTION R: HEARING ROOM ISSUES

## **Memo R1 | Hearings before the Members of the Industrial Commission Have Precedence**

Hearings before the members of the Industrial Commission 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 members of the Industrial Commission first. Hearing officers shall delay hearings where there is a conflict until the representative has completed the hearing before the members of the Industrial Commission.

## **Memo R2 | Industrial Commission Hearings – Court Reporters**

Parties wishing to have a court reporter present for any Industrial Commission hearing shall notify the hearing administrator at least 7 calendar days prior to hearing. Such party shall indicate the amount of extra time, if any, the party expects the hearing to take.

If a party brings a court reporter to a hearing without prior notice to the Industrial Commission, the hearing officer shall inquire as to the amount of extra time that 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 shall not delay other scheduled hearings in order to proceed with a lengthy, unannounced court reporter hearing.

If a party brings a court reporter to an Industrial Commission hearing, that party shall submit a copy of the transcript to the claim file within 7 calendar days of the hearing. Such party is not obligated to provide a certified copy to the opposing party. If the opposing party requests a copy of the transcript, such copy shall be made by the requesting party from the transcript submitted to the file.

## **Memo R3 | Administrator of the Bureau of Workers' Compensation Representative Appearance at Industrial Commission Hearings**

R.C. 4123.511(G)(3) provides the following:

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 section 4123.343 of the Revised Code, 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 Bureau of Workers' Compensation Law Section that identifies the cause of, or presents the circumstances of, the issue in controversy.

Attorneys assigned to the Bureau of Workers' Compensation 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 injured workers 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.

## **Memo R4 | Hearing Officer Complaint Procedure**

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

A properly filed complaint should identify the hearing officer, the issue(s) or concern(s) the individual would like to address, the time and place of the hearing, and any other pertinent information of which the Industrial Commission should be aware.

When the Director of Adjudicatory Services receives a formal written complaint, the director will wait until the appeal period for the most current district or staff hearing has ended (whichever is last). After all hearing officer appeal periods have ended, the director 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 the hearing officer to respond to the complaint in writing. The regional manager will then forward the written response to the Director of Adjudicatory Services. The Director of Adjudicatory Services 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 Adjudicatory Services will work with the regional manager and the hearing officer to implement corrective action.

## **Memo R5 | 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. Claim files are confidential records. No questions shall be entertained regarding the records or contents of a file, unless the question comes from a party or authorized representative.

Hearing officers shall introduce themselves to observers, ask the identity of the observer(s) and if the observer(s) has a particular reason to be present, and then provide a very brief explanation of the Industrial Commission policy on observers. This discussion will also serve to explain to the parties why a “stranger” is sitting in their hearing.

Observers shall 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 shall judge the propriety of such requests. Separation of witnesses is, at minimum, a professional courtesy to the requesting attorney and shall be honored in all cases, barring a valid objection by opposing counsel.

## **Memo R6 | Interpreters for the Hearing Impaired or for Foreign Language**

The service of interpreters will be secured for hearings, pre-hearing conferences, and/or for medical examinations involving individuals who could not communicate otherwise during the hearing, pre-hearing conference, and/or medical examination due to deafness or a foreign language barrier. Interpreters are scheduled by the Columbus Regional Office, Interpreter Services staff, in those instances where a party to the claim requests the service or the Industrial Commission finds such services necessary. A separate request must be submitted for each hearing, pre-hearing conference, or medical examination where an interpreter is required.

The parties shall be informed of their right to have an interpreter present. When a hearing officer, hearing administrator, 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 individual to effectively communicate. Interpreters shall only attend the hearing they were notified to attend by the Industrial Commission.

The role of the interpreter in hearings:

- Facilitate the hearing process and place the individual for whom services are provided in a position as close as linguistically possible to that of a similarly situated individual without a hearing loss or foreign language barrier in the same legal setting;
- 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; and
- Refrain from providing services if he or she has a stake in the outcome.

The role of the interpreter outside the hearing room:

- Initially acknowledge the individual for whom services are provided to ensure successful communication;
- Facilitate communication between the parties to clarify information prior to commencement of the hearing; and
- Otherwise refrain from independent conversations with the parties or witness(es) prior to commencement of the hearing.

Only individuals assigned by the Industrial Commission to serve as interpreters at Industrial Commission hearings, pre-hearing conferences, or medical examinations are entitled to payment for such services.

## Memo R6 Continued

A C-19, Service Invoice, is submitted for each interpreter service that is performed for the Industrial Commission. Service Invoices are reviewed for accuracy and approved by the Columbus Regional Office. Once approved, the Service Invoice is submitted to the Bureau of Workers' Compensation Medical Billing & Adjustments department for payment from the Surplus Fund.

**NOTE:** Industrial Commission/Bureau of Workers' Compensation Joint Resolution R88-1-200.

## **Memo R7 | Presentation of Audiovisual Evidence**

The presentation 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 Industrial Commission shall be filed at least 7 calendar days prior to the date of hearing. At the time that a party files audiovisual evidence with the Industrial 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 filing party shall provide a copy of the synopsis to the representative of the opposing party. If a party requires additional time to present audiovisual evidence during the hearing, a request shall be made in writing. Such 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 all reasonable efforts to ensure that audiovisual evidence that is filed will be made available as a document in the Industrial Commission On-line Network 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 shall 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 to the end of a docket. The hearing officer may also seek the assistance of other hearing officers not scheduled for hearings that day.

## **Memo R8 | Ethical Conflicts for Hearing Officers**

Hearing officers may encounter hearings that the hearing officer cannot preside over because of ethical considerations resulting from a personal or professional relationship between the hearing officer and either a party or a 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 or she 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 all necessary actions to avoid the ethical concern 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 available, 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. Such arrangements may require hearing officers to trade dockets in order to resolve the potential ethical concern. Only in the event that no other hearing officer is available shall the hearing be reset.

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

## **Memo R9 | 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 that discloses that a party to a case has exhibited violent behavior in the past and/or has made threats of violence directed toward Industrial 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 following measures shall be taken:

- A. Prior knowledge of a threat:
  - 1. The hearing officer or other individual receiving the information shall immediately contact the supervisor in the local Industrial Commission office.
  - 2. As soon as the hearing officer or other individual receives information regarding a possible threat of violence or a party with a history of violence and the claim has been set for hearing, the Executive Director and Director of Security shall 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, shall be shared with these two individuals. The Director of Security may be asked to provide additional security at the hearing.
  - 3. The representatives of the parties to a claim that is scheduled for hearing shall 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 shall 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 shall 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.

## **Memo R10 | Hearing Representative Schedule Conflicts**

When representatives are scheduled for more than one hearing in the same hour and a scheduling conflict occurs, hearing officers shall 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 shall proceed only as the last resort.

The hearing officer shall 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 choose, 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.

## **Memo R11 | Use of Cellular Phones, Telephonic 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 that cannot be placed in a silent/mute activation or vibrating mode shall 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 Industrial 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 Industrial Commission permission pursuant to Adjudications before the Ohio Industrial Commission Memo R7 and Industrial Commission Resolution R18-1-04.

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, he or she shall exit the building to use that device.

# SECTION S: MISCELLANEOUS ISSUES

## **Memo S1 | Representation by Former Employees**

When representing any party before the Industrial Commission, no former employee of the Industrial Commission or Bureau of Workers' Compensation shall be permitted to defend or interpret a prior order that he or she issued or signed on behalf of another hearing officer.

## Memo S2 | Overpayments

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

A Disabled Workers' Relief Fund overpayment shall be collected from future increases in such payments, where permissible, and except where the Industrial Commission finds evidence of payments obtained fraudulently or resulting from misrepresentations by injured workers or their representatives. This finding is necessary because Disabled Workers' Relief Fund 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 Disabled Workers' Relief Fund rate was initially calculated correctly, that Disabled Workers' Relief Fund payments were made in good faith to the injured worker, and there was a good faith acceptance of the Disabled Workers' Relief Fund payment, but an overpayment in Disabled Workers' Relief Fund was found due to a subsequent retroactive adjustment of the permanent total disability compensation rate. In such cases, pursuant to Martin v. Connor, no recoupment of the Disabled Workers' Relief Fund overpayment is to be ordered withheld or set-off from future Disabled Workers' Relief Fund benefits or other compensation that may be paid.

## Memo S2 Continued

**NOTE:** R.C 2913.48; State, ex rel. Short v. Indus. Comm., 10th Dist. No. 95APD05 (May 14, 1996);  
State ex rel. Koonce v. Indus. Comm., 18 Ohio St.3d 60, 479 N.E.2d 876, 18 O.B.R. 93 (1985);  
Burr v. Bd. of Cnty. Comm'rs. of Stark Cnty., 23 Ohio St.3d 69, 491 N.E.2d 1101, 23 O.B.R. 200 (1986);  
State ex rel. Martin v. Connor, 9 Ohio St.3d 213, 459 N.E.2d 889, 9 O.B.R. 523 (1984); Industrial  
Commission Resolution, dated August 10, 1977.

### **Memo S3 | 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 shall be continued and the claim file referred to the Office of Legal Counsel in order to initiate appropriate compliance measures (Motion to Compel).

## **Memo S4 | Tampering with Claim File Documents**

All hearing officers are to be aware of the provisions of R.C. 2921.12, which is titled "Tampering with evidence."

This section provides the following:

- 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; or
  - 2. Make, present, or use any record, document, or thing, knowing it to be false and with purpose to mislead a public official who is or may be engaged in such proceeding or investigation, or with purpose to corrupt the outcome of any such proceeding or investigation.
  
- B. Whoever violates this section is guilty of tampering with evidence, a felony of the third degree.

An "official proceeding" is defined by 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 September 28, 2012, a third degree felony is punishable by a prison term not less than nine months and not more than 36 months. Bureau of Workers' Compensation/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 that may be relevant to an "official proceeding or investigation," such as a hearing conducted by the Industrial Commission.

Once a document that is reasonably related to the claim is entered into a claim file, it cannot be removed unless mutually agreed to by all parties.

## **Memo S5 | Burden of Proof**

With the exceptions of the “firefighters’ or police officers’ presumption” found in R.C. 4123.68(W) and affirmative defenses such as incarceration as a ground for denial of temporary total disability compensation, the injured worker 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 injured worker has submitted “no evidence” to support payment of the requested compensation or benefit.

**NOTE:** R.C. 4123.10; Indus. Comm. v. Davis, 119 Ohio St. 221, 162 N.E. 796, 6 Ohio Law Abs. 371 (1928); State ex rel. Mitchell v. Robbins & Myers, Inc., 6 Ohio St.3d 481, 453 N.E.2d 721, 6 O.B.R. 531 (1983).

## **Memo S6 | Motions, Applications, and Appeals Not Filed by a Party in Interest**

The Industrial Commission may exercise jurisdiction over any motion, application, or appeal that has been filed by a party in interest. The term “party in interest” is expressly limited to the injured worker, his or her representative, the employer, the employer’s representative, and the Administrator of the Bureau of Workers’ Compensation.

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

## **Memo S7 | Exclusion of the First Week of Compensation**

R.C. 4123.55 precludes compensation for the first week of total disability after an injury is received or an occupational disease is contracted unless and until the injured worker is totally disabled for a continuous period of two weeks or more. It is the policy of the Industrial Commission that R.C. 4123.55 does not apply to forms of compensation other than temporary total disability compensation as provided for in R.C. 4123.56 or wages in lieu of temporary total disability compensation (i.e. salary continuation).

## **Memo S8 | Jurisdiction over Differing Psychological Conditions**

When an injured worker files a motion for a specific psychiatric condition based on a report that documents a psychological condition related to the injury, and other examining doctors diagnose conditions that are different from the conditions 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, that he or she determines most appropriate.

## **Memo S9 | Dual Causation**

The concept of dual causation does not apply to disability determinations. When adjudicating issues of temporary total disability, permanent total disability, or wage loss, the allowed conditions in the claim must be the disabling condition(s). Other non-allowed condition(s) may be present, but if those conditions contribute to the disability in a way that the allowed conditions are not independently disabling, then disability or wage loss 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 or condition(s) may be allowed despite the fact that smoking is also a proximate cause of the diagnosis.

## **Memo S10 | Formal Applications for Additional Conditions Not Required**

The Bureau of Workers' Compensation or a self-insuring employer may initiate the allowance of an additional condition in the absence of a C-86, C-9, or other formal written request by a party to the claim. Such initiation may take place when the doctor of record or other medical professional submits sufficient information to substantiate the additional allowance. When initiated by the Bureau of Workers' Compensation, the claims service specialist issues an order notifying all parties to the claim that a condition has been additionally allowed. This order will allow all parties to file an appeal, if appropriate.

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

This policy only applies to the issue of additional allowance.

**NOTE:** R.C. 4123.511; State ex rel. Morrow v. Indus. Comm., 71 Ohio St.3d 236, 1994-Ohio-357, 643 N.E.2d 118 (1994).

**Memo S11 | Request for Allowance of a Condition by Either Direct Causation, Aggravation/ Substantial Aggravation, or Flow-Through, and Jurisdiction to Rule at Hearing**

If there is evidence on file or presented at hearing to support the theories of direct causation, aggravation (date of injury or disability prior to August 25, 2006)/substantial aggravation (date of injury or disability on or after August 25, 2006), or flow-through, a request to allow a condition in a claim is to be broadly construed to cover those theories of causation. The hearing officer shall address the origin of the condition under those alleged theories of causation without referring the claim back to the prior hearing level or the Bureau of Workers' Compensation. Where a new theory, not formerly requested, is raised at hearing or 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 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 order or compliance letter the period of time allotted to obtain the necessary evidence.

**NOTE:** Ohio Adm.Code 4121-3-09(A)(1)(b).

## **Memo S12 | Role of Surety Companies in Hearings**

Pursuant to the case of Holben v. Interstate Motor Freight Sys., 31 Ohio St.3d 152, 509 N.E.2d 938, 31 O.B.R. 318 (1987), surety companies for an insolvent self-insuring employer are included within the definition of employer for the limited purpose of participating in workers' compensation benefit determination proceedings. Holben deals specifically with the surety company's ability to appeal decisions of the Industrial Commission to court. It is the Industrial Commission's position that the rights of surety companies are somewhat broader than just being able to appeal to court. However, prior to being found to be financially responsible for a claim, surety companies do not have the right to actively participate in the defense of the claim.

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

### **Memo S13 | Scheduling Industrial Commission and Bureau of Workers' Compensation Employees, Relatives, and Significant Others for Hearing**

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

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



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