Ohio | Industrial Commission

DISTRICT HEARING OFFICER TRAINING MANUAL

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CHAPTER ONE: THE ADJUDICATOR

I. INTRODUCTION

It is the responsibility of the hearing officer to conduct the hearing in such a manner so that the issues presented for resolution are determined fairly, according to all parties, and a full and reasonable opportunity to present such evidence as may be relevant to the issues involved is provided. The hearing officer's corollary responsibility is to exercise such control as is necessary for the orderly, effective, and reasonably expeditious progress of the hearing.

II. HEARING ROOM DEMEANOR

A. Attire (See **Memo L1 Hearing Room Demeanor**)

1. 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.

B. Fair and Impartial Hearings (See **Memo L1 Hearing Room Demeanor**)

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

C. Preparedness (See **Memo L1 Hearing Room Demeanor**)

1. The hearing officer shall review the claims assigned prior to hearing. The hearing officer should strive to avoid the unprofessional appearance created by an obviously unprepared hearing officer.

D. Ex Parte Communications (See **Memo L4 *Ex-Parte* Discussions**)

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

E. Informing Injured Workers About Payment (See **Memo L5 Informing Injured Workers about Payment**)

1. The hearing officer should be very careful when responding to an inquiry regarding when an injured worker will receive a check, electronic funds transfer (EFT), or electronic benefits transfer (EBT). There are many variables that affect the issuance of checks, electronic funds transfer (EFT), or electronic benefits transfer (EBT).

2. There are several steps after the order is issued. The BWC and self-insuring employer

issue checks and are the proper entities to address questions regarding same. Each BWC District Office has public inquiry assistants at the front counter available to answer such questions.

F. Threats of Violence

1. See **Memo R9 Hearing Officers' Responsibility to Threats of Violence that May Be Made by Parties to a Contested Workers' Compensation Claim**.

III. PRELIMINARY CONSIDERATIONS

A. Continuance Requests: **Resolution R12-1-03 Docketing and Scheduling Guidelines**

1. Docketing representatives may request hearing blocks with at least 15 business days' notice (up to 50 half-days per year).

2. Adm.Code 4121-3-09(C)(9) permits the hearing administrator to grant continuance requests filed more than five calendar days before the hearing on a showing of good cause, and a hearing administrator or hearing officer to grant continuance requests received less than five calendar days before the hearing on a showing of **extraordinary circumstances that could not have been foreseen**.

3. Extraordinary circumstances include, but are not limited to, the following examples:

   a. Hospitalizations and medical emergencies, deaths in immediate family, automobile accidents, weather emergencies, etc.;

   b. Inadequate notice;

   c. The processing of a discovery request that was not foreseeable and couldn't have been filed earlier;

   d. Party or representative receives notice of a conflicting court date that was not foreseeable;

   e. Recent retention of an authorized representative if the party exercised due diligence in determining whether to obtain counsel;

   f. The ability to rebut new opposing evidence only where unforeseeable issues are raised by the new evidence or the volume of new evidence precludes the ability to conduct a proper hearing;

4. Due Diligence. The evaluation of "due diligence" is made on a case-by-case basis in consideration of several factors such as the sophistication of the party, the familiarity with the Ohio workers' compensation system, the issue to be adjudicated, the stage of the claim in the administrative appeal process and whether there were prior continuances in the claim.

5. Prior Continuance Denial. If a request to continue a hearing is denied by the hearing administrator, the hearing officer may not grant a continuance of the hearing based on reasons similar to those that were previously found to be insufficient by the hearing administrator.

6. Settlements. (See **Resolution R12-1-03 Docketing and Scheduling Guidelines**)

a. When a pending settlement dispositive of the docketed issue is in the negotiation stage, the Commission will cancel the hearing and issue an interlocutory order referring the claim file to the Bureau of Workers' Compensation, pending settlement negotiations. The interlocutory order must include language that the parties are required to give written notice to the Commission in order to reschedule the docketed issue for hearing if settlement negotiations fail.

B. Due Process/Notice/Jurisdiction

1. What issues are contained in the notice for hearing? Do they adequately represent the issues that will be heard?

a. If the issues were not appropriately captured, the hearing officer does not have jurisdiction to rule on those issues unless the parties waive notice.

i. For state fund claims, waiver of notice is needed from all parties including BWC.

2. Specific Issues

a. When **"Injury or Occupational Disease Allowance"** is properly and timely noticed, the following guidelines apply.

i. The issue is construed to include such matters as:

a) Claim allowance;

b) Full weekly wage and/or average weekly wage;

c) Payment of temporary total disability compensation;

d) Payment of medical bills for the allowed conditions;

e) Whether the claim should be classified as injury or occupational disease.

ii. The issue does not include:

a) Wage loss determinations.

b. State Fund Claims: Underlying Orders

i. It does not matter if an order of the Administrator fails to address all issues contained in the initial application or motion. Hearing officers can and **shall** adjudicate all matters listed in the initial application or motion, etc.

c. Correct Employer

i. When the issue of correct employer is noticed for hearing, the hearing officer shall decide whether the noticed employer, against whom the pending application was filed, is the correct employer.

ii. The Administrator or self-insuring employer shall make the initial claim allowance determination. Thus, if a different entity is alleged as the possible employer, after the initial allowance determination or referral for hearing, the hearing officer shall issue an appealable order referring the matter back for initial processing by the Administrator and/or the self-insuring employer. In these scenarios, the claimant also has the option to file a new claim application.

d. Additional Allowances

i. Notices for additional allowance requests should be sufficient to apprise the parties of the issue to be heard. Hearing officers should decide whether notice is sufficient based on all the relevant evidence.

ii. E.g. An additional allowance request for “Rotator Cuff Tear Right Shoulder” may reasonably include “Infraspinatus Tear Right Shoulder.”

C. Attorney Representatives

1. Written consent to representation is required. Look for R1 or R2 authorization forms in file. Written notification must identify the entity that the attorney is representing, or the attorney’s representation must be clear from other similar records in the file (e.g. letter on company letterhead).

2. In some cases, attorneys appear with short notice of hearing or are unaware of the written notification requirement. Under these circumstances, a hearing officer may inquire about the entity the attorney represents. Thereafter, the hearing officer should accept the attorney’s oral representation and proceed with hearing. After the hearing takes place, the attorney is expected to submit written authorization to the claim file no later than the close of business on the hearing day.

D. Non-Attorney Representatives & Unauthorized Practice of Law

1. The parties may choose to be represented by a non-attorney representative. Non-attorney representatives may not engage in the practice of law. See **Resolution R18-1-05 Standards of Non-Attorneys Before the Commission and the Bureau**. The hearing officer is the gatekeeper with non-attorney representatives; give warnings, and, if egregious, report to your supervisor.

2. Non-attorney representatives may **not**:

a. Examine or cross-examine the injured worker or any witness, directly or indirectly;

b. Cite, file, or interpret statutory or administrative provisions, administrative rulings, or case law;

c. Make and give legal interpretations with respect to testimony, affidavits, medical evidence in the form of reports or testimony, or file any brief, memorandum, reconsideration or other pleading beyond the forms actually provided by the Commission or the Bureau;

d. Comment upon or give opinions with respect to the evidence, credibility of witnesses, the nature and weight of the evidence, or the legal significance of the contents of the

claims file;

e. Provide legal advice to injured workers and employers;

f. Give or render legal opinions, or cite case law or statutes to injured workers and employers before, at or after the time when claims are initially certified or denied certification as valid claims by the employer upon the presentation of claim applications by employees;

g. Provide stand-alone representation at hearing by charging a fee specifically associated with such hearing representation without providing other services.

h. Make the decision to waive notice; however, they may act as the *messenger* for such a decision.

3. Representation by non-attorney representatives may include:

a. Assistance to injured workers and employers in the administration of a claim and the filing of claims and appeals, without making any legal determination respecting such claims or appeals, before the administrator of the Bureau of Workers' Compensation and/or the Industrial Commission of Ohio;

b. Attendance at any hearing before the Industrial Commission for the purposes of recording and reporting any action taken at such hearing, reporting the factual results of any claim investigation, apprising the hearing officer or officers of documents or parts thereof that are in the file or that are missing from the file, including medical reports, filing documents, requesting a postponement or continuance of the hearing, and discussing matters within the independent knowledge of the representative.

E. Timing: was the appeal or application timely filed?

1. For this calculation, the first day should be excluded, and the last day included. See R.C. 1.14. When the last day is a Sunday or a legal holiday, use the next succeeding day that is not a Sunday or legal holiday.

2. For electronic submissions, to be accepted as timely filed or received, the record must be received by a device or at an address designated for that purpose and confirmed as received within the prescribed time frames. Electronic records not received during regular business hours are considered to be received and filed on the next day. See Adm.Code 4125-1-02.

3. Appeals must be filed within 14 days of receipt of the order. See R.C. 4123.511.

4. See Section VII *infra* at page 47 regarding statutes of limitation for claim filing.

F. Signature

1. Is the FROI signed? If the FROI is unsigned (and there is no other evidence on file demonstrating the intent to pursue an industrial claim) and the claimant does not appear at the hearing, the hearing officer should **dismiss** the claim, not deny it.

2. Motions, applications, and appeals not signed by a party in interest are to be **dismissed**. E.g., a doctor cannot file a C-86. See **Memo S6 Motions, Applications, and Appeals**

Not Filed by a Party in Interest.

a. Caveat: 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. See **Memo S10 Formal Applications for Additional Conditions Not Required**. Hearing officers must exercise discretion and consider all relevant evidence in determining whether the evidence demonstrates the intent of the injured worker to pursue the request.

IV. CONDUCT OF THE HEARING

A. Commencement of the Hearing

1. Before opening the hearing, the hearing officer should ascertain the identities of the parties, their attorneys, and witnesses.

2. Introduce yourself and make parties feel comfortable upon entering the hearing room.

3. If, during review, the hearing officer anticipates a continuance request, etc. ask the parties if there are any preliminary issues.

4. Briefly indicate the issue(s) subject to the hearing.

5. The applicant/movant/appellant (depending on the issue and level of hearing) is given the opportunity to argue first and is entitled to a rebuttal following argument by the remaining party or parties.

B. During the hearing

1. Demeanor:

a. Pay attention to the presentation of all parties

b. Have positive body language (don't show boredom, disbelief)

c. Maintain a professionally objective stance toward the parties

2. Seek/clarify facts and medical or legal information that is necessary to decide if the parties have not clearly presented the facts/law.

3. But, refrain from a discussion or debate of legal issues.

4. Be sufficiently aware of the facts of the case.

5. Keep parties focused on the issues.

6. Do not raise matters that unnecessarily create tension or conflict.

7. If it seems like a Staff Hearing Officer hearing will take additional time, place such language in the order.

C. Conclusion

1. At the end of the hearing, make it clear what will occur next (may announce the decision

or announce that the matter is being taken under advisement and a decision will be issued soon).

D. Filing evidence:

1. If parties bring new evidence to the table, make sure the document contains a claim number and is date-stamped, and take it to the office-specific location for scanning.

E. Unrepresented Parties

1. In the case of unrepresented injured workers, the hearing officer may explain the process to them, but the hearing officer is prohibited from dispensing legal advice. Refer them to the Ombuds office.

2. *Pro se* injured workers may require additional questioning by the hearing officer, particularly in allowance hearings regarding the mechanism of injury.

V. ORDER WRITING

A. Write for the Readers:

1. The examiner who will need to implement the decision; and/or

2. The parties and/or their representatives who need to understand the decision; and/or

3. The Tenth District to determine if the decision is based upon some evidence.

B. Four Essential Elements of a Hearing Decision

1. Issue Resolution

a. Rule on (1) the Appeal/Underlying Order (if present); and/or (2) the Motion or Application.

2. Order

a. Provide a clear directive that grants or denies the requested benefit (allowed/disallowed conditions, compensation, etc.).

3. Findings

a. Provide a brief reason for granting or denying requested benefits (e.g. explain that the legal standard is or is not met).

4. Evidence

a. Cite only the specific evidence that supports the decision.

C. Form

1. The four essential elements should appear in separate paragraphs. This provides the parties with a clearer statement of the matter that was decided.

2. The order must also comply with the **Documentation Standards for all IC**

Correspondence.

D. Basic Evidentiary Requirements

1. Rule:

   a. **Cite only the evidence that is the basis of the hearing decision.** *State ex rel. Mitchell v. Robbins & Myers, Inc.,* 6 Ohio St.3d 481, 453 N.E.2d 721 (1983).

   b. Contrary evidence does not need to be cited; nor does a reason need to be provided for rejecting evidence upon which the order does not rely. See, e.g., *State ex rel. Bell v. Indus. Comm.*, 72 Ohio St.3d 575, 651 N.E.2d 989 (1995); *State ex rel. World Stamping & Mfg. Co. v. Indus. Comm.*, 84 Ohio St.3d 433, 740 N.E.2d 1230 (1999); *State ex rel. Jackson v. Indus. Comm.*, 79 Ohio St.3d 266, 1997-Ohio-152, 680 N.E.2d 1233.

2. Corollary to the Rule

   a. If there is *no* contrary evidence, but the finding is that the offered report is not probative, then, *and only then*, must you explain why the report does not constitute some evidence. *State ex rel. Eberhardt v. Flxible Corp.*, 70 Ohio St.3d 649, 640 N.E.2d 815 (1994).

3. Exception to the Rule:

   a. If a list of evidence considered—but not relied upon—is unnecessarily provided, then **all** relevant evidence must be identified. *State ex rel. Fultz v. Indus. Comm.*, 69 Ohio St.3d 327, 1994-Ohio-426, 631 N.E.2d 1057.

   b. Clarification of the Exception: **A listing of all evidence considered—but not relied upon—is unnecessary**. *State ex rel. Buttolph v. Gen. Motors Corp., Terex Div*., 79 Ohio St.3d 73, 1997-Ohio-34, 679 N.E.2d 702.

   c. Using the **Memo K2 Precise Order Writing**-mandated phrase “All evidence was reviewed and considered” is not akin to a listing of the evidence.

4. A report obtained by a particular party is not *per se* entitled to enhanced weight or heightened deference (e.g., if from the physician of record) since the Commission determines the weight and credibility of reports. See *State ex rel. Milburn v. Indus. Comm.*, 26 Ohio St.3d 119, 498 N.E.2d 440 (1986); *State ex rel. Bell v. Indus. Comm.*, 72 Ohio St.3d 575, 1995-Ohio-121, 651 N.E.2d 989.

5. All relevant matters and critical issues must be explained. Pure award or denial of compensation is insufficient if there are other critical issues.

6. It is generally sufficient to identify the evidence that has been relied upon (for example, identify the name of the doctor and the date of the doctor’s report) without discussing the contents of the report. See *State ex rel. Smith v. Indus. Comm. (1986),* 26 Ohio St.3d 128, 26 OBR 110, 498 N.E.2d 447. However, if the hearing officer is only relying on specific opinions or exam findings in a report, rather than all (which should only rarely be done), more explanation of what opinion(s) and exam findings are being relied upon is necessary to support the decision. *State ex rel. Frigidaire Div., General Motors Corp. v. Indus. Comm.*, 35 Ohio St.3d 105, 518 N.E.2d 1194 (1988).

E. Double-check dates:

1. Reports: always double check the dates of the reports cited; one of the common mistakes resulting in corrected order requests, appeals, or reconsiderations is a clear mistake in the date of a report.

2. Periods of compensation: make sure the period of compensation awarded or denied is accurate. Be sure the year is correct!

3. R.C. 4123.52: Two-year limitation on awarding compensation (including a retroactive readjustment of the AWW) or ordering recoupment of overpayment, if the readjustment resulted from the filing of an application.

F. Allowance

1. Written descriptions

a. The initial allowance order must include a written description of the mechanism of injury.

b. The order must also provide a written description of the diagnosis or condition which is being allowed in the claim. In addition, the name of the physician authoring the report and the date of the report shall be included. Do not include the ICD code(s) for the condition(s) being allowed. See **Memo K1 Allowance – Dismissal Order v. Merits**.

2. Symptoms

a. If a party requests the allowance of a symptom rather than a condition, the request should be dismissed, not disallowed. See **Memo K1 Allowance – Dismissal Order v. Merits**.

3. Certifications by self-insuring employers

a. Where the self-insuring employer certifies a claim and/or accepts the allowance of specific conditions, hearing officers shall memorialize the certification and the matter is moot as to the certified conditions. If additional issues/conditions, not addressed by the SI certification, are adjudicated at hearing, the order shall contain the essential order elements with regard to those additional issues/conditions.

G. Party-Requested Dismissal (**Memo K1 Allowance – Dismissal Order v. Merits**)

1. Merits arguments preclude dismissal

a. Once the parties have discussed the merits, the claim or condition should be either allowed or denied. The published order should contain express allowance or denial language. Decisions may not be held for additional evidence to be submitted after the hearing.

b. Should the appealing party request dismissal prior to hearing, the hearing officer must grant the dismissal. If the request is made after a discussion of the merits, the hearing officer must deny the request for dismissal. Once a hearing on the

merits has commenced, the underlying application, motion, or other request cannot be dismissed.

2. Do not use terms such as “dismissed with prejudice” or “dismissed without prejudice.”

3. In a state fund claim, if the BWC has issued an order granting or denying the treatment or application and the injured worker withdraws/dismisses the request, e.g. C-9 or C-86, the underlying order must be vacated and then the underlying motion or application dismissed.

H. Noticed Issue(s)

1. Rule ONLY on the issue noticed for hearing (unless there has been a waiver). Do not include any extraneous findings.

2. Hearing officers shall not, sua sponte, order issues to be set for hearing that have not been properly raised and/or requested by a party to the claim.

3. Common errors:

a. Granting/awarding temporary total disability compensation (TTDC) when the only issue is “termination of temporary total:” The hearing officer only has authority to make a decision as to termination (for MMI or other reasons), but does NOT have authority to grant TTDC.

b. “Intervening injury” is a specific issue that must be noticed. It has far-reaching implications for the claim, and if the issue before the hearing officer is simply treatment, and a physician opines the treatment requested is due to an unrelated motor vehicle accident that occurred subsequent to the injury, the hearing officer does NOT have authority to declare the accident an intervening injury on a simple request for treatment. Instead, stick to *Miller* and find the requested treatment is not reasonably related to the allowed conditions in the claim.

i. This rationale applies equally to alleged new claims where there is an argument it is simply a continuation of a prior industrial injury. Do not make a causal finding as to a claim that is not noticed for hearing.

ii. For further discussion of intervening injury, see page 85.

c. When denying treatment based on a finding it is requested for non-allowed conditions, refrain from making any finding as to whether the condition(s) treatment is requested for is/are causally-related to the industrial injury. The non-allowed condition(s) could be requested later, and extraneous causal findings could lead to an attempted res judicata defense. Stick to *Miller* and find the treatment is requested for *currently* non-allowed conditions or that the treatment is not for the allowed conditions.

I. Interlocutory Orders

1. Interlocutory orders are issued when a claim is continued, when taking a claim under advisement, when a referral is needed for a medical exam/review, and other procedural issues.

2. There are **no appeal rights** to interlocutory orders.

3. Interlocutory orders should NOT:

   a. Vacate an underlying order;

   b. Address the merits of a claim;

   c. Make any findings; or

   d. Address jurisdictional issues.

4. Split Orders

   a. When a claim is heard for more than one issue and the decision is split as to referring one or more issue back and adjudicating one or more issue on the merits, the electronic hearing worksheet needs to be split into two separate PCNs so two orders can be issued: one interlocutory and one with standard appeal language.

5. Referral Orders

   a. All orders referring matters for processing are not interlocutory orders and, therefore, may require appeal language. E.g. Issues of “Jurisdiction of PPD” and “Correct Employer.”

VI. EVIDENCE

A. Rules & Discretion

1. The Ohio Rules of Evidence do not apply in hearings before the Industrial Commission. See R.C. 4123.10.

2. Hearsay and unsworn statements are permitted.

3. Discretion rests exclusively with the Commission to resolve disputed questions of fact, weigh the evidence, determine credibility, and make decisions based on the evidence presented.

4. Due to the broad grant of discretion, the Commission does not need to explain **why** a specific piece of evidence is not persuasive (subject to the exceptions previously noted).

B. Signature

1. A physician’s signature on a report is required.

2. However, a signature stamp qualifies, as does an electronic signature, provided it complies with Adm.Code 4125-1-02.

C. Rejection

1. The Commission may reject even uncontradicted evidence in the record, so long as there is a valid reason for rejection.

2. Once a medical report has been rejected for a specific issue, it may not later be relied upon for the same issue or intertwined issues. See *State ex rel. Zamora v. Indus. Comm.*, 45 Ohio St.3d 17, 543 N.E.2d 87 (1989).

3. A report that contains opinions on different, distinct issues can be severable in light of *Zamora*. See *State ex rel. Verbanek v. Indus. Comm.*, 73 Ohio St.3d 562, 1995-Ohio-330, 653 N.E.2d 374.

   a. For a report to be severable, the issues must be independent and not intertwined. For example, although maximum medical improvement and permanent total disability are separate legal issues, because MMI is a prerequisite to PTD, the issues are intertwined and could not be severed. See *State ex rel. Bacon v. Indus. Comm.*, 10th Dist. Franklin No. 10AP-230, 2011-Ohio-3026 (holding the rejection of a physician's opinion on MMI was necessarily a rejection of that physician's opinion on PTD, even though PTD was not directly at issue at the prior hearing).

   b. However, because permanent partial disability and PTD are completely different, even if the Commission were to implicitly reject a physician's opinion as to PPD, it would not render an accompanying opinion as to PTD in the same report unreliable. See *State ex rel. Bailey v. Indus. Comm.*, 139 Ohio St.3d 295, 2014-Ohio-1909, 11 N.E.3d 1136.

4. There is no such thing as a "reverse-*Zamora*." E.g., just because a report was previously found persuasive does not mean the Commission is forever bound by that report. *State ex rel. Tilley v. Indus. Comm.*, 78 Ohio St.3d 524, 678 N.E.2d 1392 (1997).

D. Equivocation, Ambiguity, and Inconsistencies

1. Equivocal medical opinions are not evidence. See *Eberhardt*, *supra*.

   a. Equivocation occurs when a doctor repudiates an earlier opinion, renders a contradictory or uncertain opinion, or fails to clarify an ambiguous statement.

   b. Clarification of ambiguous and contradictory statements cures the uncertainty and renders the opinion reliable.

2. Internally inconsistent reports are not some evidence to support a Commission decision.

3. However, this rule does not prohibit a physician from reevaluating his or her opinion in light of new evidence.

E. PAs, APNs, CNPs, and CNSs (**Memo M5 Documentation Submitted by Physician Assistants, Advanced Practice Nurses, Certified Nurse Practitioners, and Clinical Nurse Specialists** & **Memo D8 Temporary Total Disability Certification for Physical and Psychological Conditions**)

1. Medical documentation submitted by an Advanced Practice Nurse, a Certified Nurse Practitioner, or a Clinical Nurse Specialist operating within the scope of his or her standard care arrangement, or by a Physician's Assistant who is practicing under an approved supervision agreement, is evidence to be considered.

2. APNs, CNPs, and CNSs may submit documentation regarding the evaluation of the IW's

wellness, preventive or primary care services required, and care for the injured worker's health problems.

3. A PA may submit documentation assessing injured workers and developing and implementing treatment plans which are within the supervising physician's normal course of practice and expertise.

4. During the six weeks after the date of injury, PAs, APNs, CNPs, and CNSs can certify temporary total disability independently. After six weeks, they may submit this certification as long as a physician cosigns following a review of the medical documentation of the examination.

F. LPCCs and LISWs

1. 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.

2. Such documentation is to be considered for recognition of the allowance of a condition. Documentation must be signed by the LPCC and LISW authorized to treat the injured worker.

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

G. Audiologist

1. An opinion of causality from an audiologist, by itself, is not sufficient to support allowance of a claim for loss of hearing.

H. Non-Examining Physicians

1. A non-examining physician's opinion is entitled as much deference as an opinion from an examining physician.

2. The non-examining/reviewing physician must accept the factual findings of preceding examiners. This means consideration of their findings. See *State ex rel. Wallace v. Indus. Comm.*, 57 Ohio St.2d 55, 386 N.E.2d 1109 (1979).

3. "Magic words" are not required, but a report is deficient if it lacks an express or implied affirmation the preceding examiners' findings were at least considered.

4. May offer a retroactive opinion so long as the physician reviewed all of the relevant medical evidence.

I. Depositions & Interrogatories

1. R.C. 4123.09 specifically grants the Commission authority to approve deposition and interrogatory requests to BWC or Commission physicians.

2. Adm.Code 4121-3-09(A)(8) and 4121-3-15(D) prescribe the rules:

   a. A request to take the deposition or submit interrogatories must be filed within 10 days of receipt of the report.

   b. The hearing administrator in the regional office determines the "reasonableness" of the request and also "whether the alleged defect or potential problems raised by the applicant can be adequately addressed or resolved by the claims examiner, hearing administrator or hearing officers through the adjudicatory process."

   c. If the hearing administrator finds the request is reasonable, the hearing administrator will issue a compliance letter.

3. Hearing officers are assigned to attend depositions on a rotation basis and based upon their availability per their hearing schedule. A Staff Hearing Officer is usually assigned because the examinations often involve the issue of permanent total disability. If no Staff Hearing Officers are available, a District Hearing Officer would be asked to attend.

   a. The hearing officer controls the deposition by determining the appropriateness of questions and whether the physician must answer. However, the hearing officer *does not* represent the physician in the deposition.

   b. Pursuant to *State ex rel. Woods v. Indus. Comm.*, 50 Ohio St.3d 227, 553 N.E.2d 665 (1990), because disability is a legal, not medical determination, the physician is to confine their opinions to that of medical impairment, and if a question as to disability is posed, the physician is not to answer.

VII. ETHICS: ADM.CODE 4121-15

A. Policy

1. It is essential that the public has confidence in the administration of the Industrial Commission and the Bureau of Workers' Compensation. This public confidence depends in a large degree on whether the public trusts that employees of these agencies are impartial, fair, and act only in the interest of the people, uninfluenced by any consideration of self-interest, except those inherent in the proper performance of their duties. Each employee, of whatever position, should, therefore, maintain the highest standards of personal integrity, since the public often judges the actions of an employee as reflecting the standards of the employing agency.

2. The Industrial Commission and the Bureau of Workers' Compensation are entrusted with the collection and distribution of a large fund. Their employees must respect this trust and should welcome public scrutiny of the way in which they perform their duties in connection with the administration of this fund. **They should be willing to accept restrictions on their conduct that may not be necessary of public employees in other agencies, who are not in similar position of trust. They must avoid not only impropriety, but the appearance of impropriety**.

B. Standards of Conduct for All Employees

1. Definitions:

a. "Anything of value" includes anything of monetary value, including, but not limited to, money, loans, gifts, **food or beverages**, social event tickets and expenses, travel expenses, golf outings, consulting fees, compensation, or employment. "Value" means worth greater than de minimis or nominal. *This has been interpreted to be less than $25; however, repetitive receipt of things of de minimis value will take receipt thereof out of acceptable range.*

b. "Anyone doing business with the commission or the bureau" includes, but is not limited to, any person, corporation, or other party that is doing or seeking to do business with, regulated by, or has interests before the commission or the bureau, including anyone who is known or should be known to be an agent or acting on behalf of such party, including any person or entity marketing or otherwise attempting to secure business with the commission or the bureau.

c. “Compensation” means money, thing of value, or financial benefit. “Compensation” does not include reimbursement for actual and necessary expenses incurred in the performance of official duties.

2. Prohibited Conduct. Employees **may not:**

a. Solicit or accept anything of value from anyone doing business with the commission or the bureau;

b. Solicit or accept employment from anyone doing business with the commission or the bureau, unless the member or employee completely withdraws from any commission or bureau discretionary or decision-making activity regarding the party offering employment, and the commission or the bureau approves the withdrawal;

c. Use his or her public position to obtain benefits for the member or employee, a family member, or anyone with whom the member or employee has a business or employment relationship;

d. Be paid or accept any form of compensation for personal services rendered on a matter before, or sell goods or services to the commission or the bureau;

e. Be paid or accept any form of compensation for personal services rendered on a matter before, or sell (except by competitive bid) goods or services to, any state agency other than the commission or the bureau, as applicable, unless the member or employee first discloses the services or sales and withdraws from matters before the commission or the bureau that directly affect officials and employees of the other state agency, as directed in section R.C. 102.04;

f. Hold or benefit from a contract with, authorized by, or approved by the commission or the bureau, (the ethics law does accept some limited stockholdings, and some contracts objectively shown as the lowest cost services, where all criteria under section 2921.42 of the Revised Code are met);

g. Vote, authorize, recommend, or in any other way use his or her position to secure approval of a commission or bureau contract (including employment or personal services) in which the member or employee, a family member, or anyone with whom the member or employee has a business or employment relationship, has an interest;

h. Solicit or accept honoraria (see R.C. 102.01(H) and 202.03(H)) except that employees who are not financial disclosure filers may receive an honorarium only if the honorarium is paid in recognition of a demonstrable business, profession, or esthetic interest of the employee that exists apart from public office or employment, and is not paid by any person or other entity, or by a representative or association of those persons or entities, doing business with the commission or the bureau, as applicable;

i. During public service, and for one year after leaving public service, represent any person, in any fashion, before any public agency, with respect to a matter in which the member or employee personally participated while serving with the commission or the bureau, excluding ministerial acts on behalf of a client or customer, as applicable;

j. Use or disclose confidential information protected by law, unless appropriately authorized;

k. Use, or authorize the use of, his or her title, the name of the commission or the bureau, or the agencies logos in a manner that suggests impropriety, favoritism, or bias by the commission or the bureau, or by a member or employee;

l. Solicit or accept any compensation, except as allowed by law, to perform his or her official duties or any act or service in his or her official capacity; and

m. Sponsor parties or other entertainment for the personnel of their agencies, the cost of which are covered in whole or in part by donations or receipts from the sale of tickets to individuals or entities, who are doing or seeking to do business with the commission or bureau.

3. Conflicts of interest

a. No employee shall engage in outside employment that results in a conflict or apparent conflict with the employee's official duties and responsibilities.

b. Outside employment or activity in which an employee <u>with or without pay</u> represents a claimant or employer in any matter before the industrial commission or the bureau of workers' compensation is prohibited.

c. Outside employment with an attorney, representative, or entity that involves work concerning industrial claims, whether filed or to be filed, or which is in any way related to workers' compensation matters is prohibited.

4. Professional code of ethics

a. In the event there is any conflict between a professional code of ethics governing any employee of these agencies and this code of ethics for employees, the professional code of ethics shall take precedence over the code of ethics for employees but the conflict shall be promptly reported to the employing agency. In such case the agency shall promptly determine the degree of conflict and take such further action as may be indicated.

5. An employee shall not use state property of any kind for other than approved activities. The employee shall not misuse or deface state property. The taking or use of state

property for the private purposes of an employee is prohibited. The employee shall protect and conserve all state property, including equipment and supplies entrusted to or issued to the employee.

6. Diligence and impartiality in work

   a. Employees are encouraged to avoid absenteeism and tardiness, to not use sick leave unless necessary and to abide by rules of the Ohio civil service. Recognizing that the industrial commission and bureau of workers' compensation serve many people whose interests are divergent, employees should work in a speedy and efficient manner, strive to be courteous, fair and impartial to the people they serve, and responsive to the problems that come before them. All segments of the public are to be treated equally, without regard to age, race, sex, religion, country of origin, or disability.

7. It is understood that standards of ethical conduct may involve a myriad of situations. The good conscience of individual employees shall remain the best guarantee of the moral quality of their activities. The overall intent of this code of ethics is that employees avoid any action, whether or not prohibited by the preceding provisions, which result in, or create the appearance of:

   a. Using public office for private gain, or

   b. Giving preferential treatment to any person, entity, or group.

8. Confidential information

   a. The confidentiality of all information which comes into possession of commission and bureau employees shall be respected. In order to properly discharge this duty, all employees must acquaint themselves with those areas of information that are designated as confidential by statutes, by the courts and by the attorney general. Furthermore, they must become familiar with the circumstances under which and the persons to whom such information can be released.

9. Unnecessary Claim File Possession

   a. No employee shall access, a workers' compensation claim file unless the file is necessary to the performance of the employee's duties. In case of violation or apparent violation of this rule, the executive director of the commission or the chief ethics officer of the commission shall refer the matter to the office of deputy inspector general for the industrial commission for investigation, or to the administrator or the industrial commission for action consistent with R.C. 4121.122(A).

C. Standards of Conduct for Adjudicators

1. Definitions. The following definitions shall apply to the adjudication of all disputes before the industrial commission:

   a. "Claimant" means an employee as defined in R.C. 4121.01(A) and 4123.01(A), who asserts a right, demand, or claim for workers' compensation benefits.

   b. "Employer" shall have the same meaning as in R.C. 4121.01(A) and 4123.01(B).

c. "Party" means a claimant, an employer, the bureau of workers' compensation and any other person, firm, corporation, agent, manager, or entity with an interest in a dispute before the industrial commission.

d. "Adjudicator" means all hearing officers, the members of the industrial commission and their staff and any employee of the industrial commission who functions in an adjudicatory capacity in the resolution of a workers' compensation dispute or who assists in the decision making or deliberation processes in such disputes, including, but not limited to, employees of the industrial commission who participate in any alternative dispute resolution process as established by the industrial commission under the authority of R.C. 4121.36(J)(1).

e. "Representative" means any person who appears before the adjudicator, prepares any document on behalf of any party for use by the adjudicator, renders any advice or performs any other related service for a party with respect to a dispute before the industrial commission.

f. "To review" means to read with the intention that the knowledge gained from the reading shall be used in the decision-making process with respect to the merits of:

i. Deciding whether to hear a discretionary appeal filed with the members of the industrial commission pursuant to R.C. 4123.511(E);

ii. Deciding whether to hear a request for reconsideration filed with the members of the industrial commission; or

iii. Deciding any dispute before the industrial commission.

g. "Ex parte communication" means any oral, written, electronic or other method of conveying information regarding the merits of a dispute before the industrial commission.
However, "ex parte communication" does not include:

i. Oral, written, electronic or other methods of conveying information regarding the merits of a dispute before the industrial commission when such information is conveyed in the course of a hearing, including, but not limited to, testimony and other evidence offered at a hearing and information submitted to the claim file in the normal course of the dispute resolution process;

ii. Information regarding procedural aspects of the cause when such information does not include any reference to the merits;

iii. In the case of hearing officers, the members of the industrial commission or their staff, any information obtained by reviewing the claim file;

iv. In the case of hearing officers who participate in the decision-making process regarding whether to present discretionary appeals filed pursuant to R.C. 4123.511(E) and requests for reconsideration to the members of the industrial commission, any written information filed in support of an appeal or request for reconsideration with the appeals and

reconsiderations section of the industrial commission which is subsequently placed in the claim file;

v. In the case of a hearing officer, exchanges of information with other industrial commission employees which are intended to assist the hearing officer in adjudicating a particular issue(s) in a claim; however, those with whom the information is exchanged shall not act in an adjudicatory capacity in the claim with respect to the particular issue(s).

vi. Deliberations and discussions regarding claims before the members of the commission between and among the members of the industrial commission the employees of the legal services section and other personnel designated by the members of the industrial commission to assist the members of the commission in the adjudicatory process.

h. "Conflict" means a situation where the adjudicator is disqualified under the terms of this rule.

2. Disqualification of the adjudicator.

a. An adjudicator **shall** disqualify himself or herself in a proceeding in which there arises **the appearance of impropriety** or the **adjudicator's impartiality** might **reasonably be questioned**, including but not limited to instances where:

i. The adjudicator reviews a written, electronic or other ex parte communication, or participates or otherwise takes part in an oral or other ex parte communication;

ii. The adjudicator has a **personal bias or prejudice** concerning a party or representative, or **personal knowledge of disputed evidentiary facts** concerning the proceeding;

iii. The adjudicator **served as a representative in the claim**, or a representative with whom the adjudicator previously was associated, acted during such association, as a representative concerning the claim, or the adjudicator or such representative been a **material witness** concerning the claim. An employee in a governmental agency does not necessarily have an association with other employees of that agency within the meaning of this subsection; an adjudicator formerly employed by a governmental agency, however, should disqualify himself or herself in a proceeding if there arises the appearance of impropriety or his or her impartiality might reasonably be questioned because of such association;

iv. The adjudicator knows that, the adjudicator individually or as a fiduciary, or the adjudicator's spouse or minor child residing in the adjudicator's household, has a **substantial financial interest** in the subject matter in controversy or in a party to the proceeding;

v. The adjudicator or the adjudicator's **spouse**, or a person within the **third degree of relationship** to either of them, or the spouse of such a person:

1) Is a **party** to the proceeding, or an officer, director, or trustee of a party;

2) Is acting as a **representative** in the proceeding;

3) Is known by the adjudicator to have a **substantial financial interest** that could be affected by the outcome of the proceeding; or

4) Is to the adjudicator's knowledge likely to be a **material witness** in the proceeding.

b. An adjudicator has a **duty to be informed** about his or her personal and fiduciary financial interests, and make a reasonable effort to be informed about the personal financial interests of his or her **spouse and minor children residing in his or her household**.

i. The degree of relationship is calculated according to the civil law system;

ii. "Fiduciary" includes, but is not limited to, such relationships as executor, administrator, trustee and guardian;

iii. "Substantial financial interest" means **more than five percent ownership** of any partnership, trust, business trust, corporation or association.

3. Disqualification procedures

a. If a hearing officer is disqualified, the hearing officer **shall**:

i. Make every practicable effort to **obtain another hearing officer** to hear the claim at the same date, place and time as it was originally scheduled; or

ii. In cases where another hearing officer is not available to hear the claim at the same date, place and time, issue an order which **discloses that a conflict exists**, briefly **describes the nature of the conflict** and which **resets the claim** for hearing before a different hearing officer.

4. Nothing in this rule shall require the disqualification of an adjudicator who reads a document, whether written, electronic or otherwise, or a portion thereof, to ascertain whether it pertains to the merits of a dispute before the industrial commission, so long as immediately upon ascertaining that the document pertains to the merits of a dispute before the industrial commission, the adjudicator processes the document in accordance with the provisions of this rule.

VIII. COMPLAINTS

A. **Memo R4 Hearing Officer Complaint Procedure**

1. 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.

2. After review, the director will send a copy of the complaint to the hearing officer's regional manager.

3. The regional manager will discuss the issue with the hearing officer and ask the hearing officer to respond to the complaint in writing.

4. 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.

5. 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.

CHAPTER TWO: CLAIM ALLOWANCE

I. ELEMENTS OF COMPENSABILITY

A. Employer - Employee relationship; and

B. Statutorily defined injury or occupational disease that was sustained in the course of and arising out of employment; and *sometimes*

C. Disability as a direct result of injury (disability does not exist in all claims)

II. THE EMPLOYER/EMPLOYEE RELATIONSHIP

A. The Employer (R.C. 4123.01(B))

1. Includes “every person, firm, professional employer organization, alternate employer organization, and private corporation, including any public service corporation, that has:”

a. One or more employees

b. Regularly utilized in normal course of business

c. Under contract of hire

B. The Employee (R.C. 4123.01(A))

1. Broad, inclusive definition. “**Every person** in the service of the state, or of any county, municipal corporation, township, or school district therein, including regular members of lawfully constituted police and fire departments of municipal corporations and townships, whether paid or volunteer, and wherever serving within the state or on temporary assignment outside thereof, and executive officers of boards of education, under any appointment or contract of hire, express or implied, oral or written, including any elected official of the state, or of any county, municipal corporation, or township, or members of boards of education.” and

2. “Every person in the service of any person, firm, or private corporation, including any public service corporation, that (i) employs one or more persons regularly in the same business or in or about the same establishment under any contract of hire, express or implied, oral or written, including aliens and minors, household workers who earn $160 or more in cash in any calendar quarter from a single household and casual workers who earn one hundred sixty dollars or more in cash in any calendar quarter from a single employer, or (ii) is bound by any such contract of hire or by any other written contract, to pay into the state insurance fund the premiums provided by this chapter.“

3. Volunteers are not covered

a. Exception:

i. Volunteer first responders and firefighters are covered, even if off-duty (subject to the next section).

4. Off-duty peace officers, firefighters, and first responders are covered (when responding to

an inherently dangerous situation that calls for an immediate response on the part of the person, regardless of whether the person is within the limits of the jurisdiction of the person's regular employment or voluntary service when responding, on the condition that the person responds to the situation as the person otherwise would if the person were on duty in the person's jurisdiction).

5. Motor Carriers (R.C. 4123.01(A)(1)(d)) Employee includes, “Every person who operates a vehicle or vessel in the performance of services for or on behalf of a motor carrier transporting property, unless all of the following factors apply to the person:

   i. The person owns the vehicle or vessel that is used in performing the services for or on behalf of the carrier, or the person leases the vehicle or vessel under a bona fide lease agreement that is not a temporary replacement lease agreement. For purposes of this division, a bona fide lease agreement does not include an agreement between the person and the motor carrier transporting property for which, or on whose behalf, the person provides services.

   ii. The person is responsible for supplying the necessary personal services to operate the vehicle or vessel used to provide the service.

   iii. The compensation paid to the person is based on factors related to work performed, including on a mileage-based rate or a percentage of any schedule of rates, and not solely on the basis of the hours or time expended.

   iv. The person substantially controls the means and manner of performing the services, in conformance with regulatory requirements and specifications of the shipper.

   v. The person enters into a written contract with the carrier for whom the person is performing the services that describes the relationship between the person and the carrier to be that of an independent contractor and not that of an employee.

   vi. The person is responsible for substantially all of the principal operating costs of the vehicle or vessel and equipment used to provide the services, including maintenance, fuel, repairs, supplies, vehicle or vessel insurance, and personal expenses, except that the person may be paid by the carrier the carrier's fuel surcharge and incidental costs, including tolls, permits, and lumper fees.

   vii. The person is responsible for any economic loss or economic gain from the arrangement with the carrier.”

C. Contract of hire is required; not an independent contractor relationship. The contract for hire may be express or implied, oral or written. In determining whether one is an independent contractor or an employee, the right to control the manner or means of the work performed is the determining factor. See *Gillum v. Indus. Comm.*, 141 Ohio St. 373, 48 N.E.2d 234 (1943).

   1. Each case decided on own merits.

   2. Common cases: taxi leases.

3. Relevant factors to consider in determining the work relationship.

    a. Which party controls the details and quality of work (most important)?

    b. Which party controls the hours worked?

    c. Which part selects the materials, tools, and personnel?

    d. Which party selects the route?

    e. Length of employment;

    f. Type of business;

    g. Method of payment;

    h. Terms of any agreement or contract.

4. 20-part checklist for those providing services pursuant to a construction contract. R.C. 4123.01(A)(1)(c).

    a. Although the 20-part checklist specifically applies to construction contracts, the elements in that checklist are germane to the general issue of employee/independent contractor, and are consistent with the indicia of an employment relationship found above and in case law.

    b. Therefore, the elements may be used in the determination, but do not cite R.C. 4123.01(A)(1)(c) unless the matter is specifically dealing with a construction contract as defined by the statute.

    c. See *State ex rel. Ugicom Ents., Inc. v. Morrison*, 169 Ohio St.3d 244, 2022-Ohio-1689.

D. Special Situations

1. Casual or Household Workers (R.C. 4123.01(A)(1))

    a. Considered an employee if earns more than $160.00 in cash during any quarter from a single employer or household.

2. R.C. 4123.01(A)(2): Employee **does not** mean:

    a. A duly ordained, commissioned, or licensed minister or assistant or associate minister of a church in the exercise of ministry

        i. Employers of ministers can elect to cover their ministers.

    b. Officers of Family Farm Corporation

        i. May elect coverage.

    c. An individual incorporated as a corporation

        i. May elect coverage.

d. A volunteer officer of a nonprofit corporation

i. Cannot elect coverage.

3. Employer as Employee

a. Sole Proprietor, Partnerships (R.C. 4123.01(A)(1))

i. Voluntary coverage (if no other employees).

ii. U-3S Application for Elective Coverage needed (formerly C-116).

4. Officers of corporation

a. Active executive officers of a corporation, except for an individual incorporated as a corporation or officers of a family farm corporation, are considered employees for workers' compensation purposes. The workers' compensation policy of the corporation covers the corporate officers, and the employer must report wages paid to corporate officers.

5. Out of State Coverage (R.C. 4123.54; Adm.Code 4123-17-23)

a. Ohio worker temporarily out of state: covered (extraterritorial jurisdiction).

b. Non-Ohio worker temporarily in state: not covered

i. EXCEPTION:

a) Temporary exposure (before 9/17/2014): if the laws of the other state limit the ability of an employee, who is a resident of this state and is covered by the R.C., to receive compensation/ benefits under the other state's workers' compensation law while temporarily in that state AND the laws of the other state limit the liability of the employer of this type of employee

b) Temporary exposure (09/17/2014 forward): BWC respects the extraterritorial coverage of an out-of-state employer for its regular employees who are residents of a state other than Ohio while performing work in the state of Ohio for a temporary period not to exceed 90 days. While temporarily within Ohio, the rights of the employee under **the laws of the other state are the exclusive remedy** against the employer. After 90 days, the employees must be included in the payroll report.

c. Form C-110 and C-112 agreements [agreements to select state]

d. If employee receives benefits/damages from employer under the laws of another state, the amount awarded or to be awarded shall be credited on the amount of any awards made by the bureau.

e. If an employee pursues an Ohio workers' compensation claim for the same injury for which they pursued workers' compensation **and received a decision on the merits under the laws of another state**, the bureau or the employer may collect

the amount of any monies paid to the employee pursuant to the R.C.

f. Employees covered under the federal “Longshore and Harbor Workers’ Compensation Act,” are not entitled to apply for or receive compensation/benefits under Chapters 4121 and 4123 of the R.C.

6. Transportation Network Companies (Effective 03/23/2016)

a. Uber and Lyft, for example, are TNCs.

i. "Transportation network company" includes a corporation, partnership, association, limited liability company, proprietorship, or any other entity operating in this state that uses a digital network to connect transportation network company riders to transportation network company drivers who provide transportation network company services. R.C. 3942.01(F).

b. R.C. 4925.10 specifically excludes TNC drivers from the definition of “employee” pursuant to R.C. Chapters 4121, 4123, and 4141.

i. Exception: where the parties agree otherwise by written contract. The TNC must notify the agencies of this election and any subsequent change in election.

7. Non-complying employers

a. The employer is responsible for the cost of the claim, but the claim is allowed for the injured worker (if otherwise compensable).

b. An employer contracting with a non-complying subcontractor may be liable for claims of subcontractor’s injured employees. See R.C. 4123.01(A)(1).

8. Bureau as employer in Rehabilitation injuries (R.C. 4121.68)

a. Where an injured worker is injured while participating in a rehabilitation program, the BWC is considered the employer.

b. The original employer not charged cost of this claim; it is charged to Surplus Fund.

c. New claim, new claim number.

E. Rights of Employees

1. Must elect to receive compensation/benefits only under Ohio’s workers’ compensation laws and waive all rights to receive the same under the workers’ compensation laws of another state. R.C. 4123.51.

2. Employer may not deduct premium from wages. R.C. 4123.81.

3. Compensation exempt from attachment, except for court-ordered support. R.C. 4123.67.

4. Employer may not take retaliatory action against employee for filing claim. R.C. 4123.90.

5. Agreement to waive rights void. R.C. 4123.80.

   a. Exceptions:

      i. Employees who are blind, when the injury/disability may have been directly caused by blindness

      ii. Employer-sponsored recreation or fitness activity. R.C. 4123.01(C)(3).

6. Additional award for minors. R.C. 4123.89.

7. Immunity from suit by co-worker for employee's negligence. R.C. 4123.741.

8. Confidentiality of claim file. R.C. 4123.88.

9. Liberal construction of statutes in favor of employees. R.C. 4123.95.

10. Awards for the violation(s) of specific safety requirements. Adm.Code 4121-3-20.

III. INJURY

A. R.C. 4123.01(C) – "Injury" includes any injury, whether caused by external accidental means or accidental in *character and result*, received in the course of, and arising out of, the injured employee's employment.

1. Injury *does not* include:

   a. Psychiatric condition **unless** due to injury or occupational disease sustained by the injured worker or where the injured worker's psychiatric conditions have arisen from sexual conduct in which the injured worker was forced by threat of physical harm to engage or participate;

   b. Injury or disability primarily caused by the natural deterioration of body;

   c. Injury or disability incurred in voluntary participation in employer-sponsored recreation or fitness activities, *if waived* by the employee prior to; or

   d. A condition that pre-existed an injury unless that pre-existing condition is substantially aggravated by the injury.

2. *Village v. General Motors Corp., G.M.A.D.*, 15 Ohio St. 3d 129, 472 N.E.2d 1079 (1984).

   a. An injury that develops gradually over time as a result of the performance of the injured worker's job-related duties is compensable. Injury need not be the result of a one-time specific event.

   b. Cumulative trauma theory; not the same as an occupational disease.

   c. But remember R.C. 4123.01(C)(2): injury or disability caused primarily by the natural deterioration of tissue, an organ, or part of the body is not compensable**.**

B. Self-Inflicted Injuries

1. Not compensable if purposely self-inflicted. See R.C. 4123.46 and 4123.54.

2. The determinative factor is not whether the decedent intended to die, but instead whether the act leading to the death was intentional. See *Vance v. Trimble*, 116 Ohio App.3d 549, 668 N.E.2d 1049 (10th Dist. 1996) (finding the decedent's death due to Darvocet overdose was purposely self-inflicted because he intended to take the medication in excess of the recommended dosage).

3. Suicide exception

a. *Borbely v. Prestole Everlock, Inc.*, 57 Ohio St.3d 67, 565 N.E.2d 575 (1991), a suicide will be compensable when **all** of the following three elements are met:

i. There must be an initial compensable injury; and

ii. The injury must have caused the injured worker to become dominated by a disturbance of the mind of such severity as to override normal judgment; and

iii. This disturbance of the mind results in suicide.

C. Stress Claims

1. *Ryan v. Connor*, 28 Ohio St.3d 406, 503 N.E.2d 1379 (1986).

a. Physical injury caused by stress is compensable if it resulted from a greater degree of stress than to that which all workers are occasionally subjected. This requires showing that the stress is *unusual*.

b. Medical evidence must show a substantial causal relationship.

2. Whether an injury resulted from greater emotional strain or tension than that to which all workers are occasionally subjected is an objective question. *Small v. Defiance Public Library*, 85 Ohio App.3d 583, 620 N.E.2d 879 (3d Dist. 1993) ("[The] objective test squarely focus[es] on the stress experienced by all workers as a whole, not just to workers in a particular occupation or profession. To satisfy this test, the worker must distinguish the job stress at issue from the normal, everyday stress which all workers experience from time to time. The test relates to the stress itself, not to the worker's individualized or subjective response to the stress.").

3. Fright, worry, or excitement alone is not compensable. The stress must result in a physical injury.

D. Psychological/Psychiatric Conditions

1. Mental conditions caused solely by work-related stress are not compensable as occupational diseases. *Rambaldo v. Accurate Die Casting*, 65 Ohio St.3d 281, 603 N.E.2d 975 (1992).

2. *Bailey v. Republic Engineered Steels, Inc.*, 91 Ohio St.3d 38, 2001-Ohio-236, 741 N.E.2d 121.

a. Supreme Court held "a psychiatric condition of an employee arising from a compensable injury or occupational disease suffered by a third party is compensable under RC 4123.01(C)."

b. A few years later, *Bailey* was legislatively nullified. For injuries on or after **08/25/2006:**

i. The definition of injury does not include a psychiatric condition except where the injured worker's psychiatric conditions have arisen from an injury or occupational disease sustained by "that" worker.

ii. **Exception: sexual conduct**. A psychiatric condition is compensable where the injured worker's psychiatric condition arose from sexual conduct in which the injured worker was forced by threat of physical harm to engage or participate. R.C. 4123.01(C)(1). But see R.C. 4123.01(K) defining sexual conduct as requiring penetration, however slight.

3. *McCrone v. Bank One Corp.*, 107 Ohio St.3d 272, 2005-Ohio-6505, 839 N.E.2d 1.

a. The injured worker applied for workers' compensation for post-traumatic stress disorder developed after two robberies of the bank where she worked as a teller. She suffered no physical injuries in the robbery.

b. Supreme Court held that "psychological or psychiatric conditions that do not arise from a compensable physical injury or occupational disease are excluded from the definition of "injury" under R.C. 4123.01(C)(1) and from workers' compensation coverage." The Court held the exclusion of mental injuries from compensability under the Workers' Compensation Act did not violate the Equal Protection Clause of the United States or Ohio.

4. *Armstrong v. John R. Jurgensen Co.*, 136 Ohio St.3d 58, 2013-Ohio-2237, 990 N.E.2d 568.

a. The concurrent presence of compensable physical conditions and a mental disorder is not enough. Instead, the injured worker must establish the mental condition was **causally related** to his or her compensable physical injuries and not simply to his or her involvement in the industrial incident.

5. If there is reliable medical evidence establishing the allowed physical conditions are a proximate cause of the mental disorder(s), the claim can be allowed, even if the evidence establishes the incident itself is also a proximate cause. The physical injuries need not be the sole cause.

6. Order Writing Reminders

a. Hearing officers have jurisdiction over differing psychological conditions when an injured worker files a motion for a specific psychiatric condition and other examining doctors diagnose conditions different from those stated in the injured worker's motion. See **Memo S8 Jurisdiction over Differing Psychological Conditions**.

E. Work from Home Employees (R.C. 4123.01(C)(4) effective 09/22/2022)

1. Injury or disability sustained by an employee while working from home is not compensable unless **all** of the following apply to the injury or disability:

a. It arises out of the employee's employment.

b. It is caused by a special hazard of the employee's employment activity.

c. It is sustained in the course of an activity undertaken for the exclusive benefit of the employer.

IV. "IN THE COURSE OF" AND "ARISING OUT OF" EMPLOYMENT

A. Under R.C. 4123.01(C), an injury is defined as one that is "received in the course of, and arising out of, the injured employee's employment." This is a conjunctive, two-pronged test that must be satisfied for a claim to be compensable.

B. "In the course of employment" relates to the **time, place, and circumstance** of the injury.

1. An employee need not be engaged in the actual performance of work for his employer at the time of the injury to be entitled to workers' compensation benefits. It is sufficient that the employee is engaged in a pursuit or undertaking consistent with his contract of hire and which in some logical manner pertains to or is incidental to his employment.

a. Involved in the performance of required duty directly or incidentally in the service of the employer

b. Involved in a business activity, not pursuing a personal activity

2. Specific Instances

a. Before or after work hours/day off

i. Activities which are preparatory or incidental to employment are "in the course of." See, e.g., *Parrott v. Indus. Comm.*, 145 Ohio St. 66, 60 N.E.2d 660 (1945) (picking up a paycheck is a fundamental aspect of the employment relationship; an injury occurring during is in the scope of employment.) See also *Phelps v. Dispatch Printing Co.*, 10th Dist. Franklin No. 09AP-1118, 2010-Ohio-2423, for a full discussion of paycheck cases.

b. Breaks

i. "Personal Comfort Doctrine:" Breaks for personal comfort while working do not transform work activity into personal activity.

c. Traveling Salesmen

i. See Section IV.D.1.e., *infra* at page 35.

d. Business Trips

i. Ohio has rejected the "portal-to-portal" theory that an employee on a business trip is in the course of his or her employment during the entire time he or she is away.

ii. Instead, the test is whether the injured worker was performing a duty done directly or incidentally or carrying out an obligation for the employer when injured.

iii. If the employee is engaged in purely personal activity at the time of the injury, it is outside the course of employment.

iv. However, this is liberally construed, and the recreational nature of activities on its own will not defeat this element. See, e.g., *Griffith v. Miamisburg*, 10th Dist. Franklin No. 08AP-557, 2008-Ohio-6611 (finding the injured worker was in the course of his employment while participating in a basketball game on personal time on the premises of an offsite training academy).

v. But see *Callahan v. Proctor & Gamble Co.*, 3d Dist. Allen No. 1-08-19, 2008-Ohio-4954 (finding the claimant was not in the course of her employment at the time of a collision with a nightclub bouncer); *Marbury v. Indus. Comm.*, 62 Ohio App.3d 786, 577 N.E.2d 672 (1989); *Elsass v. Commercial Carriers, Inc.*, 73 Ohio App.3d 112, 596 N.E.2d 599 (1992) (truck driver on overnight trip injured while in a taxicab on way to restaurant and nightclub did not receive injures "in course of" and "arising out of" his employment).

e. Union activities

i. The Ninth District found that a city employee injured while performing duties as an officer of the union (running the steak fry) was performing activities consistent with the contract for hire and logically related to his employment, as the contract between the union and the city governed his employment and the ability to function in a union capacity while being paid by the city. See *Elyria v. Scott*, Ninth Dist. Lorain No. 13CA010459, 2015-Ohio-4619.

ii. But, the First District found an employee injured while picketing in a union-organized strike was not "in the course of" his employment, but was instead personal activity not incidental to his employment duties. See *Koger v. Greyhound Lines, Inc.*, 90 Ohio App.3d 387, 629 N.E.2d 492 (1st Dist. 1993) (the court went on to find these activities were also not "arising out of" employment, as the confrontational cessation of activities could hardly be said to benefit the employer or its interests).

C. "Arising out of" refers to **the causal relationship or direct connection** between the employment and the injury sustained by the injured worker.

1. The "Totality of the Circumstances Test" is used to determine the causal connection to employment.

a. *Fisher v. Mayfield*, 49 Ohio St.3d 275, 551 N.E.2d 1271 (1990), affirmed the *Lord v. Daugherty* factors to consider:

i. The **proximity** of the scene of the accident to the place of employment; and

ii. The **degree of control** the employer has over the scene of the accident; and

a) This includes consideration of both the situs and the activities that gave rise to the injury.

b) See, e.g., *Serraino v. Fauster-Cameron, Inc.*, 3d Dist. Defiance No. 4-12-11, 2013-Ohio-329 (finding the Employer-Clinic exercised little meaningful control over the food a caterer sold in the break room as part of the lunch program available to employees and the public); *Williams v. Martin Marietta Energy Sys., Inc.*, 99 Ohio App.3d 520, 651 N.E.2d 55 (4th Dist. 1994) (finding the employee's injury, which occurred when a Red Cross worker attempted to draw his blood during a blood drive on the Employer's premises, did not arise out of his employment).

iii. The **benefit** the employer enjoyed as a result of the employee's presence at the scene.

a) *Kohlmayer v. Keller*, 24 Ohio St.2d 10, 263 N.E.2d 231 (1970), noted the benefits received by an employer when sponsoring purely social events (a company picnic): a more harmonious working atmosphere, better job service, and greater job interest.

b) *Fisher* likewise found "a benefit in the heightened morale that naturally flows from the flower fund" for which the injured worker was injured in the process of coordinating. The flower fund was formed with the purpose "to provide flowers or other expressions of sympathy for the death of a co-worker's close family member, or congratulations upon an employee's marriage or the birth of a child."

2. The *Lord*/*Fisher* factors are not intended to be exhaustive, but illustrative. Still, they should be the starting point in the analysis.

3. When confronted with two potential employers, the Supreme Court of Ohio has held the Commission "may, but is not required to, use any of the *Lord*/*Fisher* factors that it believes will assist analysis. If different considerations are necessary, however, the Commission must have the discretion to use them." See *State ex rel. Oakwood v. Indus. Comm.*, 132 Ohio St.3d 406, 2012-Ohio-3209, 972 N.E.2d 590.

D. Special Situations

1. The "Coming and Going Rule"

a. Generally, the injured worker is not considered to be in course of employment while commuting to and from **a fixed situs**. If the employee is not fixed situs, this rule does not apply.

b. *Ruckman v. Cubby Drilling*, 81 Ohio St.3d 117, 689 N.E.2d 917, 1998-Ohio-455, defines fixed situs.

i. The focus is on whether the employee commences his *substantial employment duties* only after arriving at a specific and identifiable work place designated by his employer.

ii. Despite periodic relocation of a job site (monthly, weekly, or even daily), each particular job site may constitute a fixed place of employment.

iii. A fixed situs employee injured while traveling to or from work may be eligible for workers' compensation benefits if travel serves a function of the employer's business and causes a risk that is distinctive in nature from or quantitatively greater than risks common to the public.

c. Courts have been unpersuaded by arguments that an employee loses his or her fixed-situs status because some work is performed at home. The issue focuses on "substantial employment duties." See, e.g., *Smith v. Carnegie Auto Parts, Inc.*, 8th Dist. Cuyahoga No. 88343, 2007-Ohio-992; *Hughes v. Hughes Enterprises, Inc.*, 3d Dist. Paulding No. 11-2000-11, 2000-Ohio-1937; *Indus. Comm. v. Gintert*, 128 Ohio St. 129 (1934).

d. The coming and going rule "is not limited to instances in which a fixed situs employee injures herself in a car, in a parking lot, or on a highway. So long as an injury takes place outside the situs, the location of that injury is irrelevant." *Mitchell v. Cambridge Home Health Care, Inc.*, 9th Dist. Summit No. 24163, 2008-Ohio-4558 (rejecting the claimant's assertion the coming and going rule did not apply to common areas of a building such as hallways and elevators).

e. Traveling salesmen

i. Employees for whom travel is an integral part of their job are in the course of their employment continuously while traveling. Therefore, the "arising out of" element is the sole remaining issue. These kinds of employees **are not fixed situs** employees, and the coming and going rule does not apply. See, e.g., *State ex rel. Cossin v. Ohio State Home Servs., Inc.*, 10th Dist. Franklin No. 12AP-132, 2012-Ohio-5664; *Fletcher v. Northwest Mechanical Contractors, Inc.*, 75 Ohio App.3d 466, 599 N.E.2d 822 (6th Dist. 1991).

f. Exceptions to the Coming and Going Rule

i. Zone of Employment

a) The place of employment and the area thereabout, including the means of ingress thereto and egress therefrom, under **control** of the employer.

b) Actual control; not potential.

c) Control can be established either over the physical location or by showing that because of conditions created by the employer, the employee has no choice as to how to travel to his or her employment. Therefore, an employer exerts control over an area when the way used to enter or leave the place of employment is the sole and exclusive means of ingress and

egress. See, e.g., *Fitch v. Ameritech Corp.*, 10th Dist. Franklin No. 05AP-1277, 2007-Ohio-2725. But, the fact that an employer provides two entrances and the employee chooses one route is not determinative, as the employee has to choose one of them.

d) Exclusive control is not necessary, so the issue of ownership, while relevant, is not dispositive.

ii. Special Hazard: *Littlefield v. Pillsbury Co.*, 6 Ohio St. 3d 389, 453 N.E.2d 570 (1983).

a) When the employment creates a “special hazard,” an employee is entitled to workers' compensation benefits if he sustains injuries because of that hazard, where:

1) "But for" employment, would not have been at the place of injury; **and**

2) The character of the risk is distinctive or of greater quantity than common to the public.

b) *MTD v. Robatin*, 61 Ohio St.3d 66, 572 N.E.2d 661 (1991).

1) Maintains the *Littlefield* test but states that the test was incorrectly applied in *Littlefield* and found the injury not compensable.

c) *Ruckman*, *supra*, reiterated that the *Littlefield* test relates only to the causality (arising out of) requirement and has nothing to do with the “in the course of” element. However, courts have faltered in which element this necessarily relates to.

d) The risk of traffic accidents while commuting to work is not a special hazard. It is shared by commuting employees.

e) The risk of criminal assault on a public street, like the risk of traffic accidents, is shared equally by all citizens. See *Slagle v. White Castle Sys., Inc.*, 79 Ohio App. 3d 210, 607 N.E.2d 45 (10th Dist. 1992).

iii. Special Mission

a) If the injury occurred while the employee was on a special mission, errand, service, or task for the employer. *Stivison v. Goodyear Tire & Rubber Co*., 80 Ohio St.3d 498, 1997-Ohio-321, 687 N.E.2d 458.

b) The mission must be a **major factor in the journey**. It has to meet *more than* a “but for” test; the injured worker must be performing the special mission *while traveling*.

c) Simply being called in to work on a day off is not sufficient. But,

transporting keys to lock up business premises has been found a special mission.

d) This is the least-used exception.

iv. Totality of the Circumstances

a) Application of the *Lord/Fisher* factors.

2. Dual intent

a. The Supreme Court of Ohio has explicitly rejected the “dual intent” doctrine. See *Friebel v. Visiting Nurse Assoc. of Mid-Ohio*, 142 Ohio St.3d 425, 2014-Ohio-4531, 32 N.E.3d 413 (“an employee's subjective intent regarding the purposes of her travel is not determinative as to whether the injury occurred in the course of and arose out of the employment. Almost all work requires travel, either as part of the employment duties or as part of a commute. And almost every occasion to travel for work may, at some point, involve both personal and employment purposes.”).

3. Natural Physical Condition of Employee/Idiopathic Injuries

a. If the employee’s condition is the <u>sole cause</u> of injury, it is not compensable.

i. Example: Heart attack, hit head on floor.

b. Unexplained Falls

i. With an unknown cause of an accident, look to the circumstances and evidence. For injuries resulting from an unexplained fall see *Waller v. Mayfield*, 37 Ohio St.3d 118, 524 N.E.2d 458 (1988).

a) "Idiopathic" meaning in the context of workers' compensation" a pre-existing physical weakness or disease which contributes to the accident."

b) The employee has the burden of eliminating idiopathic causes for the fall, etc. Where those idiopathic causes have been eliminated, an inference arises that the injury is due to a hazard or risk of employment.

ii. An injured worker’s statement of general good health just prior to a fall may be sufficient to meet her burden of eliminating idiopathic causes. Expert testimony is not required.

iii. Courts have applied *Waller* to situations other than unexplained falls, broadening the case to “idiopathic injuries” in general. Still, this issue would only arise if there is no discernible employment-related explanation for why the accident or injury occurred. Where there is a specific work-related reason, this does not apply.

c. If the injury was caused by a pre-existing or idiopathic condition, the issue then becomes: was there some condition or hazard of employment that significantly

contributed to the injury by placing the employee in a position which increased the dangerous effects of the pre-existing condition and placed him/her at a greater risk than anyone else in the same circumstances would have encountered elsewhere?

i. Example: Employee has epileptic seizure at work at falls down, but hits machinery on his way. See *Indus. Comm. v. Nelson*, 127 Ohio St. 41, 186 N.E. 735 (1933) (an injury brought on by the employee's natural physical condition can still be compensable if the employment significantly contributed to the injury by placing the employee in a position which increased the dangerous effects).

d. Order Writing Reminder

i. **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 is unnecessary.

4. Acts of God or Nature

a. Example: Tornado, Lightning

b. If the act alone causes an injury it is not compensable.

c. Exceptions:

i. The hazards of the employment were made active by the forces of nature; or

ii. The employment, through its activities, conditions or environments, subjects the employee to a greater hazard from the act of God than that to which the general public in the community is subject.

5. Horseplay

a. Generally, horseplay has been seen as disconnected from employment.

b. The injuries to an **innocent victim** (who did not partake in the horseplay) are compensable.

c. The **instigator's** injuries are not compensable, unless the horseplay was carried on with the knowledge and consent or acquiescence of the employer.

6. Fights

a. When the origin of a fight is **personal** in nature, the resulting injuries are not

compensable.

b. If the altercation is **work-related**, it is compensable so long as the injured employee was not the instigator.

c. Dual causation

i. "[T]he fact that a personal quarrel, in addition to a work-related quarrel, contributed to a situation that culminates in an assault and injury should not automatically prevent the injury from being compensable. Rather, an injury that results from an animosity fueled by both personal and work-related quarrels should be compensable when the work-related quarrel exacerbated the situation and, thus, establishes a causal connection between the injury and the employment." *Coleman v. APCOA, Inc.*, 10th Dist. Franklin No. 99AP-60, 2000 WL 192560 (Sept. 28, 1999). See also, *Luo v. Gao*, 9th Dist. Summit No. 23310, 2007-Ohio-959.

7. Intoxication

a. R.C. 4123.54 contains two ways for an employer to establish an intoxication defense: (1) proving the intoxication proximately caused the injury; or (2) meeting the requirements of a rebuttable presumption of proximate cause.

b. R.C. 4123.54(A)(2) – An injury is not compensable if it was proximately caused by intoxication or being under the influence of a controlled substance not prescribed by a doctor. *This requires a medical opinion on proximate cause*.

c. R.C. 4123.54(B) – Establishes a rebuttable presumption that an employee's intoxication was the proximate cause of an injury. To take advantage, the employer must establish **both**:

i. It posted written notice to employees that the results of, or the employee's refusal to submit to, any chemical test described under this division may affect the employee's eligibility for compensation and benefits; **and**

ii. Either of the following:

a) A qualifying chemical test [as defined in R.C. 4123.54(C)] administered within 8 or 32 hours of injury (depending on substance) reveals a level above the statutory threshold; or

b) Refusal to submit

d. A "qualifying test" is one administered in any of the following circumstances: 1) after the employer had reasonable cause to suspect intoxication; 2) at the request of a police officer pursuant to Revised Code 4511.191 (dealing with driving under the influence); or 3) at the request of a licensed physician *not employed by the employer*.

i. "Reasonable cause" means evidence "drawn from specific, objective facts and reasonable inferences drawn from these facts in light of experience and training." May be based on, but is not limited to, the

following:

a) Observable phenomena of direct use or of the physical symptoms of being under the influence of alcohol or a controlled substance;

b) A pattern of abnormal conduct, erratic or aberrant behavior, or deteriorating work performance;

c) The identification of an employee as the focus of a criminal investigation into unauthorized possession, use, or trafficking of a controlled substance;

d) A report provided by a reliable and credible source;

e) Repeated or flagrant violations of the safety or work rules that are determined to pose a substantial risk of physical injury or property damage.

e. Note: the medical marijuana legislation has no effect on this analysis.

8. Parking Lot cases

a. Owned & controlled by the employer:

i. *Griffin v. Hydra-Matic Division, G.M.C*., 39 Ohio St.3d 79, 529 N.E.2d 436 (1988): an injury sustained by an employee upon the premises of the employer is compensable irrespective of the presence or absence of a special hazard thereon which is distinctive in nature or quantitatively greater than hazards encountered by the public at large.

b. For parking lots not owned and/or controlled by the employer, analyze any of the applicable “coming and going” exceptions.

9. Recreation Cases

a. “Course of employment” element is satisfied by the incidental benefit to employer.

b. Employer must sponsor or encourage activity:

i. Supervision, directly or indirectly

ii. Payment for activity fees, uniforms, etc.

c. Extends to sports teams, picnics, parties, trips.

d. R.C. 4123.01(C)(3) - Waiver

10. Deviations remove the conduct from the course of and arising out of employment and render the injury non-compensable

a. Temporary deviations for personal activities/reasons.

b. Work wholly foreign to contract of hire.

V. OCCUPATIONAL DISEASE

A. "Occupational disease" means a disease contracted in the course of employment, which by its causes and the characteristics of its manifestation or the condition of the employment results in a hazard which distinguishes the employment in character from employment generally, and the employment creates a risk of contracting the disease in greater degree and in a different manner from the public in general. R.C. 4123.01(F).

1. Requirements for any non-scheduled diseases:

a. The disease is contracted in the course of employment.

b. The disease is peculiar to the injured worker's employment or a hazard of this particular type of employment distinguished from employment generally.

c. The employment creates a risk of contracting the disease in a greater degree than that to which the general public is exposed.

d. See *State ex rel. Ohio Bell Telephone Co. v. Krise*, 42 Ohio St.2d 247, 327 N.E.2d 756 (1975).

2. A disease which meets the general definition of R.C. 4123.01(F) is compensable pursuant to this chapter though it is not specifically listed. R.C. 4123.68.

B. Scheduled diseases are contracted by the employee, in the course of his or her employment, in which he or she was engaged, and due to the process described in section 4123.68. There are 27 specific compensable occupational diseases.

1. (K) Dermatitis: most common disease

2. (R) Tenosynovitis and Prepatellar Bursitis

a. Repetitive motion or pressures over time

b. Could be an injury claim

3. Most diseases follow normal medical proof standards

4. Restricted Diseases (Respiratory Diseases)

a. (V) Berylliosis

i. Specialist exam required

b. (W) Cardiovascular, pulmonary, or respiratory diseases of firefighters or police officers following exposure to heart, smoke toxic gases, chemical fumes, and other toxic substances. [**exposure creates a rebuttal presumption of causation**]

i. Claim payable only for TTDC, PTD, or death. Medical, hospital and nursing expenses are also payable without a total disability.

ii. Specialist exam required.

iii. Claim may be denied if the injured worker lied on job application about prior employment.

c. (X) Cancer contracted by a firefighter who has been assigned to at least six years of hazardous duty as a firefighter constitutes a presumption that the cancer was contracted in the course of and arising out of the firefighter's employment if the firefighter was exposed to an agent classified by the international agency for research on cancer or its successor organization as a group 1 or 2A carcinogen.

i. Presumption may be rebutted by affirmative evidence that:

a) 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;

b) the firefighter was not exposed to a group 1 or 2A carcinogen;

c) the firefighter incurred the type of cancer alleged before becoming a member of the fire department; or

d) the firefighter is 70 years of age or older.

e) 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.

ii. Presumption does not apply if:

a) In claims arising before 09/29/2017, it has been more than 20 years since the firefighter was last assigned to hazardous duty as a firefighter.

b) In claims arising on after 09/29/2017, it has been more than 15 years since the firefighter was last assigned to hazardous duty as a firefighter.

c) "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. See **Memo C1 Firefighters' and Police Officers' Occupational Disease**.

iii. Claim payable only for TTDC, working wage loss, PTD, or death.

iv. 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. See **Memo C1 Firefighters' and Police Officers'**

Occupational Disease.

d. (Z) Coal Miners' Pneumoconiosis ("Black lung disease")

i. Claim payable only for TTDC, PTD, or death. Medical, hospital and nursing expenses are payable without a total disability.

ii. Specialist exam required

iii. Claim may be denied if injured worker lied on job application about prior employment

iv. **Resolution R15-1-01 Modification of R96-1-01 and R03-1-02 related to medical evidence necessary to support a claim for an asbestos-related condition** – an injured worker must present a statement of causation from medical doctor, pulmonary function study interpreted by doctor, and an interpretation of x-rays by "B reader" or high-resolution CT *prior to adjudication*.

a) These requirements are the baseline; if the injured worker presents better evidence (like a biopsy), the requirements are still met.

b) The resolution also clarified it is not to be applied in instances or mesothelioma or death. See **Memo C2 Processing of Claims for Mesothelioma**.

e. (Y) Silicosis, (BB) Asbestosis, and all other respiratory tract diseases from exposure to dust (see (Z))

D. Multiple exposures with different employers:

1. *State ex rel. Hall China v. Indus. Comm*., 120 Ohio App. 374, 202 N.E.2d 628 (10th Dist. 1964).

a. An injurious exposure is defined as one which causes, augments, or aggravates the disease.

2. Last Injurious Exposure

a. When multiple exposures occur at work with different employers over period of time, the Commission will decide as to which employer will be charged with the cost of the claim.

b. As a matter of policy and to ensure consistency and predictability, the Commission will charge the last employer with whom the injured worker last had an injurious exposure with the entire cost of claim.

3. *State ex rel. Marion Power Shovel v. Indus. Comm.*, 153 Ohio St. 451, 92 N.E.2d 14 (1950).

a. Where the last exposure was while the employer was self-insuring, but the total disability occurred after employer became state-fund, the claim is a self-insuring claim.

b. Consistent with *Hall China.*

4. *State ex rel. Pilkington N. Am., v. Indus. Comm.*, 118 Ohio St.3d 161, 2008-Ohio-1506, 887 N.E.2d 317, affirmed the “last injurious exposure” concept is still good law.

E. Change of Occupation Award (R.C. 4123.57(D)-(E))

1. Payable for respiratory diseases

2. Objective: encourages a worker to change to a job that reduces exposure to disease-causing agents.

3. No job search is required for the first 30 weeks of this award. See *State ex rel. Regal Ware, Inc. v. Indus. Comm.*, 105 Ohio St.3d 1, 2004-Ohio-6893, 821 N.E.2d 984.

VI. CAUSATION

A. Causal relationship required: Proximate Causation

1. Natural and continuous sequence, unbroken by new and independent causes, which produces an event that, without which, event would not occur.

2. Direct relationship between the incident and conditions alleged.

B. Standard of Proof

1. "Probability" not "possibility" is the standard.

2. Mere possibility is conjectural, speculative, and does not meet the required standard. Adm.Code 4123-3-09.

C. Proof Requirements

1. Degree of Proof

a. Preponderance of the evidence. *Fox v. Indus .Comm.*, 162 Ohio St. 569, 125 N.E.2d 1 (1955).

b. The greater weight of evidence, taking into consideration all evidence presented. Adm.Code 4123-3-09.

2. Burden of Proof

a. The injured worker carries the burden to establish each essential element of their claim.

b. Adm.Code 4123-3-09(C)(1)

i. Sufficient quantum (measurable quantity)

ii. Probative value (tendency to prove or establish)

3. Adjudication

a. The Commission is not bound by the opinion of any physician (attending, employer, Commission specialist, etc.).

b. The final decision to accept or reject a medical opinion/evidence rests with the discretion of the hearing officer (provided there are no legal infirmities in the report).

c. The medical evidence provided in support of the claim must contain the work-related history, a compensable diagnosis, a causal relationship, and signature of the medical provider or provider's authorized designee. See **IC Resolution R97-1-06 Requirement on Physicians Reports**.

D. Theories

1. Direct causation

a. The injury or occupational disease alleged was caused directly by the workplace incident/conditions.

2. Dual Causation

a. Applies to injury, occupational disease, and additional allowance situations.

b. The standard is whether the work-related hazard is a proximate cause of the condition(s). It does not matter that other non-industrial hazards may also be proximate causes of the condition(s).

c. E.g., lung conditions & an injured worker who smokes but was also exposed to inhalants in the course of and arising out of employment.

d. See **Memo S9 Dual Causation**.

3. Aggravation/Substantial Aggravation

a. Employers take their employees as they find them. See *Hamilton v. Keller*, 11 Ohio App.2d 121, 229 N.E.2d 63 (3d Dist. 1967).

b. For dates of injury prior to August 25, 2006, the injury must only aggravate or accelerate pre-existing conditions. *Schell v. Globe Trucking*, 48 Ohio St.3d 1, 548 N.E.2d 920 (1990).

i. For an aggravation, the injured worker must establish by medical evidence an increase in pre-existing symptomatology or the current existence of symptoms that were not previously present.

c. Pursuant to SB7, injuries on or after **August 25, 2006**, must be *substantially* aggravated.

i. For a substantial aggravation, pursuant to 4123.01(C)(4), "a substantial aggravation must be documented by objective diagnostic findings, objective clinical findings, or objective test results. Subjective complaints may be evidence of such a substantial aggravation. However, subjective complaints without objective diagnostic findings, objective clinical findings, or objective test results are insufficient to substantiate a

substantial aggravation."

ii. See also **Memo B2 Substantial Aggravation**.

d. Return to baseline:

i. For a substantial aggravation, pursuant to 4123.54(G), "If a condition that pre-existed an injury is substantially aggravated by the injury, and that substantial aggravation is documented by objective diagnostic findings, objective clinical findings, or objective test results, no compensation or benefits are payable because of the pre-existing condition once that condition has returned to a level that would have existed without the injury."

ii. A finding of return to baseline has no effect 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. See **Memo B2 Substantial Aggravation**; *Clendenin v. Girl Scouts of W. Ohio*, 150 Ohio St.3d 300, 2017-Ohio-2830, 81 N.E.3d 438.

iii. Order Writing Reminder - Allowance orders should not include resolution language: "resolved," "abated," or "returned to baseline," unless it is specifically noticed for the hearing.

e. Aggravation of a pre-existing disease

i. *State ex rel. Miller v. Mead Corp.*, 58 Ohio St.2d 405, 390 N.E.2d 1192 (1979).

a) Pre-existing disease, aggravated in employment, is not compensable.

b) Disease must be contracted in employment.

ii. *Brody v. Mihm*, 72 Ohio St.3d 81, 647 N.E.2d 778 (1995).

a) Aggravation of a pre-existing disease is compensable only when the aggravation itself qualifies as a compensable injury or occupational disease.

b) This excludes wear and tear aggravation.

4. Flow-through/Residual Injuries. R.C. 4123.84(C).

a. Loss due to and a result of or residual of the injury.

b. Often occurs to a body part not originally injured due to the inability to use injured

body part or overuse of a non-injured body part to compensate for the injured body part.

c. Can also be disability produced by medical treatment.

5. Order Writing Reminder

a. **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.

VII. STATUTES OF LIMITATION

A. Injury or Death due to Injury

1. For claims arising on or after 09/29/2017, a claim is forever barred unless written notice is given to the Commission or the Bureau of the specific part(s) of body injured within one year. Prior to 09/29/2017, it is a two-year statute of limitation.

a. This rule is satisfied if the employer, with knowledge of the injury, pays wages in lieu of compensation.

b. For self-insuring employers, the statute of limitations is satisfied if the employer directly pays for compensation or medical benefits, or employer treats injured worker by a company physician. This does not prohibit the employer from contesting the claim, but relates only to the statute of limitations issue.

2. When an injured worker applies for a residual or flow-through condition as an additional allowance, the notice requirement in R.C. 4123.84(A) does not apply. See *Specht v. BP America*, 86 Ohio St.3d 29, 711 N.E.2d 22 (1999). See **Memo I2 | Two Year Limit and R.C. 4123.52, Application for Compensation Construed and Additional Conditions**.

3. Further, once a body part has been allowed, the injured worker has the life of claim to request additional conditions related to that body part. *Dent v. AT&T Technologies*, 38 Ohio St.3d 187, 527 N.E.2d 821 (1988).

B. Occupational Disease or Death due to Occupational Disease

1. The applicable statute of limitations for occupational disease claims is contained in R.C. 4123.85 (exceptions are noted in R.C. 4123.68).

2. Claims arising on or after 09/28/2021, must be filed within one year after the date of disability or death or within six months of the date of diagnosis, whichever is longer. Claims arising prior to 09/28/2021, must be filed within two years after the date of disability or death or within six months of the date of diagnosis, whichever is longer.

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

   a. Disability begins on the latest of:

      i. Date injured worker first became aware through medical diagnosis of disease,

      ii. Date of first medical treatment for the disease; or

      iii. Date injured worker first quit work on account of such disease.

   b. It follows that if the injured worker has not yet quit on account of the disease, the applicable period has not begun to run. See **Memo C3 R.C. 4123.85 and White v. Mayfield**.

VIII. EMPLOYEES WITH DISABILITIES

A. Statute provides relief for employers to reduce the financial burden when the disability of an injured worker is related to some pre-existing conditions (a schedule of 25 recognized conditions).

B. R.C. 4123.343

1. Definition of employee with a disability

   a. Must be one of the 25 scheduled conditions or diseases - No exceptions.

   b. Most common: Arthritis (4).

   c. Disability of employee who has completed BWC rehabilitation program (25).

      i. Encourages employers to hire worker.

      ii. If a second injury occurs, that employer may apply for relief.

2. Employers no longer need to pre-register employees with disabilities, but instead just show the disabling condition pre-existed the date of injury and either caused or contributed to the claim (increased costs, delay in recovery, etc.).

3. Payable only in claims for which TTDC, PTD, death, and scheduled loss pursuant to R.C. 4123.57(B) have been paid.

4. Procedure for Reimbursement

   a. Employer must file application for reimbursement within the experience period.

      i. Private, state-fund employers:

b. For claims with **a date of injury on or before 12/31/2009** must file by June 30 of the year no more than six years from the year of the date of the injury or occupational disease.

c. For claims with a date of injury **on or after 01/01/2010**, must file by June 30 of the year no more than **six years** from the year of the date of the injury or occupational disease if the date of injury is between Jan. 1 and June 30 and by June 30 of the year no more than **seven years** from the year of the date of the injury or occupational disease if the date of injury is between July 1 and Dec. 31.

i. Public employer taxing districts

d. For claims with a date of injury **on or before 12/31/2009**, must file by Dec. 31 of the year no more than **five years** from the year of the date of the injury or occupational disease.

e. For claims with a date of injury **on or after 01/01/2010**, must file by Dec. 31 of the year no more than **six years** from the year of the date of the injury or occupational disease.

i. Effective 09/29/2015, self-insuring employers can no longer participate in the disability relief program.

f. BWC rules on this application first; the decision can then be appealed to District Hearing Officer under R.C. 4123.511.

5. Method of Reimbursement

a. If injury would not have occurred but for the disability, 100% reimbursement.

b. If injury would have occurred regardless of the disability, but disability caused at least in part by aggravation of the disability, such percentage as Administrator or hearing officer determines.

c. No employer shall in any year receive credit in an amount greater than the premium paid.

CHAPTER THREE: COMPENSATION

I. BASIS FOR COMPUTATION OF BENEFITS

A. Compensation is governed by the law in effect on the date of injury, death, or disability from occupational disease.

B. Types and rates of compensation involve substantive law, and thus are not retroactive.

C. An injured worker's Average Weekly Wage (AWW) is the basis for computation of (almost) all compensation. See R.C. 4123.61.

1. Wages.

a. Concurrent wages from concurrent employment during the year preceding the date of injury are to be included in the calculation. *State ex rel. FedEx Ground v. Indus. Comm.*, 126 Ohio St.3d 37, 2010-Ohio-2451, 930 N.E.2d 295.

b. "Income" and "wages" are not synonymous. Miscellaneous income may properly be excluded. *State ex rel. McDulin v. Indus. Comm.*, 89 Ohio St.3d 390, 2000-Ohio-205, 732 N.E.2d 367 (while 'earnings' encompass wages earned as compensation for labor, 'Income,' on the other hand, derives from capital, labor, or a combination of both. Income is a much broader term than 'earnings' or 'wages,' and cannot, therefore, be used interchangeably.").

D. **Standard Calculation for AWW**. The standard calculation is based on wages for the year (52 weeks) prior to injury and shall be applied in all cases except the situations noted below.

1. Unemployment. Exclude periods of unemployment due to sickness, industrial depression, strike, lockout or other cause beyond the injured worker's control.

a. Receipt of OBES/Unemployment benefits may be considered, being that those benefits hinge on both unemployment and an ongoing effort to find work. May be used as evidence the unemployment was beyond the injured worker's control, but is **not conclusive** and the hearing officer is **not required** to rely on the determination of another agency. *State ex rel. Logan v. Indus. Comm*., 72 Ohio St. 3d 599, 1995-Ohio-71, 651 N.E.2d 1008.

b. **Seasonal workers** may be eligible, so long as it is not a lifestyle choice. Even though the period of unemployment is predictable for seasonal workers, it can still be excluded if beyond the injured worker's control. *State ex rel. Baker Concrete Construction, Inc. v. Indus. Comm.*, 102 Ohio St.3d 149, 2004-Ohio-2114, 807 N.E.2d 347.

2. Special Circumstances. In cases where the average weekly wage cannot justly be determined by using the standard calculation, a deviation from the standard calculation shall be used that does *substantial justice* to the injured worker *without providing a windfall*. "Special circumstances" is not defined by statute, but has generally been confined to uncommon situations. This permits an alternative calculation. It does not have to be exclusion of certain weeks, although it may be.

a. **First time entrance into the workforce** on a full-time basis following a period of

specialized education and training in a field with enhanced income and career potential is a special circumstance to be considered in setting the AWW. *State ex rel. Ohio State Univ. Hosp. v. Indus. Comm.*, 118 Ohio St.3d 170, 2008-Ohio-1969, 887 N.E.2d 325.

b. **Re-entrance of stay-at-home parents/grandparents** can be a special circumstance. See, e.g., *State ex rel. Huff v. Group Mgt. Servs.*, 10th Dist. Franklin No. 07AP-931, 2008-Ohio-6221; *State ex rel. Clark v. Indus. Comm.*, 69 Ohio St.3d 563, 1994-Ohio-396, 634 N.E.2d 1014. Staying home is a voluntary choice, so it cannot be excluded under the "control" exception. Further, because workers' compensation benefits are not intended to subsidize lifestyle choices, there must be some additional reasoning for why the caretaker stayed home. See *State ex rel. Howard v. Indus. Comm.*, 10th Dist. Franklin No. 08AP-129, 2008-Ohio-5616 (Oct. 30, 2008).

c. The Ohio Supreme Court found that the period in which an injured worker **operated a gas station at a net loss** was a special circumstance to be considered in calculating the average weekly wage. The Court reasoned that the consideration of this period in the average weekly wage calculation increased the number of weeks by which the total earnings are divided from 9 to 30, without adding any income whatsoever to the total earnings. This lopsided alteration of the average weekly wage calculation produces the type of inequitable result which the Legislature sought to avoid through the inclusion of the special circumstances provision in R.C. 4123.61. *State ex rel. Smith v. Indus. Comm.*, 25 Ohio St. 3d 25, 494 N.E.2d 1140 (1986).

d. **Part-time work** *may or may not* be a special circumstance. It is *not per se* a special circumstance, but in some cases, it may qualify. E.g., if the injured worker desired to work full-time, but due to the economy, full-time work was not available. *State ex rel. Wireman v. Indus. Comm.*, 49 Ohio St. 3d 286, 551 N.E.2d 1265 (1990). See also *Logan*, *supra*.

e. **Incarceration** *can be* a special circumstance. It cannot be a period of unemployment beyond the injured worker's control, as the criminal justice system is holding them responsible for their actions. State ex rel. Sutherland v. Indus. Comm., 10th Dist. No. 85AP-866, 1986 WL 10744 (Sept. 25, 1986). But, it is not a special circumstance *per se*. It simply must be considered. See Commission Order, 13-841885 (issued 10/25/2014).

f. A **natural increase in earnings** over the course of time is **not** a special circumstance under R.C. 4123.61 that is sufficient to justify recalculation of an individual's average weekly wage*. State ex rel. Stevens v. Indus. Comm.*, 110 Ohio St. 3d 32, 2006-Ohio-3456, 850 N.E.2d 55. But see the Tender Years section below.

3. "Tender Years" Doctrine

a. "If it is established that an injured or disabled employee was of such age and experience when injured or disabled as that under natural conditions an injured or disabled employee's wages would be expected to increase, the administrator of workers' compensation may consider that fact in arriving at an injured or disabled employee's average weekly wage." R.C. 4123.62(A).

b. R.C. 4123.62(A) applies only when a person of immature years could have expected an increase in wages in the employment in which he or she was engaged at the time of injury. See *State ex rel. Valley Pontiac Co. v. Indus. Comm.*, 71 Ohio App.3d 388, 594 N.E.2d 52 (10th Dist. 1991); *State ex rel. Weil v. Indus. Comm.*, 10th Dist. Franklin No. 01AP-1242, 2002-Ohio-4774.

c. R.C. 4123.62(A) “does not vest a discretion in the commission *to consider or not consider* age and experience under such circumstances but, instead, vests the discretion in the commission to determine *the effect*, if any, the age and experience of the injured person has upon determining the appropriate average weekly wage. Thus, when present, the factors necessarily **must** be considered, although such consideration *does not necessarily require a change* in the average weekly wage that would otherwise be calculated by applying the provisions of R.C. 4123.61. See *State ex rel. Major v. Indus. Comm.*, 10th Dist. Franklin No. 01AP-833, 2002-Ohio-2224.

E. **Full Weekly Wage**. An injured worker's Full Weekly Wage (FWW) is the basis for computation of the first 12 weeks of temporary total disability compensation *only*. See R.C. 4123.61.

1. Statute does not define time period for calculation.

2. **Joint Resolution R80-7-48 Computation of Full Weekly Wage**. The **greater** of:

a. Six weeks prior to injury, *including* overtime; or

b. Seven days prior to injury, *excluding* overtime

3. For employees who have not been continuously employed for six weeks prior to the date of injury and who have not worked for at least seven days prior to the date of injury, the full weekly wage shall be computed by multiplying the employees' hourly rate times the number of hours he/she was scheduled to work for the week in which the injury occurred.

F. Statewide Average Weekly Wage (SAWW). See R.C. 4123.62(C).

1. Average weekly earnings of all Ohio workers subject to unemployment compensation reporting.

2. Adjusted annually.

G. Retroactive adjustment of wages is limited to two years prior, per R.C. 4123.52.

1. Hearing officers 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. See **Memo Q1 Adjustments in Average or Full Weekly Wage**.

II. TEMPORARY TOTAL DISABILITY COMPENSATION (TTDC) R.C. 4123.56

A. A temporary and total disability is one which prevents a worker from returning to his former position of employment. See *State ex rel. Ramirez v. Indus. Comm.*, 69 Ohio St.2d 630, 433 N.E.2d 586 (1983).

B. Procedure

1. Claims examiner may pay undisputed TTDC upon proof.

2. Contested or disputed claims are set for hearing.

3. The request for TTDC must be filed within two years of the period of disability being

requested. The statute of limitations bars the payment of TTDC for any period more than two years from the date of the request. See R.C. 4123.52 and **Memo I2 | Two Year Limit and R.C. 4123.52, Application for Compensation Construed and Additional Conditions**.

C. **Applicable Standard "Direct Result of an Impairment"** (R.C. 4123.56(F))

1. If an injured worker is unable to work **or** suffers a wage loss as a **direct result of an impairment** arising from an injury or occupational disease, the injured worker is entitled to receive compensation under R.C. 4123.56 provided the injured worker is otherwise qualified. If the injured worker is not working or has suffered a wage loss as the direct result of reasons unrelated to the allowed injury or occupational disease, the Injured Worker is not eligible to receive compensation under the section.

2. No Voluntary Abandonment. "It is the intent of the general assembly to supersede any previous judicial decision that applied the doctrine of voluntary abandonment to a claim brought under this section." R. C. 4123.56 (F).

D. Eligibility

1. There is a three-part test to determine whether an injury qualifies for TTDC. The first two parts focus upon the disabling aspects of the injury, whereas the third part determines if there are any factors, other than the injury, which would prevent the injured worker from returning to his former position.

   a. Are there medical restrictions or medical disability certifications directly related to impairment from the allowed conditions in the claim? and

   b. Do those restrictions or disabilities directly result in the injured worker's inability to work or result in wage loss? or

   c. Is the inability to work or wage loss the direct result of reasons unrelated to the allowed injury or occupational disease. Example: If the injured worker is not working because of a reason or reasons unrelated to the injury, at the time the disability arises, then the Injured Worker may not be eligible for the compensation.

2. R.C. 4123.56 has been defined as compensation for wages lost where an injured worker's injury prevents a return to the former position of employment. *State ex rel. Ramirez v. Indus. Comm. (1982), 69 Ohio St.2d 630, 433 N.E.2d 586; State ex rel. Rest. Mgmt. v. Indus. Comm.,* 2010-Ohio-5626, P27, 210 Ohio app. LEXIS 4743, *12, 2010 WL 4681887. However, an injured worker does not have to prove a negative. (An injured worker having supplied evidence of a direct causal relationship between his allowed neck conditions and his disability, is not required to further show that his non-allowed diagnosis is not causing his inability to work.) *State ex rel. Ignatious v. Indus. Comm.*, 99 Ohio St.3d 285, 2003-Ohio-3627, 791 N.E.2d 443, ¶33.

3. An allowed but non-disabling condition is irrelevant to determining whether an injured worker continues to qualify for TTDC. See *State ex rel. Sears Logistics Serv., Inc. v. Cope*, 89 Ohio St.3d 393, 732 N.E.2d 370 (2000).

4. 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. See **Memo S9 Dual Causation**.

5. Incarceration:

a. Incarceration is a factor which is independent of an industrial injury, and precludes receipt of TTDC.

b. This preclusion is now codified by statute. Compensation is not payable to an injured worker during a period of confinement in penal institution. R.C. 4123.54(J).

c. R.C. 4123.54(J) –For injuries or occupational diseases **on or after 10/25/2006**, incarceration includes county jails in addition to a state or federal correctional institution.

E. Termination of Temporary Total Disability Compensation

1. Payment continues until one of the following occurs: (1) the injured worker returns to work; (2) physician of record states the injured worker is capable of returning to the former position of employment; (3) the injured worker has reached maximum medical improvement for the allowed conditions; or (4) the employer makes work within the physical capacity of the injured worker available. Each situation will be separately addressed below.

a. The Injured Worker Returns to Work

i. Any return to work bars the receipt of TTDC, not just a return to the former position of employment. *State ex rel. Johnson v. Rawac Plating Co.*, 61 Ohio St.3d 599, 575 N.E.2d 837 (1991).

ii. Even part-time work precludes TTDC. *State ex rel. Durant v. Superior's Brand Meats, Inc.*, 69 Ohio St.3d 284, 1994-Ohio-373, 631 N.E.2d 627. Moreover, work does not need to be "substantially gainful." *State ex rel. Blabac v. Indus. Comm.*, 87 Ohio St.3d 113, 1999-Ohio-249, 717 N.E.2d 336. See also *State ex rel. Rollins v. Indus. Comm.*, 105 Ohio St.3d 319, 2005-Ohio-1827, 825 N.E.2d 1104 (The low amount of weekly remuneration involved in his position as a pastor was not a determining factor. Wage-loss compensation is the appropriate type of compensation for injured workers who experience a post-injury reduction in income as the result of lower-paying alternative employment.)

iii. Activities that are not minimal and that directly generate income for a separate entity may be considered work and may disqualify an injured worker from receiving TTDC even when the injured worker is not paid. *State ex rel. McBee v. Indus. Comm.*, 132 Ohio St.3d 209, 2012-Ohio-2678, 970 N.E.2d 937.

iv. Activities that generate income only secondarily, e.g., receiving income from rental properties, do not bar TTDC, as the income is not remuneration given in exchange for labor. *State ex rel. American Standard, Inc. v. Boehler*, 99 Ohio St.3d 39, 2003-Ohio-2457, 788 N.E.2d 1053.

v. Payment for services precludes TTDC regardless of whether the recipient's enterprise earns a profit. *State ex rel. Sherry v. Indus. Comm.*, 108 Ohio St.3d 122, 2006-Ohio-249, 841 N.E.2d 309.

b. Physician of Record States the Injured Worker is Capable of Returning to the Former Position of Employment

i. This **must** be in writing.

c. The Injured Worker has been found to have Reached Maximum Medical Improvement (MMI)

i. Definition:

a) "Maximum medical improvement" is a treatment plateau (static or well-stabilized) at which no fundamental functional or physiological change can be expected within reasonable medical probability in spite of continuing medical or rehabilitative procedures. An injured worker may need supportive treatment to maintain this level of function. Adm.Code 4121-3-32(A)(1).

ii. When multiple conditions prevent an injured worker's return to the former position of employment, it is imperative that an MMI determination include consideration of all allowed conditions. *State ex rel. Tilley v. Indus. Comm.*, 78 Ohio St.3d 524, 678 N.E.2d 1392 (1997).

iii. Where some of the allowed conditions have reached MMI, TTDC may still be paid if the injured worker can establish that other allowed conditions have not yet reached MMI and prevent a return to the former position of employment. *State ex rel. Stone Container Corp. v. Indus. Comm.*, 79 Ohio St.3d 163, 1997-Ohio-174, 679 N.E.2d 1135.

iv. "Permanency" in the context of TTD and permanent partial disability (PPD) are not the same. Therefore, an award of PPD does not preclude a later award of TTDC, should an injured worker's condition worsen. *State ex rel. Kaska v. Indus. Comm.*, 63 Ohio St.3d 743, 1992-Ohio-7, 591 N.E.2d 235.

v. An injured worker's condition may be permanent in the sense that there will always be some degree of impairment and at the same time be temporary in the sense that the condition may not always prevent a return to the former position of employment. Receipt of overlapping awards of PPD and TTDC for the same injury is not necessarily an error. *State ex rel. Advantage Tank Lines v. Indus. Comm*., 107 Ohio St.3d 16, 2005-Ohio-5829, 836 N.E.2d 550.

d. Work Within the Physical Capability of the Injured Worker is Made Available by an Employer

ii. An injured worker's refusal to accept a written bonafide job offer is grounds for terminating TTDC. Adm.Code 4121-3-32.

iii. If a job offer is to be sufficient to stop TTDC, it must be **clear** that the job is indeed within the injured worker's restrictions. *State ex rel. Coxson v. Dairy Mart Stores of Ohio,* 90 Ohio St.3d 428, 2000-Ohio-188, 739 N.E.2d 324.

2. Date of TTDC termination: ~~*State ex rel. Russell v. Indus. Comm.*, 82 Ohio St.3d 516, 1998-Ohio-212, 696 N.E.2d 1069~~. Overruled by *State ex rel. Dillon v. Indus. Comm.,* 2024-Ohio-744.

a. The appropriate date on which to terminate ongoing TTDC on the basis of MMI is *the date of termination hearing*. The Commission cannot declare an overpayment for payments received before that date.

b. See **IC Resolution 98-1-04 Termination Date-MMI** and **Memo D2 Jurisdiction over the Issue of Maximum Medical Improvement**.

c. But, when TTDC ceases and a new motion for a new period is filed, *Russell* does not apply, as the injured worker is not receiving ongoing TTDC. Accordingly, the date of hearing is not the appropriate date of termination of TTD, but the release to work date. *State ex rel. M. Weingold v. Indus. Comm.*, 97 Ohio St.3d 44, 2002-Ohio-5353, 776 N.E.2d 69.

F. Additional Considerations

1. No TTDC is payable for first seven days after the injury or date of disability unless the injured worker is disabled for a continuous period of two weeks or more. See R.C. 4123.55.

a. 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). See **Memo S7 Exclusion of the First Week of Compensation**.

2. TTDC is not payable on the **date of injury** or the **date of return to work**.

3. A self-insuring employer may not terminate TTDC without a hearing, except in the following three circumstances: (1) the injured worker has returned to work; (2) the injured worker has been released to the former position of employment; or (3) the injured worker was determined MMI by his/her own treating physician. See *Jeep v. Indus. Comm.,* 62 Ohio St.3d 64 (1991).

4. After 90 days of TTDC, BWC shall schedule the injured worker for a medical exam to determine whether the disability has become permanent. R.C. 4123.53.

5. After 200 weeks of TTDC, the injured worker may be scheduled for an extent of disability exam to determine if the disability has become permanent.

6. Sickness and accident benefits paid under a policy wholly funded by the employer:

a. For DOIs prior to 09/29/2015, the benefits are deducted from TTDC.

b. For DOIs on 09/29/2015 and after, TTDC can be paid without an offset for supplemental sick leave benefits provided by an employer **if the employer and employee mutually agree in writing.** See R.C. 4123.56.

7. Unemployment offset. The injured worker cannot receive both TTDC and unemployment compensation concurrently. Unemployment compensation paid to the injured worker (pursuant to Chapter 4141) is deducted from an award of TTDC. R.C. 4123.56(A).

   a. Federal unemployment funds, despite being administered by ODJFS, are not awarded pursuant to R.C. Chapter 4141. Therefore, where an injured worker's unemployment compensation is federally-funded and not state-funded, TTDC should not be offset in accordance with R.C. Chapter 4141. See *State ex rel. Timken v. Indus. Comm.,* 10th Dist. Franklin No. 11AP-1095, 2012-Ohio-5087. See also **Memo D4 State and Federal Unemployment Funds**.

8. Split-rate

   a. The Industrial Commission may allocate payment of temporary total disability equally to two claims when each of claims is sufficient in itself to result in temporary total disability, and is not required to allocate payments solely to claim which would result in higher payments to claimant." *State ex rel. Crocker v. Indus. Comm.*, 9 Ohio App.3d 159 (10th Dist. 1983); *State ex rel. Henson v. Indus. Comm.*, Tenth Dist. No. 14AP-1053, Slip. Op. (Sept. 17, 2015).

9. **Memo D3 Salary Continuation**

   a. If the injured worker has received salary continuation over a period of temporary total disability, the hearing officer should make a TTD finding but state that TTDC shall be paid less wages received. However, to the extent that TTDC would exceed the after-tax amount received by the injured worker through salary continuation, the excess amount is payable in TTDC to the injured worker.

   b. The hearing officer does not have jurisdiction to terminate salary continuation benefits, nor does the hearing officer have jurisdiction to make a finding of MMI in claims where TTDC is not being paid or requested. However, salary continuation may be discontinued by either the employer or the injured worker at any time.

   c. Where ongoing TTDC is not being paid due to salary continuation and those benefits cease, TTDC shall commence or be ordered to commence. If a request is filed to find MMI, *Russell* applies and termination should take place at the date of hearing.

III. WAGE LOSS COMPENSATION
R.C. 4123.56(B) and Adm.Code 4125-1-01

A. Definition

1. Wage loss as a result of returning to employment other than the former position of employment or the inability to find work within the injured worker's physical capabilities.

   a. Non-working wage loss – payable when the injured worker is unable to return to the former position of employment and is unable to find employment within his or her physical restrictions.

   b. Working wage loss – payable when the injured worker returns to employment other than his or her former position employment including return to work with the

employer of record with different job duties, less hours and less pay resulting from the restrictions.

2. Replaced Temporary Partial, although the wage loss determination is made with regard to the actual loss in wages rather than an impairment of earning capacity.

3. Effective only for dates of injury, or disability in occupational disease claims, on or after 08/22/1986.

B. Rate of Payment

1. 66 $^{2}/_{3}$% of the injured worker's weekly wage loss

2. For injuries on or after 05/15/1997, the wage calculation is based on the injured worker's AWW. If the date of injury is before 05/15/1997, wage loss is the difference between the higher of AWW or FWW and the actual wage.

3. For DOIs prior to 08/25/2006, compensation is limited to 200 weeks.

4. For DOIs on or after 08/25/2006, compensation limits are as follows:

a. Working wage loss: maximum of 200 weeks reduced by the corresponding number of weeks in which the employee receives (living maintenance wage loss). 4123.56(B)(1).

b. Non-working wage loss: Maximum of 52 weeks. The first 26 weeks shall be in addition to the maximum of 200 weeks of payments allowed under division (B)(1). Anything received in excess of 26 weeks shall be reduced from the maximum in (B)(1). R.C. 4123.56(B)(2).

c. Aggregate shall not exceed 226 weeks of working and non-working wage loss combined. R.C. 4123.56(B)(3).

C. Guidelines

1. Proof of a good faith search for work within the residual functional capacity is required of those seeking working wage loss compensation. *State ex rel. Marrero v. Indus. Comm.*, 126 Ohio St.3d 439, 2010-Ohio-3755, 935 N.E.2d 1.

2. All applications for wage loss shall be accompanied by:

a. Medical Report (which **must** contain the following);

i. Identification of the restrictions of the injured worker;

ii. An opinion on whether the restrictions are permanent or temporary;

iii. When the restrictions are temporary, an opinion as to the expected duration of the restrictions. Temporary restrictions cannot be certified for a period to exceed 90 days without a new examination of the injured worker

iv. When the restrictions are permanent, the report must be based on an examination or treatment conducted within 90 days prior to the initial

date of wage loss compensation requested on the application for wage loss compensation;

v. The date of the last medical examination;

vi. The date of the report;

vii. The name of the physician; and

viii. The physician's signature.

b. Supplemental medical reports must be submitted every 90 days if the restrictions are temporary; 180 if permanent.

c. The application must also contain an employment history. The employment history shall include a description of each position which was held by the injured worker.

3. Job Search Statements

a. Injured workers seeking non-working wage loss must complete job search statements.

b. Injured workers seeking working wage loss must also supplement with job search statements, unless excused.

c. An injured worker **shall** supplement his or her application with job search statements in accordance with the following rules:

i. Submitted for every week where non-working wage loss compensation is sought;

ii. Submitted with the wage loss application and/or any subsequent request for non-working wage loss;

iii. An injured worker who receives non-working wage loss shall submit the job search statements, at a minimum, every four weeks to the BWC (or the self-insuring employer);

iv. Job search statements shall include the name and address of each employer contacted, the employer's telephone number, the position sought, a reasonable identification by name or position of the person contacted, the date and method of contact, for on-line job searches, a copy of the on-line posting and verification of the application submission, the result of the contact, and any other information requested by the bureau of workers' compensation job search statement; and

v. Submitted on forms provided by the BWC or equivalent forms.

d. Failure to perform a job search will be construed as a voluntary limitation of income.

4. Exceptions:

a. Light/Modified Duty

i. When an injured worker is unable to return to the former position of employment, but the injured worker returns to alternative employment with the same employer (or another employer at the direction of the employer of record), working wage loss is payable without a job search.

b. Working wage loss is also payable without a job search when the injured worker must miss work in order to obtain treatment for allowed conditions in the claim if that treatment cannot be obtained outside work hours. The injured worker **must** provide documentation that:

i. the treatment was medically necessary for the injured worker to perform his or her job;

ii. the injured worker could not continue to work full time without the treatment; and

iii. the treatment was available only during the injured worker's hours of employment.

5. Wage Loss Factors:

a. The injured worker's search for suitable employment;

i. The injured worker must first seek suitable employment with the Employer of Record (EOR) or establish it would be futile to do so (e.g., the injured worker was discharged or EOR is out of business)

ii. For non-working wage loss, the injured worker must register with ODJFS (or the equivalent if out of state)

iii. An injured worker may first seek employment within his or her skills, prior employment history, and education background. If within **60 days**, the injured worker does not find employment, the injured worker **shall** expand his or her job search to include entry level and/or unskilled opportunities.

iv. A **good faith effort**: consistent, sincere, and best attempts to obtain suitable employment that will eliminate the wage loss. Good Faith Factors:

a) The injured worker's skills, prior employment history, and educational background;

b) The number, quality, and regularity of contacts;

c) The time spent in searching for a new job;

d) Refusal without cause to accept free assistance in finding employment;

e) Labor market conditions;

f) The injured worker's restrictions;

g) The injured worker's socioeconomic status (e.g., access to transportation and telephone service);

h) Any part-time employment and whether that constitutes a voluntary limitation on earnings;

i) Whether the injured worker restricts his or her search to positions that would require fewer hours than the former position; and

j) Whether the injured worker is enrolled in a rehab program with the Opportunities for Ohioans with Disabilities Agency.

b. The injured worker's failure to accept a good faith offer of suitable employment; and

i. Offers by the EOR must be in writing and contain a reasonable description of the job duties, hours, and rate of pay.

ii. The injured worker is not required to accept a position that requires him or her to work a greater number of hours per week than the former position of employment.

c. Other actions of the injured worker which result in a wage loss not causally related to the allowed conditions of the claim

IV. IMPAIRED EARNING CAPACITY/TEMPORARY PARTIAL (IEC/TP) R.C. 4123.57(A) (Prior to 08/22/1986 ONLY)

A. Impaired earning capacity is a function of the degree to which an injured worker's industrial injury affects the ability to earn a living.

1. Example: the injured worker returns to work part-time or to light work, but is unable to earn the same as before.

B. Rate of Payment

1. 66 2/3% of injured worker's impairment of earning capacity

2. Maximum: 100% of SAWW

3. Total Maximum payable: $17,500.00

C. Procedure

1. Injured worker files C-92; the injured worker must elect to receive an award under Paragraph A.

2. Two step hearing process. First, C-92%; then, hearing on impairment of earning capacity.

3. Injured worker must submit periodic wage affidavits.

D. Additional Considerations

1. May pay IEC/TP where actual wages are higher than prior to injury, but lower than the wages possible without injury.

2. In addition to proving pre- and post-earning capacity, the injured worker must also prove an *actual impairment* in earning.

3. The hearing officer can use the injured worker's AWW as a starting point in determining the pre-injury earning capacity.

4. If the injured worker retains capacity to work, use the current minimum wage expressed in a weekly figure. [In 2016, the Ohio minimum wage is $8.10 per hour, which equates to a full-time salary of $324 per week).

5. The calculation should be: (Pre-injury Earning Capacity – Post-injury Capacity) x 66 $^{2}/_{3}$ = weekly rate for IEC.

6. If not working, the injured worker must show a *desire* to work. See *State ex rel. Garon v. Univ. Hosp. of Cleveland*, 88 Ohio St.3d 288, 2000-Ohio-329, 725 N.E.2d 642.

7. The two-year statute of limitations in R.C. 4123.52 does not apply to IEC/TP.

E. Change of Election

1. The injured worker must show good cause for the election such as new and changed circumstances that were unforeseeable at the time of the initial election. See *State ex rel. Fellers v. Indus. Comm.*, 9 Ohio App.3d 247, 459 N.E.2d 605 (10th Dist. 1983); *State ex rel. Combs v. Goodyear Tire & Rubber Co.*, 62 Ohio St.3d 378, 582 N.E.2d 990 (1992).

2. This showing requires two elements:

   a. New and changed circumstances; and

   b. Lack of foreseeability.

3. Examples:

   a. Significant worsening;

   b. Unexpected transformation of a non-work-prohibitive injury into a work-prohibitive one;

   c. Recognition of additional conditions after the election.

V. PERMANENT PARTIAL DISABILITY COMPENSATION (PPD) R.C. 4123.57(A)

A. Definition

1. Percentage of an injured worker's permanent disability, except as is subject to paragraph (B), due to injury and causing medically demonstrable impairment.

2. Rated as percentage of whole person.

3. Not a wage loss payment, but a damage payment.

B. Payment

1. The award is payable in weekly installments.

2. Payment is equal to the percent of impairment times two. E.g., a 10% impairment is paid for 20 weeks.

C. Procedure

1. Timing:

a. For DOIs prior to 06/30/2006, an injured worker can file his or her C-92 no earlier than **40 weeks** from date of last payment of compensation under R.C. 4123.56, or from date of injury if no compensation has been paid.

b. For DOIs on or after 06/30/2006, an injured worker can file his or her C-92 application no earlier than **26 weeks**.

c. For all claims pending on or arising after 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). See **Memo D3 Salary Continuation**.

d. These time frames apply only to the initial C-92, not to requests for an increase.

e. Timeliness is determined at the time of filing; a later retroactive award of TTDC doesn't affect this aspect, although it may have an effect on a physician's ability to assess permanent impairment.

i. If the BWC does not process the C-92 application and dismisses or denies it on the basis of an untimely filing, after appeal or referral, the IC, orders that deal with these timeliness issues should include appeal language as opposed to reconsideration language. The issue is also set on an allowance docket. Examples of reasons for BWC denial:

a) the 26 weeks from the date last payment of compensation, or date of injury if no competition has been paid, have not passed.

b) Statute of limitations has expired.

c) Injured Worker has failed to attend the medical exam, or fails to respond to the Bureau's attempt to schedule a medical examination, pursuant to R.C. 4123.57 and Adm.Code 4123-3-15.1.

1) When set for hearing this issue is captured as "Jurisdiction of Permanent Partial Disability." At hearing, if the hearing officer finds the injured worker intends to appear for an examination, the matter should be referred to the Bureau for processing and

the order shall contain appeal language.

ii. If the BWC processes the C-92 application and denies or awards a percentage, after appeal or referral, the IC orders should include the reconsideration language, even if timeliness is raised at hearing.

2. Injured worker is examined by BWC physician who gives an opinion on impairment.

3. BWC puts on a tentative order

a. Parties must object in 20 days

b. District Hearing Officer determines percentage of PPD, if there is an objection to the BWC tentative order. Parties can then file a request for reconsideration from the District Hearing Officer determination with 10 days.

4. For DOIs prior to 08/22/1986, an injured worker must elect to receive compensation under *either* Paragraph A or B.

5. Parties may submit additional medical evidence at the SHO level concerning the initial award of PPD only, but not in increases.

D. Award

1. Carefully review the medical evidence on file to ensure the decision will be based only upon the allowed conditions in the claim. See **Memo E1 Award Based Only upon Allowed Conditions**.

2. The hearing officer may choose any percent of impairment that is in the range of the physicians relied upon on. See **Memo E2 Permanent Partial Disability – Hearing Officer Discretion**.

a. E.g., if one physician says 0%, one says 4%, and one says 16%, the hearing officer can choose any number between 0% and 16%, as long as the hearing officer cites reliance on all the physicians.

b. If the hearing officer chooses a percentage between 4% and 16%, the hearing officer could omit reliance on the physician who opined 0%.

c. Moreover, the parties may agree, subject to the hearing officer approval, to a compromise rating within the aforementioned range.

3. Percentages shall be awarded in whole numbers only.

4. A combined effects review from a BWC nurse is some evidence the hearing officer may rely on, if the hearing officer finds the review persuasive, as long as it utilizes the impairment ratings from physicians' reports.

E. Increase in Percentage of PPD

1. When injured worker's PPD has increased (due to deterioration or newly allowed conditions), he/she may file for an additional award. (C-92 and C-92-A are combined)

2. Injured worker must show substantial medical evidence of new and changed

circumstances developing in disability since last award. Newly allowed conditions may establish this.

3. If the injured worker files for an increase based on a newly allowed condition, a report that does not find an increase in the *whole person impairment* but nevertheless attributes a percentage based *solely* on the newly allowed conditions can be used to support an increase up to that amount. *State ex rel. Grimm v. Indus. Comm.*, 10th Dist. Franklin No. 07AP-761, 2008-Ohio-1800.

    a. See also Commission Order Claim No. PEL114827 (Heard 09/17/2015).

4. Parties **cannot** submit additional medical evidence at the SHO level concerning an increase of PPD.

F. Additional Considerations

1. An injured worker cannot receive more than 100% PPD in all claims considered together for DOIs on or after 10/01/1963.

2. If PPD equals 90%, the injured worker is paid for 200 weeks (the full 100%).

3. Request for PPD while TTD in Another Claim:

    a. In cases where an injured worker has two claims involving the **same body** parts, the injured worker is currently receiving TTDC in one claim, and a C-92 is pending in the second claim, the hearing officer should process the C-92 even though the injured worker may be receiving TTDC in the first claim. Should the examining physicians be unable to render an opinion because they are unable to split the evaluations between the claims, the claim may understandably be delayed. See **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**.

4. Pending .512 Appeals. See **Memo E7 Processing Applications for Compensation Pursuant to R.C. 4123.57(A) when Allowance Question is in Court** and **Memo I5 Processing Compensation and Medical Benefits Issues in Claims When an Original Allowance or Additional Allowance Issue is in Court**.

    a. A C-92 application shall not be processed during the pendency of the Employer's .512 appeal of the **original allowance** in Court.

    b. If the issue of **additional allowance** is pending in court, the Commission does have jurisdiction to process the C-92 as it relates to the conditions in the claim that **are not being contested** in court.

5. Legal Infirmities in BWC's Medical

    a. Adm.Code 4121-3-15(E)(2)

        i. If the hearing officer finds the BWC medical was legally insufficient, the hearing officer can remand to the BWC for a second exam or review.

        ii. This must be done via interlocutory order.

iii. The hearing officer must also instruct the BWC to return the claim to the Commission for hearing (at the same hearing level) once the new medical is complete. The BWC should not issue a new TO in this instance.

iv. This can only be done once; so even if the new medical is legally insufficient, the hearing officer is to proceed on the merits once it has been returned to the Commission.

v. Where the reviewing/examining doctor opines that it is premature to make a finding of permanent partial impairment because the conditions have not reached MMI, and the injured worker wishes to go forward with the hearing, the hearing officer may deny the application based on that report, or may choose to rely on a different report from a physician that makes a finding of permanent partial impairment. In these scenarios, hearing officers may not rely on both reports to grant a compromise percentage.

G. Concurrent Compensation (PPD and PTD)

1. The Industrial Commission does not have authority to award permanent partial under R.C. 4123.57(A) to an injured worker who is receiving permanent total disability in the same claim. *See State ex rel. Ohio Presbyterian Retirement Servs., Inc. v. Indus. Comm.*, 151 Ohio St.3d 92, 2017-Ohio-7577, 86 N.E.3d 294.

2. See **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**.

VI. SCHEDULED LOSS R.C. 4123.57(B) (prior to 08/22/1986: R.C. 4123.57(C))

A. Definition

1. Compensation for specific, scheduled bodily loss.

2. Not a wage loss compensation; it is therefore payable regardless of work or other compensation (akin to a damages award).

3. The loss can be by amputation, or loss of use including ankylosis.

a. 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 that the injured body part be of absolutely no use in order to establish eligibility for a loss of use award. See **Memo F5 Loss of Use Need Not be Absolute**; *State ex rel. Alcoa Bldg. Products v. Indus. Comm.,* 102 Ohio St.3d 341, 2004-Ohio-3166, 810 N.E.2d 946.

B. Payment

1. Payment is made in weekly installments for a scheduled number of weeks of compensation depending on the bodily members at issue.

2. The compensation payable under R.C. 4123.57(B) is based on the statewide average weekly wage (not the injured worker's AWW) as defined in R.C. 4123.62(C).

C. Specific Situations

1. Vision (**Memo F1 Loss of Vision** and **Memo F2 Loss of Vision – Corneal Transplants and Corneal Implants**)

a. Loss of vision award is based upon the **uncorrected vision post-injury**.

i. **Memo F2 Loss of Vision – Corneal Transplants and Corneal Implants**: The improvement of vision resulting from a corneal transplant or corneal implant is a correction of vision and thus shall not be taken into consideration in determining the percentage of vision actually lost pursuant to the scheduled loss provision of R.C. 4123.57. The proper measure for loss of vision is the percentage of vision actually lost when comparing the pre-injury vision to the post-injury vision, prior to any corrective treatment. However, if the result of the attempted corrective procedure is that the vision has worsened, that fact may be taken into account when making an award. *State ex rel. Kroger Co. v. Stover*, 31 Ohio St.3d 229, 510 N.E.2d 356 (1987).

b. The Industrial Commission has some discretion in determining the appropriate measure of *pre-injury* vision. *State ex rel. La-Z-Boy Furniture Galleries v. Thomas*, 126 Ohio St.3d 134, 2010-Ohio-3215, 931 N.E.2d 545.

c. A diagnosis of "legally blind" is sufficient to support an award for the loss of the sight of an eye. *State ex rel. AutoZone, Inc. v. Indus. Comm.*, 117 Ohio St.3d 186, 2008-Ohio-541, 883 N.E.2d 372.

d. *State ex rel. Smith v. Indus. Comm.*, 138 Ohio St.3d 312, 2014-Ohio-513, 6 N.E.3d 1142: the statute does not provide for compensation for a loss of brain-stem functioning that precludes an injured worker from processing and understanding the visual and auditory stimuli received by functioning eyes and ears. To be entitled to an award for loss of vision, evidence must demonstrate an actual loss of function of the eyes. See **Memo F4 Loss of Use of Vision and/or Hearing Secondary to a Traumatic Brain Injury**.

2. Hearing

a. Partial hearing loss is not compensable; an award can only be granted for **permanent and total loss** of hearing of at least one ear. See R.C. 4123.57(C); *Kingry v. Complete Gen. Constr. Co.*, 10th Dist. No. 84AP-109, 1985 WL 9920 (Mar. 26, 1985).

b. See also *State ex rel. Hammond v. Indus. Comm.*, 64 Ohio St.2d 237, 416 N.E.2d 601 (1980) (partial hearing loss is not compensable under R.C. 4123.57(A) either).

c. Hearing connotes the ability to comprehend the spoken word for the purpose of communication with others. The mere fact that a person is able to discern certain sounds of certain frequencies at certain intensities does not prevent a finding of a total loss of hearing if the person is unable to hear and comprehend the spoken

word even when spoken extremely loudly. *State ex rel. Sheller-Globe v. Indus. Comm.*, 10th Dist. Franklin No. 80AP-194, 1980 WL 353639 (Aug. 21, 1980).

d. But, hearing loss induced solely by anoxic brain injury is not compensable; see *Smith*, *supra*. To be entitled to an award for loss of hearing, evidence must demonstrate an actual loss of function of the ears. See **Memo F4 Loss of Use of Vision and/or Hearing Secondary to a Traumatic Brain Injury**.

3. Fingers

a. Loss of a phalange does not mean partial loss; rather, it means severance near the joint. "Near" leaves the Commission with discretion, but the loss must be more than one-half. See *State ex rel. Green Tokai, Co. v. Indus. Comm.*, 10th Dist. Franklin No. 06AP-642, 2007-Ohio-4688.

b. Ankylosis of Finger Joints (See **Memo F3 Ankylosis of Finger Joints**)

i. The injured worker is entitled to an award for total loss of use of a finger when they suffer from ankyloses of the proximal interphalangeal (PIP) joint. In other words, ankyloses of the joint below the middle phalange is a loss of more than the middle and distal phalanges of the finger.

c. If an injured worker has a loss of two or more fingers, the hearing officer may increase the award up to loss of hand, depending upon occupation and a "special occupational disability." However, this award shall not exceed the amount for a total loss of a hand.

4. Facial Disfigurement

a. Payable for injury which results in serious facial or head disfigurement which impairs opportunity for future employment

b. Maximum payable: Prior to 06/30/2006 the award was not to exceed $5,000. For dates of injury or occupational disease on or after 06/30/2006, the award cannot exceed $10,000.

D. Additional Considerations

1. Offset of Awards – There is an offset of a scheduled loss award and an award of permanent partial disability. Cannot receive a scheduled loss award and a permanent partial disability award for the same condition. This is a *dollar* offset.

2. For scheduled loss awards accrued at death, see Section VIII.F.1.b, *infra* at page 71.

3. An injured worker must file an application; the Bureau has no affirmative duty to do so. See **Memo E3 Injured Worker Must File an Application**.

4. Start Date - When awarding compensation for a scheduled loss, hearing officers shall provide a start date for the award. See **Memo F6 Orders Awarding Scheduled Losses**.

VII. DEATH BENEFITS & ACCRUED COMPENSATION (R.C. 4123.59, R.C. 4123.60)

A. Death Claims. Death benefits are payable where an injury or occupational disease causes an employee's death.

1. Dependents - Under R.C. 4123.59, death benefits are payable only to dependents of the deceased worker.

2. Death from a pre-existing cause that is accelerated by an occupational disease contracted in the course of and arising out of the scope of employment is compensable where the death is *accelerated by a substantial period of time as a direct and proximate result of the occupational disease*. See *Oswald v. Connor*, 16 Ohio St.3d 38, 476 N.E.2d 658 (1985).

3. Abatement – See Chapter Five, V. Abatement and **Memo H4 Appeal Abated by Death**.

B. Dependency.

1. Two Classes of Dependents - Wholly or Partially Dependent

a. Determined by facts of each case existing at the time of death. Actual dependency must be shown if presumption of dependency does not exist.

b. No person shall be considered dependent unless person is a member of family of the deceased, or spouse, descendant, ancestor, sibling.

2. Presumption of Dependency

a. Surviving spouse living with worker at death (unless separated due to worker's aggression) is presumed wholly dependent.

i. This section requires the spouse be living with the decedent only to be found wholly dependent; a spouse not living with the decedent can still be found partially dependent.

ii. *See State ex rel. Maglis v. Indus. Comm.*, 10th Dist. Franklin No. 15AP-648 (June 28, 2016).

b. Children: if the injured worker was contributing more than one-half of the support for such child and with whom he is living at the time of the death (or legally liable for such maintenance), they are presumed wholly dependent until age 18, or age 25 for full-time education program, or even longer if physically or mentally incapacitated from earning.

3. Surviving natural parent(s) with whom the decedent was living are presumed sufficiently dependent for total minimum award of $3,000.00.

4. Prospective dependency may be considered.

a. "No person shall be considered a prospective dependent unless such person is a member of the family of the deceased employee and bears to the deceased employee the relation of surviving spouse, lineal descendant, ancestor, or brother or sister. The total award for any or all prospective dependency to all

such claimants, except to a natural parent or natural parents of the deceased, shall not exceed three thousand dollars to be apportioned among them as the administrator orders." R.C. 4123.59(D)

C. Duration of award depends on type of dependents and dependency

1. Wholly dependent spouse: until spouse's death or remarriage

a. If remarriage, spouse receives two years of benefits in lump sum.

b. Spouse's portion will be reapportioned (see below)

2. Wholly dependent children: until ages stated above in definitions.

3. Partly dependent: for such time as the Commission determines in each case.

4. Where death is due to injury, but there are no dependents, payments are limited to expenses based upon R.C. 4123.66.

a. Medical Bills

b. Funeral expense, up to $5,500.00 for claims prior to 09/15/2020, and $7,500 for claim on or after 09/15/2020.

D. Apportionment of award

1. Where there are wholly dependent persons, the death award is apportioned by the Commission among the dependents.

2. The total award amount is always constant; thus, when a change in dependency occurs, the full award is reapportioned among remaining dependents.

3. Upon remarriage of spouse, the spouse receives two-year lump sum and the spouse's share is immediately reapportioned among remaining dependents

a. *State ex rel. Endlich v. Indus. Comm.*, 16 Ohio App.3d 309, 475 N.E.2d 1309 (10th Dist. 1984).

b. See **Memo H3 Reapportionment of Death Benefits – Remarriage**.

E. At death, a new cause of action arises for dependents. A surviving spouse cannot step into the decedent's shoes, but instead has his or her own cause of action upon the death of the injured worker. See *State ex rel. Nicholson v. Copperweld Steel Co.*, 77 Ohio St.3d 193, 1996-Ohio-198, 672 N.E.2d 657.

F. Accrued Compensation (R.C. 4123.60)

1. If the decedent would have been lawfully entitled to have applied for an award at the time of his/her death, the dependent(s) are entitled to the amount the decedent might have received for the period prior to the date of death.

a. Where there are no dependents, the decedent's estate can be entitled to compensation that accrued but was not paid to the decedent at time of death.

i. Where the Commission awards death benefits to the surviving spouse, but the spouse dies before the funds are disbursed, accrued benefits for the period between the employee's death and the spouse's death shall be paid to the spouse's estate. *State ex rel. Nossal v. Terex Div. of I.B.H.*, 86 Ohio St.3d 175, 712 N.E.2d 747 (1999).

ii. Equally, where there are no dependents, the decedent's estate is entitled to compensation that accrued but was not paid to the decedent at time of death. See *State ex rel. Liposchak v. Indus. Comm.*, 90 Ohio St.3d 276, 2000-Ohio-73, 737 N.E.2d 519.

iii. See **Memo H5 Accrued Compensation Reminder**.

b. Scheduled loss awards

i. Consciousness is not required for a loss of use award. *State ex rel. Moorehead v. Indus. Comm*., 112 Ohio St.3d 27, 2006-Ohio-6364, 857 N.E.2d 1203.

a) As long as the death was not instantaneous with injury, even if the decedent died a very short while after the injury, he/ she would have been entitled to apply for a loss of use award; accordingly, his/her dependents are entitled to seek the accrued compensation.

ii. "The number of weeks to measure a partial disability award is **not in the injured worker's life span**, but rather that of **their spouse, dependent children, or other dependents** as the BWC determines." *State ex rel. Arberia v. Indus. Comm.*, 10th Dist. No. 13AP-1024, 2014-Ohio-5351.

a) In *Moorehead* on remand, the Commission held the entire loss of use award does not accrue to the injured worker's widow at the time of the injured worker's death. Lump sum awards could only be made pursuant to R.C. 4123.64; otherwise, loss of use awards are payable in weekly installments. However, in accordance with R.C. 4123.57(B) which provides survival to the spouse, the injured worker's widow is entitled to continue to receive the weekly compensation her husband was getting up to the 850 weeks awarded, *for as long as she is living*.

b) R.C. 4123.64 and Adm.Code 4123-3-37 both allow commutation to lump sum in certain circumstances.

iii. Following *Arberia*, the Bureau amended Adm.Code 4123-3-37, adding a provision that prohibits surviving dependents from receiving lump sum advancements from the decedent's scheduled loss awards.

iv. Adm.Code 4123-3-15(C)(3):

a) For short time between 10/12/2010-07/10/2013, an injured worker was entitled to a lump sum award.

b) Effective 07/11/2013, (C)(3) simply provides awards pursuant

to R.C. 4123.57 are payable in weekly installments.

c. A pending settlement is not accrued compensation.

2. Timeliness

a. R.C. 4123.60 contains a statute of limitations requiring an application for accrued compensation be filed within one year.

b. Generally, this time will begin to run from the date of death. See **Memo H5 Accrued Compensation Reminder**. However, the Tenth District has held that resolution of the issue turns on the meaning of the phrase "if the decedent would have been lawfully entitled to have applied for an award at the time of his death." See *State ex rel. Leto v. Indus. Comm.*, 180 Ohio App.3d 17 (10th Dist. 2008).

i. This case affects claims that were not allowed prior to the decedent's death.

ii. In *Leto*, the Court held that because the surviving spouse spent nearly a year administratively litigating the death allowance issue, the decedent was NOT entitled to apply for the award at the time of his death. Instead, he would not have been entitled to apply for the scheduled loss award until the Commission mailed its order granting the decedent the right to participate.

iii. While the opinion doesn't explicitly state it, the implication present—that also made its way into the headnote—was that the one-year period would begin to run from the date the order was issued.

G. Procedure

1. Death claims are always investigated to obtain marital records, birth certificates, etc.

2. Most claims are referred to hearing to determine causal relationship, dependency, and/or apportionment.

a. Date of death is used to determine maximum and minimum rates.

i. See **Memo H1 Death Benefits – Eligibility for Maximum Benefits** and **Memo H6 Rate of Compensation where there are Wholly Dependent Persons**.

b. Even if the "living" claim was previously allowed, a death claim is not presumed payable; causation is still at issue, and the dependent(s) bear the burden of proof

3. Also see **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**.

4. Dependents may receive both death benefits and accrued compensation in appropriate claims. See **Memo H2 Eligibility for Death Benefits and Accrued Compensation**.

H. Incarceration

1. For claims arising on or after 09/29/2017, compensation and benefits are not payable to a dependent during the period of the dependent's incarceration. See R.C. 4123.54(J).

CHAPTER FOUR: BENEFITS

I. MEDICAL BENEFITS & DISPUTES

A. Process

1. State Fund

a. The payment of medical benefits in state fund claims is made by managed care organizations ("MCO"). The MCO processes requests from the injured worker's attending physicians and medical providers for medical services, such as requests for treatment, diagnostic studies, physical therapy, consultation exams, medical appliances, and other treatment issues.

b. Typically, treatment requests are submitted on a C-9 form. If the MCO disapproves or modifies the C-9 request, the injured worker may appeal. If an appeal is filed, an alternative dispute resolution (ADR) process begins. If the injured worker is still dissatisfied with the MCO's decision, the BWC reviews the matter and issues an order, which may be appealed to the Commission.

2. Self-Insuring Employers

a. For denials or modifications of C-9 requests, the injured worker's remedy is to file a motion and request a hearing.

B. *Miller* Criteria: In order for medical treatment to be authorized, it must be:

1. Reasonably **related** to the allowed conditions;

2. Reasonably **necessary** for treatment of the industrial injury; and

3. The cost must be medically **reasonable.**

C. “Medically Necessary”

1. Services which are reasonably necessary for the **diagnosis or treatment** of disease, illness, and injury, and meet accepted guidelines of medical practice. A medically necessary service must be reasonably related to the illness or injury for which it is performed regarding type, intensity, and duration of service and setting of treatment. Adm.Code 4123-6-01(M).

D. Diagnostic Requests

1. X-rays

a. Payment for x-ray examinations (including CT, MRI, and discogram) shall be made when medical evidence shows that the examination is medically necessary either for the treatment of an allowed injury or occupational disease, or for diagnostic purposes to pursue more specific diagnoses in an allowed claim. Adm.Code 4123-6-31.

2. Other diagnostic requests may still be granted as long as the *Miller* criteria are met.

3. *State ex rel. Jackson Tube Servs., Inc. v. Indus. Comm.*, 99 Ohio St.3d 1, 2003-Ohio-2259, 788 N.E.2d 625.

    a. The injured worker sought diagnostic surgery. The Commission and the Court granted the request, stating specifically: All agree that *Miller* was never intended to permit an employee to circumvent additional allowance by simply asserting a relationship to the original injury. The problem in this case, however, is that because any conditions are internal, claimant could not know what conditions to seek additional allowance for without first getting the diagnosis that only surgery could provide.

    b. Furthermore, the surgeon also consistently listed the allowed condition as requiring surgery, notwithstanding other conditions that may have been contemplated.

E. Granting the Request

1. An authorization for medical treatment must be based on the opinion of a doctor, as hearing officers do not have medical expertise.

2. As such, the hearing officer is not permitted to grant a compromise in treatment between two doctors. See **Memo M8 Adjudication of Treatment Issues**.

F. Non-allowed Conditions

1. Treatment cannot be authorized for non-allowed conditions.

2. However, the existence of a contributing non-allowed condition is not a legitimate reason for refusing to pay for medical treatment independently required for an allowed condition. See *Jackson Tube*, *supra*.

G. Maximum Medical Improvement

1. Treatment may be necessary regardless of whether it is expected to produce fundamental improvement.

2. Medical care may be authorized despite an MMI finding.

H. Specific Treatment Requests. Authorization of certain medical treatment is governed by specific rules. The most common examples are noted below.

1. Outpatient medication formulary. Adm.Code 4123-6-21.3.

    a. BWC has adopted the outpatient medication formulary contained in the appendix to Adm.Code 4123-6-21.3.

    b. Injured workers have no vested right to payment for brand name drugs. *State ex rel. Jordan v. Indus. Comm.*, 120 Ohio St.3d 412, 2008-Ohio-6137, 900 N.E.2d 150.

2. Payment for lumbar fusion surgery. Adm.Code 4123-6-32.

3. Payment for spinal cord stimulator. Adm.Code 4123-6-35.

I. Time limitations

1. R.C. 4123.52(B) prohibits payment for medical bills or vocational rehabilitation services when they are submitted more than one year after the date of services or the date services became payable under R.C. 4123.511(I).

2. Exceptions:

a. Requests made by centers for Medicare and Medicaid for reimbursement of conditional payments pursuant to the Medicare Secondary Payer Act;

b. Due to administrative error by the MCO or BWC; or

c. Fee bills were initially submitted to a patient, third-party payer, or state or federal program and that patient, payer, or program was not responsible for the cost.

3. SI employers may negotiate with providers for a period other than one year.

II. PSYCHIATRIC CONSULTATION FEE (NO ALLOWED PSYCH CONDITIONS)

A. May be paid when such consultation is a necessary part of pre-op work-up or to be used by attending physician in the planning of a future course of treatment. See **Memo M1 Psychiatric and Psychological Consultation Fee — No Psychiatric Condition Allowed**.

III. VOCATIONAL REHABILITATION

A. Eligibility [Adm.Code 4123-18-03(C)]. Three requirements:

1. Recognized claim (a claim with eight or more days of lost time or claims certified by a state agency/university or self-insuring employer);

2. Injury reflects a significant impediment to employment or job retention; and

3. At least one of the following:

a. The injured worker is receiving, or has been awarded, TTDC, NWWL, or PTD on the date of referral;

b. The injured worker was granted scheduled loss award;

c. The injured worker is receiving salary continuation;

d. The injured worker is not currently receiving compensation and continues to have claim related restrictions; or

e. The injured worker is receiving job retention services to maintain employment, or the allowance reflects a significant impediment to the injured worker's employment or job retention

4. EXCEPTION:

a. Employees of state agencies or universities are eligible if the claim has been certified and the parties agree on rehab services.

B. Feasibility

1. Whether the injured worker is fit or unfit for vocational rehabilitation.

2. ADR process governs any appeal of the MCO's decision to accept or deny admission to a rehabilitation program.

3. Adm.Code 4123-18-03(H)

a. Feasibility for vocational rehabilitation services means there is a reasonable probability that the injured worker will benefit from services at this time and return to work as a result of the services. Feasibility is initially determined at the time of referral and is assessed throughout the rehabilitation process.

i. An injured worker is feasible for vocational rehabilitation services when a review of all available information demonstrates that **it is likely the provision of such services will result in the injured worker returning to work**.

ii. An injured worker is not feasible when a review of all available information demonstrates that, in spite of the provision of such services, it is not likely the injured worker will return to work.

C. Job retention services may be provided if:

1. The injured worker has received TTDC or salary continuation from an allowed claim with eight or more days of lost time;

2. The POR provides a written statement in office notes or correspondence indicating the injured worker has work limitations related to the allowed conditions in the claim that negatively impact the injured worker's ability to maintain employment; and

3. The injured worker's employer describes the specific job task problems the injured worker is experiencing to the MCO and the MCO documents these problems in the claim. The MCO shall include a statement describing why the injured worker needs job retention services to maintain employment.

D. Living Maintenance

1. Paid to injured worker upon commencement of a vocational rehabilitation program.

2. Weeks payable (200) offset by any weeks of payment of TTDC.

3. Termination

a. The injured worker has returned to work;

b. The injured worker has failed to fulfill the responsibilities of the rehab plan;

c. The injured worker is unable to attain the goals of the rehab plan;

d. The injured worker has failed, without good cause, to accept an offer of employment within the vocational goal of the plan; or

e. The injured worker is no longer living

4. Suspension

a. Medical instability for 30 days or more.

IV. LUMP SUM ADVANCEMENTS (R.C. 4123.64; ADM.CODE 4123-3-37)

A. Under special circumstances, an advancement of expected future payments of compensation or benefits to an injured worker may be commuted to one or more lump sum payments. Lump sum payments are divided into two categories.

1. Rehabilitation or Financial Relief. Lump sum advancements may be made to injured workers upon a showing that the lump sum payment is advisable:

a. To further rehabilitation; or

b. Provide financial relief.

2. Attorney Fees. The Commission may grant lump sum advancements for the payment of attorney fees for services rendered in securing an award of compensation and may additionally approve requests for reimbursement of expenses for obtaining medical or vocational reports.

a. See **IC Resolution R18-1-08 Guidelines for Lump Sum Advancements for Attorney Fees and Reimbursement of Expenses**.

b. Under R.C. 4123.06, lump sum advancements for attorney fees are solely within the jurisdiction of the Commission.

B. Requirements

1. The application must be completed.

2. The applicant must provide proof as to why the advancement is sought.

C. BWC enters initial order (except Attorney Fees awards)

1. Reduces future payment by actuarial value of award.

2. Payable from awards for PPD, scheduled loss, and PTD only.

a. Surviving dependents are not entitled to lump sum advancements for scheduled loss awards of the decedent. See Adm.Code 4123-3-37(A)(3).

3. Maximum reduction

a. Cannot result in a rate reduction of more than one-third of the biweekly rate of compensation.

b. Exception: where payment is for attorney fees or the advancement is from a PPD or scheduled loss award.

c. See Adm.Code 4123-3-37(C).

V. ADDITIONAL BENEFITS

A. Travel Expenses. Adm.Code 4123-6-40 allows an injured worker to request reimbursement for reasonable and necessary travel expenses.

1. Travel expenses may be paid under the following situations.

a. Medical examination of injured worker is ordered or authorized, outside of the city or community limits where injured worker resides, and the travel distance exceeds forty-five miles round trip;

b. Treatment is preauthorized for the allowed conditions, that cannot be obtained within the city or community where the injured worker resides, and the travel distance exceeds forty-five miles round trip.

c. Taxicab or other special transportation is preauthorized for treatment or examination for allowed conditions.

d. Travel expenses are authorized as part of a vocational rehabilitation assessment or plan, or job retention plan pursuant to Adm.Code 4123-18-08.

2. Additional Guidelines

a. An injured worker's permanent or temporary residence may be considered.

b. Automobile mileage may be reimbursed on a per mile basis, portal to portal, using the most direct and practical route.

c. Actual and necessary airplane, railroad or bus fare is reimbursable.

d. Reasonable cost of necessary meals, based on distance traveled is reimbursable.

e. Preauthorized and necessary lodging bills at reasonable actual cost.

f. Tolls and parking, actual and necessary costs are reimbursable.

B. Damages to eyeglasses, dentures, hearing aids.

1. R.C. 4123.66 "….In case an injury or industrial accident that injures an employee also causes damage to the employee's eyeglasses, artificial teeth or other denture, or hearing aid, or in the event an injury or occupational disease makes it necessary or advisable to

replace, repair, or adjust the same, the bureau shall disburse and pay a reasonable amount to repair or replace the same."

CHAPTER FIVE: LIMITATIONS, DUE PROCESS, & MISCELLANEOUS

I. TIME LIMITATIONS FOR CLAIMS

~~A.~~ Statute of limitations as addressed in Chapter Two, VII. Statute of Limitations.

B. Claim Expiration. See **Memo I1 Continuing Jurisdiction – Ten Years and Five Years**.

1. Dates of injury or diagnosis before 08/25/2006:

a. For medical only claims, the time limit is six years from the last payment of a medical bill.

i. "Medical Only" means no compensation of any type is paid, regardless of frequency of treatment.

b. For a lost time claim, the time limit is ten years from the date of the last payment of compensation.

i. "Lost Time" means payment of any compensation (temporary total, temporary partial, permanent partial, permanent total, or wages or sick leave in lieu of temporary total).

ii. Last payment of compensation includes medical benefits. *Copeland v. Bur. of Workers' Comp.*, 192 Ohio App.3d 586, 2011-Ohio-813, 949 N.E.2d 1046 (5th Dist.).

c. The 6/10-year limits were effective 12/11/1967.

2. Dates of injury or diagnosis on or after 08/25/2006, R.C. 4123.52:

a. For medical only **and** lost time claims, the time limit is five years from the date of the injury or date of the last payment of compensation or medical bill.

b. A request for treatment and/or compensation filed prior to the expiration of the time limit may be paid, even if ruled upon after the time limit.

3. Dates of injury or diagnosis on or after 07/01/2020:

a. For medical only **and** lost time claims, the time limit is five years from the date of injury or date of the last payment of compensation or date of last medical service to the injured worker.

b. A request for treatment and/or compensation filed prior to the expiration of the time limit may be paid, even if ruled upon after the time limit.

II. DUE PROCESS

A. Procedural Due Process

1. Includes the right to a reasonable notice of hearing as well as a reasonable opportunity to be heard, including reasonable notice of the time, date, location and subject matter of the

hearing. *State ex rel. Finley v. Dusty Drilling Co.*, 2 Ohio App.3d 323, 441 N.E.2d 1128 (10th Dist. 1981).

2. A defective notice of hearing can be cured by obtaining a waiver from the parties at hearing; otherwise, the hearing cannot go forward on an issue that was not properly noticed.

    a. See Chapter One, III. Preliminary Considerations, B. Due Process/Notice/Jurisdiction and Chapter One, V. Order Writing, H. Noticed Issue(s).

III. RES JUDICATA

A. Generally

1. Res judicata precludes re-litigating a claim that was at issue in a former action involving the same parties and decided by a court of competent jurisdiction.

2. The preclusive effect of res judicate attaches to administrative proceedings of a judicial nature where the parties had ample opportunity to fully and fairly litigate the issues involved in the proceeding. *Set Prods., Inc. v. Bainbridge Twp. Bd. Of Zoning Appeals* (1987), 31 Ohio St.3d 260, 510 N.E.2d 373.

3. Res judicata is an affirmative defense that must be raised.

B. Limited Application

1. Continuing Jurisdiction - Res judicata applies in administrative proceedings, but has limited application in workers' compensation due to the Commission's broad grant of continuing jurisdiction.

2. Physical Conditions and Degree of Disability - Res judicata does not apply if the issue is the injured worker's physical condition or degree of disability at two entirely different times because the physical condition and degree of disability can change. *State ex rel. B.O.C. Group v. Indus. Comm.*, 58 Ohio St.3d 199, 569 N.E.2d 496 (1991).

C. Second Claim Application

1. **Linda Greene**: *Greene v. Conrad*, 10th Dist. No. 96APE12-1780, 1997 WL 476703 (Aug. 21, 1997) allows the hearing officer to adjudicate the merits of the issue of allowance on a second claim application only when:

    a. An order issued by the BWC on the issue of the original allowance of the claim which denied the original allowance of the claim for the reason the injured worker did not provide all the information requested by the BWC to establish a claim or there was insufficient information submitted to establish a claim;

    b. No appeal is filed from the BWC order denying the allowance;

    c. A second claim application is filed for the same incident/accident; and

    d. The BWC issues an order denying the second claim application, or dismisses the second claim application, or refers the second claim application to a District Hearing Officer as a contested claims matter.

e. See **IC Resolution R98-1-02 Jurisdiction of Hearing Officer to Adjudicate Issue of Allowance on a Second Claim Application**.

D. Subsequent Motions/FROIs in Previously Disallowed Claims

1. Briefly, by way of history, prior to 2005, claimants were permitted to add any alleged conditions to a .512 appeal at the trial court level, regardless of whether the conditions had been administratively adjudicated.

2. In 2005 this changed with *Ward v. Kroger Co.*, 106 Ohio St.3d, 2005-Ohio-3560, 830 N.E.2d 1155, when the Supreme Court found "the grant or denial of the right to participate for one injury or condition does not preclude a subsequent claim for participation in the fund based on another injury or condition arising out of the same industrial accident. But any such claim must be initiated before the Industrial Commission."

3. Current Standard - Hearing officers cannot dismiss a C-86 or FROI on the basis of res judicata for a condition that was not administratively adjudicated. This means there may be situations in which the hearing officer will need to adjudicate the merits of a C-86 or FROI in a previously disallowed claim.

a. The extent of the hearing officer's ability to adjudicate the merits without implicating res judicata will depend on the facts of each case. The hearing officer will need to assess the medical evidence that was on file at the time of the initial denial to determine whether the new condition(s) were encompassed in the earlier decision. If they were not, the hearing officer must rule on the merits.

b. However, if a claim was disallowed/denied on legal grounds (e.g., independent contractor/employee, in the course of and arising out of employment, intoxication, etc.), res judicata can be used to dismiss the claim.

IV. CONTINUING JURISDICTION

A. Once a claim is allowed, the Commission has continuing jurisdiction to make modifications or changes, including additional awards, in the claim. R.C. 4123.52.

B. The exercise of continuing jurisdiction shall be based on one of the following:

1. Clear mistake of law of such character that remedial action would clearly follow;

2. Clear mistake of fact;

3. New and changed circumstances occurring subsequent to the date of the order;

a. This includes newly discovered evidence that could not, with the exercise of due diligence, previously have been discovered.

4. Fraud; and/or

5. Error by inferior administrative agent or subordinate hearing officer.

C. Order Writing Reminder – When exercising continuing jurisdiction, hearing officers must clearly state and fully explain in the order which of the five bases for invoking continuing jurisdiction is being relied upon.

D. See R.C. 4123.52; *State ex rel. Nicholls v. Indus. Comm.*, 81 Ohio St.3d 454, 692 N.E.2d 188 (1998); *State ex rel. Foster v. Indus. Comm.*, 85 Ohio St.3d 320, 707 N.E.2d 1122 (1999); and *State ex rel. Gobich v. Indus. Comm.*, 103 Ohio St.3d 585, 2004-Ohio-5990, 817 N.E.2d 398.

E. Broad authority

1. Once continuing jurisdiction is exercised, pursuant to R.C. 4123.52, the Commission may "make such modification or change" to former findings or orders "as, in its opinion is justified." Such broad authority permits the Commission to address any issues pertaining to the order in question.

2. See *State ex rel. Haddox v. Indus. Comm.*, 135 Ohio St.3d 307, 2013-Ohio-794, 986 N.E.2d 939 ("although the parties litigated the issue of [the Injured Worker's] eligibility for temporary-total-disability benefits to a resolution in 2006, the commission reopened the issue when it exercised continuing jurisdiction to reconsider [the Injured Worker's] second application based on a mistake of law. The commission's continuing jurisdiction permitted it to modify or amend, if necessary, the former order dating back to the injury.").

F. Self-Insuring Employers and Certified Conditions

1. Pursuant to *State ex rel. Baker Material Handling Corp. v. Indus. Comm.*, 69 Ohio St.3d 202, 631 N.E.2d 138, 1994-Ohio-437, once a self-insuring employer certifies a claim or an additional allowance on the claim, the finding is conclusive and cannot be modified "over the objection of the claimant, upon the assumption that the self-insured employer erroneously certified the condition. "

2. Later, *Lewis v. Trimble*, 79 Ohio St.3d 231, 1997-Ohio-393, 680 N.E.2d 1207, held *Baker* prohibited the self-insuring employer from attempting to withdraw allowance of psychological condition, even though the employer claimed it was erroneously allowed beyond the statute of limitations.

3. In 2012, the Second District in *Lane v. Bur. of Workers' Comp.*, 2d Dist. Montgomery No. 24618, 2012-Ohio-209, further explained that *Baker* permits modification of conditions accepted by the self-insuring employer only on a showing of continuing jurisdiction grounds.

4. Therefore, to modify the previously allowed conditions, the hearing must be noticed for continuing jurisdiction; notice on allowance/additional allowance is not sufficient.

V. ABATEMENT

A. Claims (Adm.Code 4123-5-21)

1. When an injured worker dies, action on any application filed by the injured worker, and pending before the BWC or the Commission at the time of his death, is abated.

2. Abatement doesn't apply to payment for medical treatment and other health care services rendered as a result of the injury or occupational disease for which the claim was allowed during the injured worker's lifetime, provided the bills were filed within the applicable statute of limitations.

B. Appeals

1. An appeal by an injured worker is abated by his or her death, but an appeal by an employer is not. See *Seabloom Roofing & Sheet Metal Co. v. Mayfield*, 35 Ohio St.3d 108 (1988); **Memo H4 Appeal Abated by Death**.

D. Settlements

1. Settlements are not subject to abatement if the settlement has reached the stage of BWC approval (in state fund claims) or has been signed by both the employer and injured worker (in SI claims), unless there is evidence that, prior to the death, one of the parties had withdrawn from or the Commission disapproved of the settlement.

2. Effective 10/11/2007, R.C. 4123.65 Paragraph (C) – Commission Review of Settlements.

   Language was added to paragraph (C) to provide that if an employee dies during the 30-day cooling off period, the settlement can be voided by any party for good cause shown.

   The provision would affect both self-insuring and state fund settlements.

   Death itself is not good cause.

3. The abatement provisions of Adm.Code 4123-5-21 are generally applicable in state fund claims when the injured worker's death occurs before the settlement is approved by the BWC, unless the BWC failed to process the application for approval within a reasonable period of time.

4. See **Memo O1 Settlements – Finality, Abatement, and Withdrawal**.

VI. INTERVENING INJURY

A. Generally

1. Just as the term "permanent" has different meanings in different contexts, the phrase "intervening injury" can have different meanings. The phrase can be used in a hearing on medical treatment or on the issue of temporary total disability compensation. In this context, a claim of intervening injury is often just the idea that the specific medical treatment or period of temporary total disability sought by the injured worker is not related to the industrial injury, but instead to an unrelated event that occurred after the industrial injury. Denying treatment or compensation on these grounds doesn't terminate the claim.

2. In a separate context is the definitive issue of an **intervening and superseding injury**. In these cases, the employer or the Bureau is asking the Industrial Commission to find that an intervening injury occurred and that the intervening injury was significant enough that it breaks the chain of causation between the injured worker's original industrial injury and any subsequent medical condition or disability. The Bureau and/or Employer have the burden of proof in these cases. A finding that an intervening and superseding injury occurred results in termination of the injured worker's right to participate in the workers' compensation system. It is far more serious than the use of intervening injury as an argument against specific treatment or a specific period of disability.

B. Notice

1. As indicated in the "notice" section at the beginning of the manual, a true request for a finding of intervening injury is a distinct issue that requires proper notice for adjudication. This is an issue of due process. See *State ex rel. Steinbrunner v. Indus. Comm.*, 10th

Dist. Franklin No. 05AP-626, 2006-Ohio-3444.

2. Intervening injury used simply as a defense to an injured worker's request for treatment, compensation, or an additional condition *does not* require notice. However, be sure to restrict the order to the denial of the specific request(s) at hand, finding the industrial injury was not the cause.

C. Standard

1. The issue of a true intervening injury is whether there was a subsequent injury that was sufficient to break the chain of causation, rendering the injured worker unable to receive benefits for the original industrial injury. See, e.g., *Cascone v. Herb Kay Co.*, 6 Ohio St.3d 155, 451 N.E.2d 815 (1983).

D. Support

1. "Just as there must be medical evidence to support the causal relationship between the original industrial accident and the claimed disability, there must be medical evidence to support a finding that a new injury has severed the causal connection and become the intervening cause of the resulting disability." See *State ex rel. Steinbrunner v. Indus. Comm.*, 10th Dist. Franklin No. 05AP-626, 2006-Ohio-3444 (June 30, 2006) (Finding a report that opined the injured worker 'significantly aggravated his lower back' by tripping over his dogs was not enough to support the conclusion the injured worker suffered a new injury, let alone one that severed the causal connection between the industrial injury and his disability).

E. Relief

1. A finding of intervening and superseding injury severs the causal connection as of the date of the intervening injury. Therefore, the order should include a directive that the injured worker was not entitled to any medical benefits and compensation paid as of the date of the intervening injury, and that any such benefits should be deemed overpaid and can be recouped.

CHAPTER SIX: CLAIM PROCEDURES AND JUDICIAL REMEDIES

I. BUREAU CLAIM PROCESSING (R.C. 4123.511(B))

A. Claim may be filed by phone, mail, and online.

1. BWC notifies employer, who has 15 days to verify notice.

B. Referred to claim representative for adjudication.

1. Claims representative can enter order on all claims matters, contested or not, *except* self-insuring employer claims.

2. Must act no sooner than 21 nor more than 28 days.

a. BWC can act sooner than 21 days in certified claims.

3. Parties can appeal BWC order within 14 days after the date of the receipt of the order.

II. ADMINISTRATIVE APPEAL PROCESS

A. District Hearing procedure (R.C. 4123.511(C))

1. Hearing officers are impartially assigned to a docket.

2. Notice of the hearing is sent to all parties at least 14 days in advance. Adm.Code 4121-3-09(C)(2).

3. The District Hearing Officer has 45 days to conduct the hearing, and seven days after the hearing to issue a written decision, mailed to all parties.

4. Parties may be represented, although not required.

5. Public hearings; strict rules of evidence do not apply.

6. Burden of proof is upon the injured worker.

B. Staff Hearing Officers (R.C. 4123.511(D))

1. Parties have 14 days to file an appeal as of right from the District Hearing Officer order, except in C-92 hearings, where they must seek reconsideration within 10 days.

2. The Staff Hearing Officer has 45 days to hear an appeal, and seven days from the hearing to issue an order.

3. Appeal hearings are de novo.

4. Staff Hearing Officers have original jurisdiction on PTD, VSSR, and settlements.

C. Appeals to Industrial Commission (R.C. 4123.511(E))

1. Hearing is discretionary; the Commission has 14 days after the expiration of the 14-day appeal period to decide to hear appeal.

a. See **IC Resolution R07-1-04 Guidelines for Filing Notices of Appeals from Staff Hearing Officers Orders**.

2. Hearings may be heard before a Deputy Regional Manager, a Deputy of the Commission, or the members of the full Commission.

3. A hearing must be held within 45 days.

D. 4123.511(F): Every notice of an appeal from an order * * * shall state the names of the claimant and employer, the number of the claim, the date of the decision appealed from, and the fact that the appellant appeals therefrom.

1. Substantial compliance with R.C. 4123.511(F) is required. See *State ex rel. Lapp Roofing & Sheet Metal Co., Inc, v. Indus. Comm.*, 117 Ohio St.3d 179, 2008-Ohio-850, 882 N.E.2d 911.

E. Payment of compensation or benefits following appeal.

1. Any appeal of BWC order stays payment of compensation unless/until the District Hearing Officer rules in favor of injured worker.

2. If the District Hearing Officer decision is favorable to the injured worker, compensation is paid regardless of further appeal.

a. If it is later determined that compensation should not be paid, charged to injured worker as overpayment and collected from certain future awards at certain percentages (R.C. 4123.511(K)).

b. No recoupment if the allowance is reversed by Court of Appeals or Supreme Court.

F. Requests for Reconsideration (**IC Resolution R18-1-06 Reconsideration Guidelines**)

1. If a party disagrees with an order that is not appealable or with the order refusing to hear an appeal from the Staff Hearing Officer, they may file a request for reconsideration within 14 days of receipt of the order.

2. Grounds for reconsideration:

a. New and changed circumstances occurring subsequent to the date of the order from which reconsideration is sought. For example, there exists newly discovered evidence which by due diligence could not have been discovered and filed by the appellant prior to the date of the order from which reconsideration is sought. Newly discovered evidence shall be relevant to the issue in controversy but shall not be merely corroborative of evidence that was submitted prior to the date of the order from which reconsideration is sought;

b. Evidence of fraud in the claim;

c. A clear mistake of fact in the order from which reconsideration is sought;

d. A clear mistake of law of such character that remedial action would clearly follow; or

e. Error by the inferior administrative agent or subordinate hearing officer in the order from which reconsideration is sought which renders the order defective.

3. If a request for reconsideration is granted, a two-part hearing is held before the members of the Commission. First, the parties will address arguments pertaining to jurisdictional grounds. The Commission will take that portion under advisement and the parties will proceed with their arguments on the merits of the case. If the Commission decides to exercise continuing jurisdiction, the hearing is de novo.

G. Requests for Corrected Orders (**Memo K6 Corrected Orders**)

1. Corrected orders are intended to correct **typographical or other minor errors** which may be necessary. They may not correct a decision involving the merits. The distinction between whether the request amounts to a typographical/minor error versus a substantive change is not always clear. Each request should be carefully considered.

2. Timing

a. Corrected orders may be issued during the appeal period so long as no appeal has been filed.

b. Requests for corrected orders filed outside of an appeal period for orders that have become final should be treated as a request to exercise continuing jurisdiction. *Except as noted below in the case of agreement.*

c. Appeals

i. Once an appeal to the order has been filed, the hearing officer can no longer correct the order without the party agreeing to withdraw the appeal.

d. Agreement

i. If the requested correction is agreed to by all parties, whether in the appeal period or outside the appeal period, a corrected order may be issued.

3. Procedure

a. The regional manager reviews all incoming requests for correct orders and then forwards the request to the hearing officer.

b. The hearing officer will review the request and communicate their decision to the regional manager.

c. If the hearing officer agrees a correction is warranted, the hearing officer or other support staff, will use the corrected order tool in Workflow to retrieve the order for the hearing officer to correct. Every corrected order should include the following basic information:

i. The title *Corrected Order* under the Appearances section of the order.

ii. An explanation that the order is being corrected due to a clerical or

typographical/minor error.

iii. A statement whether the order is being corrected *sua sponte* or at the request of a party.

iv. An explanation that the corrections are bolded, or bolded and underlined, in the body of the original order. (If the correction involves removing of unnecessary language, state this instead.)

v. A statement that the remainder of the order is not changed in any other regard.

vi. If an appeal was filed, and the filing party has agreed to withdraw the appeal, the corrected order should contain language dismissing the appeal.

vii. The corrections should be made in bold in the body of the original order.

d. If the hearing officer does not agree the order contains an error, the request will be construed as an appeal.

III. APPEALS TO COURT

A. Under R.C. 4123.512, the injured worker or employer may appeal an allowance decision to the Court of Common Pleas.

1. Parties do not have right of appeal for extent of disability.

a. Limits those final administrative decisions appealable to court under R.C. 4123.512 to only those decisions involving an injured worker's right to participate or to continue to participate in the fund.

2. Court appeal procedure

a. Injured worker or employer files Notice of Appeal in Court of Common Pleas within 60 days of receipt of final Commission order.

b. Notice states names of parties, claim number, date of decision appealed, and fact that appellant appeals.

c. Administrator is a party to appeal.

i. Administrator is represented by the Attorney General.

d. Within 30 days, injured worker must file complaint to participate in fund.

i. Burden of proof and proceeding is on injured worker, regardless of who appealed.

ii. De novo proceeding on merits.

e. If the injured worker prevails, the decision is certified to the Commission as status of claim.

3. Parties may appeal decisions of the Common Pleas Court to the Court of Appeals and the Ohio Supreme Court.

4. An employer's appeal to Court *does not* stay the payment of compensation.

B. Mandamus

1. Remedy available for extent of disability cases or other issues not appealable to court under R.C. 4123.512.

2. Requests for writs of mandamus can be filed in the Tenth District Court of Appeals.

3. The standard is whether the Commission abused its discretion.

   a. The court will not substitute its evaluation or judgment for that of the Commission.

   b. Where there is "some evidence" upon which the Commission based its decision, mandamus generally will not lie.

4. The court can issue full or partial writs. In a full writ, the court vacates the Commission's order and enters its own in its place. In a partial writ, the court recognizes a mistake was made, but remands the claim back to the Commission for rehearing on the issue.