Ohio | Industrial Commission

STAFF HEARING OFFICER TRAINING MANUAL

SHO HEARING OFFICER TRAINING MANUAL

Revised 1-25-2021

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CHAPTER ONE: APPEALS/C-92 RECONS

I. APPEALS

A. Jurisdiction

A party has 14 days from receipt of the District Hearing Officer order to file an appeal, or else the Staff Hearing Officer does not have jurisdiction.

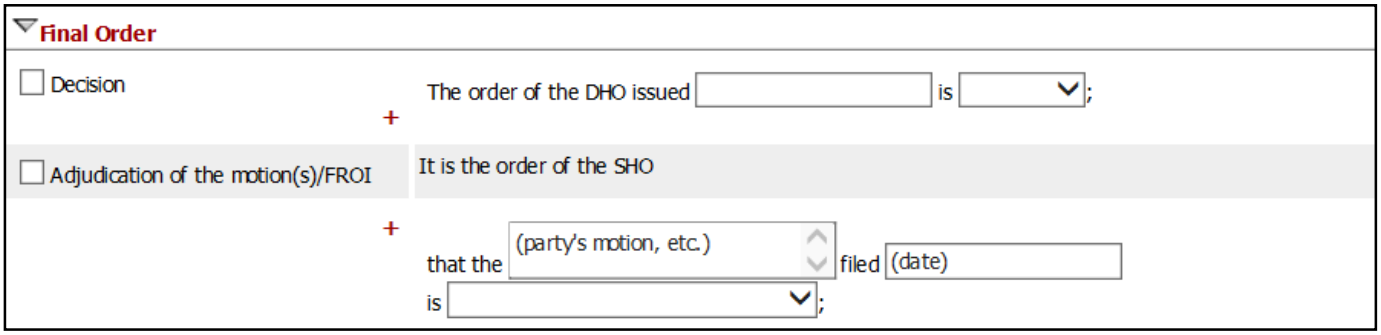
B. De Novo

Staff Hearing Officer appeal hearings are de novo; a Staff Hearing Officer is not required to accept any of the findings or determinations of the District Hearing Officer.
Memo K2: Precise Order Writing

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

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

C. Case Manager Worksheet (very basic)



II. C-92 APPLICATION RECONSIDERATIONS

A. Jurisdiction

Applications for reconsideration of a District Hearing Officer order on permanent partial disability must be filed within ten days of receipt of the District Hearing Officer order.

1. The Supreme Court has held that the Industrial Commission has no authority to award an injured worker permanent-partial-disability compensation when the worker has been previously found to be permanently totally disabled in the same claim, even when the new finding is based on a condition or conditions in the claim that formed no part of the basis for the prior finding of permanent total disability. *State ex rel. Ohio Presbyterian Retirement Servs., Inc. v. Indus. Comm.* 150 Ohio St.3d 102 (2016), 79 N.E.3d 522, 2016-Ohio-8024.

B. Evidence

Initial Applications: evidence may be submitted between the District Hearing Officer and Staff Hearing Officer hearings by either party.

Applications for increase (even based on newly allowed conditions): evidence may not be submitted after the District Hearing Officer hearing. The Staff Hearing Officer may only consider evidence that was filed before the District Hearing Officer hearing. See State ex rel. Grimm v. Indus. Comm., 10th Dist. Franklin No. 07AP-761, 2008-Ohio-1800; Ohio Adm.Code 4121-3-15(E)(3).

C. Appeals

C-92s are not subject to appeal, so the 14-day language should never be included.

Instead, the only option for further review is for the aggrieved party to file a request for reconsideration to the full Commission.

D. Case Manager Worksheet

For a final order on the merits, there are three umbrella options, like usual: affirm, modify, or vacate.

Under each decision, there are checkbox subcategories that will comprise your decision. The bottom field is your support where you can input physicians' names and report dates. The "+" button allows you to add more than one report.

Case Manager Worksheet for C-92 Reconsiderations (next page):

Interlocutory Order

☐ Advisement	This matter is taken under advisement because
	(explain)
☐ Continuance	The [ ] 's request for a continuance [ ] is [ ] for the reason that [ ] extraordinary and unforeseeable circumstances exist to justify the request. Specifically,
	(explain)
	☐ The continuance is agreed to by the parties.
	☐ The continuance has not been agreed to by all parties.
	☐ The matter should not be reset for hearing prior to [ ]
	☐ The matter should be reset on the next available docket.
☐ Referral	☐ (explain)
	☐ Pursuant to Ohio Adm.Code 4121-3-15(E)(2), the Staff Hearing Officer returns this claim to the Bureau of Workers' Compensation for a [ ] because (explain) Once the new medical report is on file, the Staff Hearing Officer directs the Bureau to return the claim to the Commission to be reset on the next available Staff Hearing Officer docket.

Final Order

○ Affirmed	The Staff Hearing Officer affirms the District Hearing Officer's order for the reason that it is supported by proof of record and is not contrary to law.
Grant Initial Award	☐ Therefore the initial award of [ ] % is awarded for a period of [ ] weeks. This award is to be paid in accordance with the provision of R.C. 4123.57.
Grant Increased Award	☐ Therefore the increased award of [ ] %, which is an increase of [ ] %, entitles the Injured Worker to an additional award compensation for a period of [ ] weeks. This award is to be paid in accordance with the provision of R.C. 4123.57.
Denied	☐ Therefore, there is no basis for a percentage of permanent partial award or increase at this time and the Injured Worker's C-92 Application for the Determination of Percentage of Permanent Partial Disability or Increase of Permanent Partial Disability is denied.
○ Modified	The Staff Hearing Officer modifies the District Hearing Officer's order issued [ ] to the extent that the Injured Worker is found to have a permanent partial disability
Grant Initial Award	☐ of [ ] %; therefore an award of compensation for a period of [ ] weeks will be paid. This award is to be paid in accordance with the provision of R.C. 4123.57.
Grant Increased Award	☐ of [ ] %, which is an increase of [ ] %, which entitles the Injured Worker to an additional award of compensation for a period of [ ] weeks. This award is to be paid in accordance with the provision of R.C. 4123.57.
○ Vacated	The Staff Hearing Officer vacates the District Hearing Officer order issued [ ]
Grant Initial Award	☐ for the reason that the Injured Worker is entitled to an award of [ ] %, which is an award of compensation for a period of [ ] weeks. This award is to be paid in accordance with the provision of R.C. 4123.57.
Grant Increased Award	☐ for the reason that the Injured Worker is entitled to an increased award of [ ] %, which is an increase of [ ] %, for an additional award compensation for a period of [ ] weeks. This award is to be paid in accordance with the provision of R.C. 4123.57
Denied	☐ for the reason that there is no basis for a percentage of permanent partial award or increase at this time and the Injured Worker's C-92 Application for the Determination of Percentage Permanent Partial Disability or Increase of Permanent Partial Disability is denied.
Dismissed	☐ The Staff Hearing Officer finds that the IC-88 Application for Permanent Partial Reconsideration was not filed within the time limits set forth in R.C. 4123.57; therefore, the IC-88 is dismissed and the District Hearing Officer's order remains in full force and effect.
○ No Jurisdiction	(explain)
○ Moot	(explain)
	This decision is based upon the report(s) of:
	[ ] Dated [ ] + −
	POA on file: ☑ Self Insured: ☐

CHAPTER TWO: HEARING ADMINISTRATOR ISSUES

I. REQUESTS FOR .52/.522 RELIEF

A. Failure to Receive **Notice** of Hearing (.52)

1. Parties and their representatives are, per due process, entitled to notice of a hearing to be held before the Commission.

2. If a party fails to receive such notice, and files a request for relief, the request is initially referred to the Hearing Administrator (who may issue a compliance letter granting relief).

3. The request is referred to a Staff Hearing Officer for a hearing in one of three situations:

   a. The party requesting relief has requested a formal hearing on the issue;

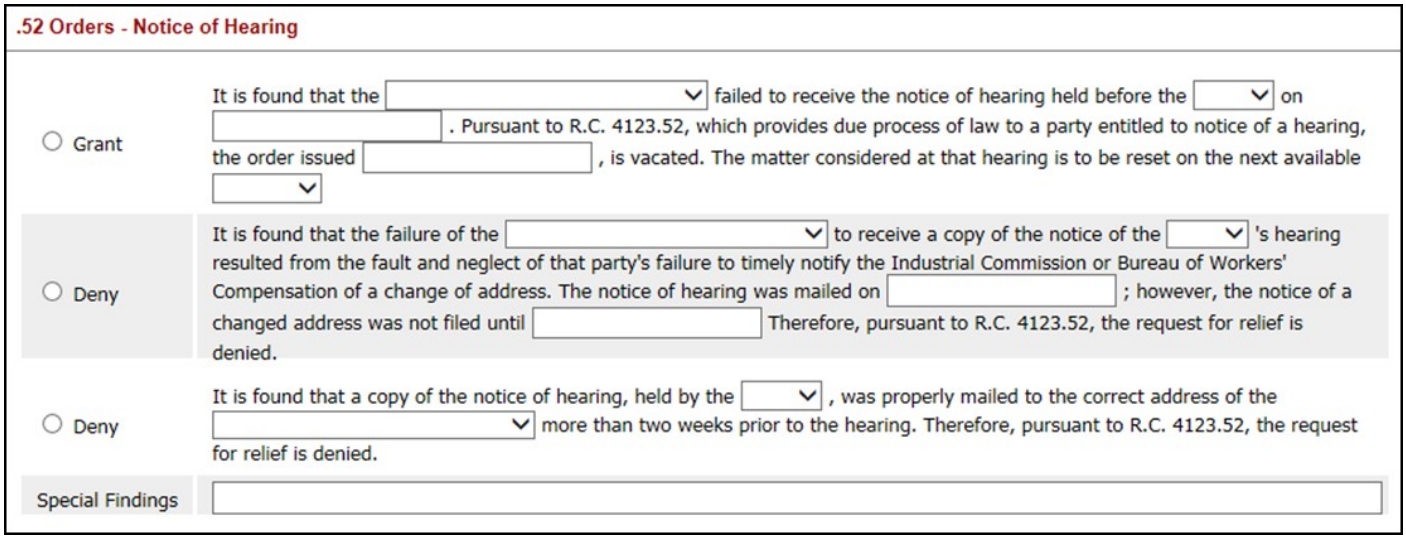
   b. The opposing party has objected to the compliance letter granting relief; or

   c. The Hearing Administrator determines there is not good cause for granting relief.

4. Resolution R94-1-19

   The Staff Hearing Officer, upon **a finding of good cause**, may grant relief under Section 4123.52 of the Ohio Revised Code to provide that the **underlying order be vacated** and **the hearing be reheard**.

5. Case Manager Worksheet Options:



B. Failure to Receive the **Order** (.522)

1. R.C. 4123.522 provides that parties **and** their representatives are entitled to "written notice of any hearing, determination, order, award, or decision * * *."

   a. The statute further contains a **rebuttable presumption**, sometimes called the "mailbox rule" that,

once an order is mailed, it is presumed to be received in due course.

b. To successfully rebut that presumption, the party alleging the failure to receive notice must prove that:

i. the failure was due to circumstances beyond the party's or the party's representative's control;

ii. the failure of notice was not due to the party's or the party's representative's fault or neglect; AND

iii. neither the party nor the party's representative had prior actual knowledge of the import of the information contained in therein.

c. When the Commission makes these findings, the moving party becomes entitled to what amounts to a second notice of the order, which actually comes from the Commission upon the determination that the moving party has rebutted the mailbox-rule presumption. **That** is the order from which the new 21-day appeal time is activated.

d. Accordingly, when the moving party sustains its burden of proof, the party is deemed to have received notice of the first Commission order when they receive the .522 order; at that point, they have 21 days to file their appeal to the initial order, unless they have already filed the appeal on this issue, in which case it is construed as timely filed and the matter is ordered reset on the next available docket

e. *See Weiss v. Ferro Corp.,* 44 Ohio St.3d 178, 542 N.E.2d 340 (1989)(holding, the appeal runs 21 days for receipt of the order); *State ex rel. LTV Steel Co. v. Indus. Comm.,* 88 Ohio St.3d 284, 2000-Ohio-328, 725 N.E.2d 639 (Employer had actual knowledge of the order at issue).

f. See also *State ex rel. Nicodemus v. Indus. Comm.,* 5 Ohio St.35 58, 448 N.E.2d 1360 (1983) (holding, receipt of an order by a third-party administrator does not constitute notice to the employer).

2. Affidavits

As the exclusive evaluator of the evidence, as a hearing officer you are entitled to reject an affidavit in support of a .522 request without stating the reasons for your rejection. See *State ex rel. Nerlinger v. AJR Ents., Inc.,* 116 Ohio St.3d 314, 2007-Ohio-6438, 878 N.E.2d 1039.

3. Receipt equals arrival in mailbox

a. The Tenth District has explicitly held that an order is received when it arrives in the party's mailbox, not when they are capable of opening, reading, and understanding it. See *Daniel v. Williams*, Tenth Dist. No. 10AP-797, 2011-Ohio-1941. In Daniel, the injured worker was discharged from the hospital on August 22, 2008, and the Administrator's order was mailed on August 28, 2008. He did not open and review his mail until September 19, 2008, and after obtaining counsel, filed an appeal on September 30, 2008.

b. Applying the three-day presumption, the Court found the order was received September 1, 2008.

c. The Court held it could not expand the definition of the word "receive" and make it applicable to the facts therein where the injured worker timely received the order but failed to read it until 18 days after delivery.

4. Order Writing

a. An order granting .522 relief based on the rebuttable presumption must contain all three specific findings referenced in Section I.B.1.b, *supra*.

b. An order denying relief need not explicitly address each element, but must contain support for the finding that the filing party failed to rebut the presumption (which may be based on one or more elements).

c. Sometimes, the party filing for .522 relief will simultaneously file the appeal to the order they allegedly failed to receive. If that's the case and you're granting .522 relief, in your order, you should identify the appeal by the filing date and specifically find the appeal timely filed.

   i. Example: Therefore, the [*filing party*]'s appeal that previously was filed on [date] is found to have been timely made. State ex rel. *Scott v. Connor*, 16 Ohio App.3d 151, 474 N.E.2d 1233 (10th Dist. 1984). The appeal is referred for hearing on the next available docket.

d. If the party has not filed the appeal and you find they are entitled to .522 relief, include a specific finding that the party has 21 days from the receipt of this order in which to file their appeal.

   i. Example: Therefore, the [*filing party*] is granted an opportunity to appeal the [*BWC/District Hearing Officer/Staff Hearing Officer*] order issued [date] by filing an appeal from that order within 21 days of receipt of this decision.

5. Case Manager Worksheet Options:

.522 Orders

○ Grant

The Staff Hearing Officer finds that the [ ] did not receive the [ ] order issued [ ] and did not have actual knowledge of the information contained therein. It is found that the failure to receive such order was beyond the control and without the fault or neglect of the [ ]

☐ Therefore, the [ ] is granted an opportunity to appeal the [ ] order, issued [ ], by filing an appeal from that order within 21 days of receipt of this decision.

☐ Therefore, the [ ] 's appeal that previously was filed on [ ], is found to have been timely made. *State ex rel. Scott v. Connor,* 16 Ohio App.3d 151, 474 N.E.2d 1233 (10th Dist.1984).

☐ The appeal is referred for hearing on the next available [ ] docket.

☐ The appeal filed is referred for processing to the Commission Level Hearing section.

○ Deny

It is the order of the Staff Hearing Officer that the [ ] 's request for relief, filed [ ], is denied.

☐ It is found that the [ ] 's failure to receive the order of the [ ] issued [ ], resulted from that party's failure to timely notify the Industrial Commission or the Bureau of Workers' Compensation of a change of address. The order was issued on [ ]; however the notice of a changed address was not filed until [ ]. Therefore, pursuant to R.C. 4123.522, the request for relief, is denied.

☐ It is found that a copy of the order of the [ ], issued [ ], was properly mailed to the correct address of the [ ]. Therefore, pursuant to R.C. 4123.522, the request for relief is denied. The order of the [ ] remains in full force and effect.

Special Findings [ ]

C. Appeal Rights

1. Parties do not have direct appeal rights from .52/.522 orders, but they can file a request for reconsideration to the full Commission.

2. After a denial of a request for reconsideration or full Commission order, they can also seek mandamus relief in court.

II. DISCOVERY-RELATED REQUESTS

A. Authority

1. Ohio Adm.Code 4121-3-09(A)(2) provides: "The free pre-hearing exchange of information relevant to a claim is encouraged to facilitate thorough and adequate preparation for commission proceedings."

2. R.C. 4123.08 further provides that: "Each member of the industrial commission, and its deputies, supervisors, directors, and secretaries, appointed by the commission * * * may for the purposes contemplated by this chapter, administer oaths, certify to official acts, **take testimony or depositions**, conduct hearings, inquiries, and investigations, **issue subpoenas**, and **compel the attendance of witnesses and the production of books, accounts, papers, records, documents, evidence, and testimony.**"

3. These provisions give a hearing officer considerable discretion.

B. Subpoenas

1. Standard

a. Subpoenas should not be granted lightly; once a subpoena is granted, the problem then becomes enforcement. If the Commission never receives the evidence subpoenaed, it is difficult to justify going forward with a hearing on the issue, thereby stalling the claim in the administrative process.

b. Subpoenas may be granted when the information sought is both relevant and necessary for a fair adjudication.

c. Subpoenas should only be issued with a direction to appear or send evidence to the relevant Industrial Commission office, NOT the requesting law firm, employer, etc. This way, the Commission can properly monitor compliance.

2. Types

a. Subpoenas come in two forms: witness subpoenas and evidence subpoenas.

3. Witness Subpoenas

a. The Industrial Commission will not subpoena the Injured Worker to appear for a hearing. It is not mandated that the Injured Worker appear and he/she cannot be compelled to do so.

b. The requesting party has an obligation to set forth the reason for the request and the witness's connection to the issue in dispute.

c. Witness subpoenas are not issued for physicians.

d. Witness subpoenas are sent out by the Hearing Administrator section by certified mail and sent out at the time of hearing notices to afford the witness professional courtesy and time to make schedule arrangements.

e. If a witness fails to appear for the hearing, it is the decision of the hearing officer whether to go forward without the witness or continue the claim and seek enforcement of the subpoena.

i. If the hearing officer decides to go forward without the witness, they must be aware of the evidence in the file and the reason behind the issuance of the subpoena, as these factors may impact the hearing officer's ability to rely on certain evidence. See, e.g., *State ex rel. Newsome v. Indus. Comm.,* 10th Dist. Franklin No. 13AP-453, 2014-Ohio-1643 (it was unreasonable for the Commission to rely on the questionable affidavit of the subpoenaed witness who failed to appear for hearing, as it was clear the Commission considered him to be a crucial witness and his attendance was indispensable).

4. Evidence Subpoenas

a. Most of these requests are for medical records, but other evidence (such as wage information) is requested from time to time.

b. The requestor must show that they have made a good faith effort to obtain the information on their own. When they have done so, in appropriate situations, an evidence subpoena will be issued, affording the party two weeks to provide the requested information.

c. The Hearing Administrator makes the initial determination on whether a subpoena is warranted. The parties can object to this letter, and the issue would then be set before a Staff Hearing Officer.

d. When a subpoena is deliberately not honored, the Hearing Administrator will follow up by telephone. If this should fail to result in obtaining the records, the underlying issue is referred to hearing. The Staff Hearing Officer should then determine if the requested records are necessary for a fair adjudication of the issue. When enforcement is deemed necessary, the matter is then referred to the legal department; they will then make attempts to secure the evidence or refer the matter for enforcement.

e. Hearing officers should not grant a subpoena for official records of other state agencies. The requestor should make a public record request.

5. Case Manager Worksheet:

Subpoena Requests

☐ By motion filed _____ , the _____ has requested that the Industrial Commission issue a subpoena for certain records.

Following review of the claim file and relevant evidence, it is the finding of the Staff Hearing Officer that the request for subpoena is _____ for the reason that the requesting documents are _____ to the issue(s) to be heard by the hearing officer.

The claim file is referred to the _____ Hearing Administrator to process the claim file in accordance with the findings herein.

Special Findings _____

C. Requests to Depose/Serve Interrogatories

1. The Industrial Commission has limited its involvement in depositions to State- sponsored physicians. Depositions are time-intensive and delay the speedy adjudication of claims. Attorneys have the opportunity to (cross)examine the Injured Worker, Employer, or other witnesses at hearing, with or without a court reporter to memorialize that testimony. An Injured Worker has the ability to provide rebuttal medical evidence to be weighed by the hearing officer.

2. Process

   a. These requests go to the Hearing Administrator first. If the Hearing Administrator does not find a request for interrogatories or deposition well-taken, this request is not summarily denied but is set for hearing before a Staff Hearing Officer so the parties can make arguments.

   b. When a request is granted, the appropriate form letters are sent to the parties. If an objection to the discovery is filed, the issue is set for hearing before a Staff Hearing Officer.

3. Grounds

   a. Deposition requests should clearly spell out the reason for the request. Reasons may include internal inconsistency in the report, vagueness, etc.

   b. When determining the reasonableness of the request for deposition or interrogatories, the Staff Hearing Officer shall consider whether the alleged defect or potential problem raised by the applicant can be adequately addressed or resolved through the adjudicatory process. See Ohio Adm.Code 4121-3-09(A)(8).

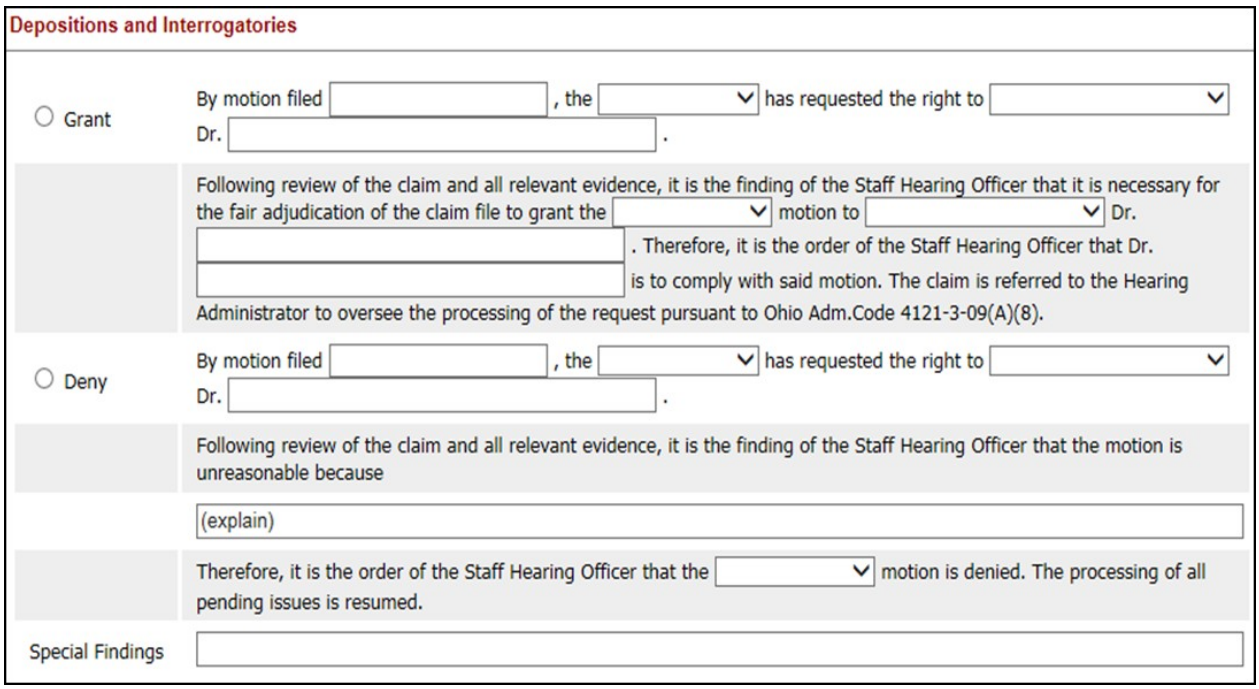
   c. A difference in the conclusion between physicians is not a basis for deposition. These differences are to be resolved at hearing, where the hearing officer can weigh the value of each report.

4. Ohio Adm.Code 4121-3-15(D)

   a. Either the Injured Worker or the Employer can request a deposition or interrogatories of the BWC/IC physician that examined the Injured Worker for PPD if there is more than a 15% difference between any two reports on the issue or it appears that the disability assessment was based in part on non-allowed conditions or allowed conditions were excluded.

   b. However, depositions due to differences in the percentage of impairment in a permanent total disability report should be discouraged. Percentages set forth in PTD reports are not given the same weight as PPD.

5. Case Manager Worksheet:



D. Claim Suspension

1. R.C. 4123.651 provides for suspension of a claim for failure to attend an Employer-scheduled Independent Medical Examination (IME) or failure to provide a medical release to the Employer when requested. This will be the most common suspension request a hearing officer comes across.

   a. Suspension requests result in the issuance of a compliance letter granting or denying suspension of the claim. If an objection to this Compliance Letter is filed, the issue is then set for hearing before a Staff Hearing Officer. Hearings on objections are to be set within 3 business days of receipt of the objection. Ohio Adm.Code 4121-3-09(A)(6)(e).

2. Examinations

   a. Examinations scheduled by the BWC or IC are not covered under this section. R.C. 4123.53(C) allows the BWC to suspend a claim for an Injured Worker's failure to submit to a medical exam or vocational evaluation, but sometimes the BWC will ask the IC to suspend the claim.

   b. The Employer is entitled to one examination on a pending issue. Any additional examinations must be justified and approved by the Hearing Administrator pursuant to Ohio Adm.Code 4121-3-09(A)(6)(b).

   c. Examinations should provide the Injured Worker with reasonable notice so he/she can adjust their schedule to attend.

3. Case Manager Worksheet:

Suspension of Claim - Failure to Attend Employer's Exam

Pursuant to R.C. 4123.651(C), the Employer requests that the claim file be suspended due to the Injured Worker's failure to appear for a medical examination by Dr. _____ that the Employer scheduled for _____ in accordance with R.C. 4123.651(A).

○ Suspension Denied	The SHO finds that the Injured Worker has shown good cause for failing to appear for the medical examination previously scheduled by the Employer. Therefore, the Employer's request to suspend the claim is denied. The processing of all pending issues is to continue.
	(explain)
○ Suspension Granted	The SHO finds that the Injured Worker has not shown good cause for failing to appear for the medical examination previously scheduled by the Employer.
	(explain)
	Accordingly, the Employer's request to suspend the claim is granted. This order suspends the Injured Worker's right to have the claim considered for compensation or benefits previously granted. Additionally, the hearing scheduled on _____ before a _____ on the issue of _____ is also suspended.
	To remove this suspension, the Injured Worker must notify the Employer, in writing, of his/her willingness to appear for a new examination that will be scheduled by the Employer. The Employer must reschedule and complete the medical examination within 45 days of receiving the Injured Worker's notice of intent to appear for the examination.
	After the Injured Worker attends the rescheduled examination, the parties shall immediately notify the _____ Hearing Administrator, in writing, of the Injured Worker's attendance. The Injured Worker's attendance at the examination will automatically revoke the suspension. A compliance letter will not be issued revoking the suspension.
Special Findings	

4. Medical Releases

a. Injured workers are only required to release access to their medical records that are relevant to their claim. To that end, they are required to provide a BWC/IC **or substantially similar** release upon request.

i. There is no requirement to provide a facility-specific release, although many providers will only accept their own release. Sometimes this can be resolved if the Injured Worker agrees to sign such a release, often limited to only the body parts allowed or requested in the claim.

ii. If the Injured Worker refuses to sign an over-broad provider release, claim suspension is NOT the answer; the Injured Worker is not required to release medical information for unrelated issues.

iii. Some Employers will file for suspension where they have a release but have not been successful in obtaining records from the provider. This is not an appropriate use of this section. Their remedy is to request a subpoena of those records after they have made reasonable but unsuccessful efforts on their own.

b. A medical release without a list of providers who treated the Injured Worker is not very useful. Pursuant to Ohio Adm.Code 4121-3- 09(A)(4)(a), "upon written request made by the employer, the injured worker **shall provide a list of the medical providers** that the injured

worker is authorizing to release medical records that have examined or treated the injured worker for any medical, psychological and/or psychiatric conditions that are related causally or historically to the physical or psychological and/or psychiatric injuries relevant to the injured worker's claim."

5. Case Manager Worksheet:

Suspension of Claim - Providing a Signed Medical Release

The Employer requests that the claim be suspended for the reason that the Injured Worker [ ] to provide the Employer with a recently signed medical release as required by R.C. 4123.651(B).

○ Suspension Denied	The SHO finds that the Injured Worker has fully satisfied the obligation to provide a recently signed medical release, as required by R.C. 4123.651(B); therefore, the Employer's request to suspend the claim is denied. The processing of all pending issues is to continue.
○ Suspension Granted	The SHO finds that the Injured Worker has not shown good cause for his/her failure to provide the Employer with a recently signed medical release. Therefore, pursuant to R.C. 4123.651(C), it is ordered that all activity in the claim file is suspended. This order suspends the Injured Worker's right to have the claim considered for payment of compensation or benefits previously granted, until the Injured Worker provides the signed medical release. Additionally, the hearing scheduled on [ ] before a [ ] on the issue of [ ] is also suspended.
	The suspension provided herein shall be revoked immediately when the Employer notifies the [ ] Hearing Administrator that it has received a signed medical release from the Injured Worker, or a copy of the signed release is submitted to the claim file by either party. A compliance letter will not be issued revoking the suspension.
Special Findings	[ ]

CHAPTER THREE: FEE DISPUTES

I. THE RULE: OHIO ADM.CODE 4121-3-24 – "FEE CONTROVERSIES"

A. Fee Basics: The commission may inquire into the amounts of fees charged by attorneys, agents, or representatives of the parties for services in matters before the commission and shall protect parties against unfair fees. Attorney fees shall be based upon:

1. The time and labor required.

2. The novelty and difficulty of the questions involved and the skill requisite to perform the legal services properly.

3. The amount involved and the results obtained.

4. The likelihood, if apparent to the claimant, that the acceptance of the particular employment will preclude other employment by the lawyer.

5. The fee customarily charged in the locality for similar legal services.

6. The time limitations imposed by the claimant or by the circumstances.

7. The nature and length of the professional relationship with the claimant.

8. The experience, reputation, and ability of the lawyer or lawyers performing the services.

9. Whether the fee is fixed or contingent.

B. Disputes: When a controversy exists between a party and his representative concerning fees for services rendered in industrial claims, either the party or the representative may make a written request to the Commission to resolve the dispute. The Commission shall set the matter for special hearing and inquire into the merits of the controversy. The commission shall fix the amount of a reasonable fee, if any fee be due the representative, and the decision of the Commission shall be binding upon the parties to the dispute.

In such controversies, the commission shall not assume jurisdiction unless the written request is filed within one year of the payment of the amount claimed or request therefore.

The representative shall file a copy of the written fee agreement and an itemized statement showing all services rendered and expenses incurred in regard to the matter in controversy and also any and all payments received.

C. Contingent Fees/Contingency: The Commission shall make inquiry into whether the fee agreement is a contingency fee agreement. If the fee agreement is a contingency fee agreement, inquiry shall be made as to whether the contingency that is the basis for the matter in controversy has occurred.

D. Posting of Authority: The Commission and the Bureau of Workers' Compensation shall prominently display in all areas of an office which the claimants frequent a notice to the effect that the commission has statutory authority to resolve fee disputes.

E. Controversy Defined: A "controversy," as used in this rule, means a dispute between a claimant and his attorney.

II. ADJUDICATION

A. Fee Disputes: Resolved by letter, not order. Accordingly, there are no direct appeal rights and can only be disturbed on reconsideration, which is also issued by letter.

B. Determining Fees:

1. Quantum Meruit

a. When an attorney is discharged by a client without cause prior to final resolution of the case, the discharged attorney may recover only the reasonable value of services rendered prior to the discharge on the basis of *quantum meruit. Fox & Associates Co., L.P.A. v. Purdon*, 44 Ohio St.3d 69, 541 N.E.2d 448 (1989).

b. Further, "[a]n attorney who **substantially performs** under the contract may be entitled to the full price of the contract in the event of discharge 'on the courthouse steps,' or just prior to settlement." Id. (citations omitted)(emphasis added).

c. Thus, pursuant to Fox, even if an attorney is discharged without cause, and even if a contingent fee agreement is in effect at the time of the discharge, the discharged attorney recovers on the basis of *quantum meruit*, and not pursuant to the terms of the agreement.

2. Contingency Agreements

a. When an attorney representing a client pursuant to a contingent-fee agreement is discharged, the attorney's cause of action for a fee recovery on the basis of *quantum meruit* arises upon the successful occurrence of the contingency. Under this approach, in most situations the discharged attorney is not compensated if the client recovers nothing. *Reid, Johnson, Downes, Andrachick & Webster v. Lansberry*, 68 Ohio St.3d 570, 629 N.E.2d 431 (1994).

b. Further, the maximum quantum meruit recovery of a discharged attorney should be **limited** to the amount provided for in the contingent fee agreement.

3. Totality of the circumstances

a. The number of hours worked by the attorney before the discharge is only one factor to be considered.

b. Additional relevant considerations include the recovery sought, the skill demanded, the results obtained, and the attorney-client relationship itself.

c. Further, the factors contained in Rule 1.5 of the Code of Professional Conduct may also be considered.

C. Case Manager Worksheet Options:

1. Fees payable - enter the amount of fee that is payable and then your supporting evidence (bills, testimony, etc.)

2. Fees denied - the date of the request for fees should automatically be entered into workflow.

3. Dispute dismissed for no jurisdiction as untimely filed - no additional information needs to be entered on the radio button, but you are free to include anything in addition at the bottom written or dictated section.

4. Dispute dismissed for no supporting evidence - the motion and filing date should automatically populate in Workflow. Then there is a box to fill in the specific findings as to what specifically is missing.

5. Generic reset/dismissal - If you choose this option, you need to type or dictate the reasons therefore. You can use this option to dismiss a request for fees where the contingency has not yet been met. That way, the attorney is given the opportunity to file for fees again upon happening of the contingency.

Fee Dispute Letter Format

Pursuant to the provisions of R.C. 4123.06 and Ohio Adm. Code 4121-3-24 a fee controversy hearing was conducted at the request of [ ]. The hearing was attended by [ ]

C-86 Motion filed by Employer on 12/23/2015

Issues:		Decisions:
	24 Rights Pursuant To R.C. 4123.651	

○ Fee Payable	Based upon a review of the claim file and the testimony presented at the hearing, it is my opinion that valuable legal services were rendered by the law firm on the injured worker's behalf and further that [ ] represents a reasonable legal fee for those services
	This amount is based upon
	[ ]
○ Fees Denied	Based upon a review of the claim file and the testimony presented at the hearing, it is my opinion that the law firm has received adequate monetary remuneration for legal services rendered. Therefore, the request for attorney fees filed [12/23/2015] is denied.
○ Fees dispute dismissed, no jurisdiction, not timely filed	Based upon a review of the claim file and the testimony presented at the hearing, it is my decision to jurisdictionally dismiss the fee controversy request, as the same was not filed within one year of the date of the determination which forms the basis of the disputed fee.
○ Fees dispute dismissed, no supporting evidence	Based upon a review of the claim file the [C-86] filed [12/23/2015] is dismissed for the reason that no evidence was submitted to the claim file to support the request for fee dispute.
	In particular,
	[ ]
○ Fees dispute reset / dismissal	

CHAPTER FOUR: LUMP SUM SETTLEMENTS

I. THE STATUTE: R.C. 4123.65

A. State fund: The employer or injured worker may file an application for approval of a final settlement. The application shall include the settlement agreement, which must be signed by the injured worker and the employer and clearly set forth the circumstances by reason of which the proposed settlement is deemed desirable and that the parties agree to the terms of the settlement agreement.

1. The BWC approves all agreed settlements, except self-insuring employers.

2. Commission has 30 days to approve, if the settlement is not a gross miscarriage of justice or unfair.

3. Effective 08/25/2006, R.C. 4123.65 Paragraph (A) – State Fund Settlements. An injured worker may file an application **without** an employer's signature in the following situations:

   a. The employer is no longer doing business in Ohio; or

   b. The claim no longer is in the employer's experience and the injured worker is no longer employed with that employer; or

   c. The employer has failed to comply with section 4123.35 (payment of premiums).

4. If an injured worker files an application without an employer's signature and the employer still is doing business in this state, the administrator **shall** send written notice of the application to the employer immediately upon receipt of the application. If the employer fails to respond to the notice within 30 days after the notice is sent, the application need not contain the employer's signature.

5. The administrator may file an application so long as it gives notice to the injured worker and employer, and the information and signatures required are present.

B. Self-insuring employers: Within 7 days of signing a settlement agreement, the SI employer must mail a copy to the administrator and the injured worker's representative.

C. 30-Day "Cooling Off" Period

1. During the 30-day period, the injured worker, employer, or administrator (for SF claims) may withdraw consent to the settlement *by providing written notice*.

   a. Exception: An employer shall not deny or withdraw consent to a settlement application filed under this section if **both** of the following apply to the claim at issue: 1)The claim is no longer within the date of impact of the employer's experience as provided in division (B) of 4123.34 of the Revised Code; 2) The employee named in the claim is no longer employed by the employer. This information should be apparent in the BWC settlement packet.

   b. For state-fund employers, this period begins when the administrator issues an order approving the agreement.

   c. For self-insuring employers, this period begins the last date the agreement is executed.

2. Effective 10/11/2007, R.C. 4123.65 Paragraph (C) – Commission Review of Settlements.

   a. 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.

b. Death itself is not good cause.

D. Full Settlement: Partial Settlement, Prior to 10/11/2007, upon final settlement of claim, all rights to claim terminate upon settlement, including medical bills.

E. Partial Settlement: After 10/11/2007

1. Currently, a settlement may pertain to **one or more claims** of a claimant, or **one or more parts** of a claim, or the **compensation** or **benefits** pertaining to either, or **any combination thereof**.

II. SPECIFIC SITUATIONS

A. Strict Compliance:

1. The parties must strictly comply with the statute, including the provision that the settlement application "shall * * * clearly set forth the circumstances by reason of which the proposed settlement is deemed desirable." See *State ex rel. Wise v. Ryan*, 118 Ohio St.3d 68, 2008-Ohio- 1740, 886 N.E.2d 193.

B. Withdrawal:

1. Intent to withdraw consent **must** be in writing and sent to all parties. Absent such notice, the settlement agreement becomes valid upon expiration of the cooling-off period, and the injured worker is entitled to rely on it. *State ex rel. Jones v. Conrad*, 92 Ohio St.3d 389, 2001-Ohio-207, 750 N.E.2d 583.

C. Abatement:

1. Ohio Adm.Code 4123-5-21(A) provides that when an injured worker dies, action on any application filed by the injured worker and pending before the Bureau or Commission at the time of his death, is abated by his death.

2. Abatement is generally applicable to joint applications for approval of a state fund settlement, provided that the injured worker's death occurs **before** the settlement is approved by the Bureau. See *State ex rel. Johnston v. Ohio Bur. of Workers' Comp.,* 92 Ohio St.3d 463, 2001-Ohio-1284, 751 N.E.2d 974.

3. However, abatement is nullified where the Bureau fails to process an application for approval of a state fund settlement within a reasonable period of time. *Johnston*, *supra* (holding eight months was an unreasonable delay).

D. Minors:

1. The settlement shall be paid to the legally appointed guardian of the minor. R.C. 4123.89.

E. Suspension:

1. A valid settlement application will suspend all other pending applications or unresolved issues **except** applications for PTD and those involved in the ADR process.

a. However, a Hearing Administrator or Staff Hearing Officer at hearing can **continue** a PTD hearing for processing a settlement or for settlement negotiations.

2. The IC will suspend appeals, including ADR appeals, when a settlement application is filed.

F. Unrepresented Injured Workers:

1. The Staff Hearing Officer should pay close attention to settlements with unrepresented injured workers, as they have not had the benefit of counsel in the negotiation process. If the Staff Hearing Officer finds the settlement is clearly unfair or a gross miscarriage of justice, they should be sure to specifically explain what is unfair in the order so the parties can correct, if desired.

G. Unauthorized Practice of Law:

1. A settlement agreement shall be signed by all necessary parties and/or their attorney. The signature of a non-attorney representative on a settlement agreement is not sufficient, as it is considered the unauthorized practice of law. See Memo O2.

III. PROCESS

A. Desk Review:

1. The approval of a settlement agreement will be assigned to a Staff Hearing Officer as a desk review, as a hearing is not held on the matter.

2. The Staff Hearing Officer must, within the 30-day period, determine whether the settlement agreement is or is not a gross miscarriage of justice. If the Staff Hearing Officer determines the agreement is clearly unfair, the Staff Hearing Officer shall issue an order disapproving the settlement. If the Staff Hearing Officer determines the agreement is not clearly unfair or fails to act within the 30-day period, the agreement is approved.

B. Case Manager Worksheet Options:

1. The settlement agreement is not a gross miscarriage of justice nor is it clearly unfair.

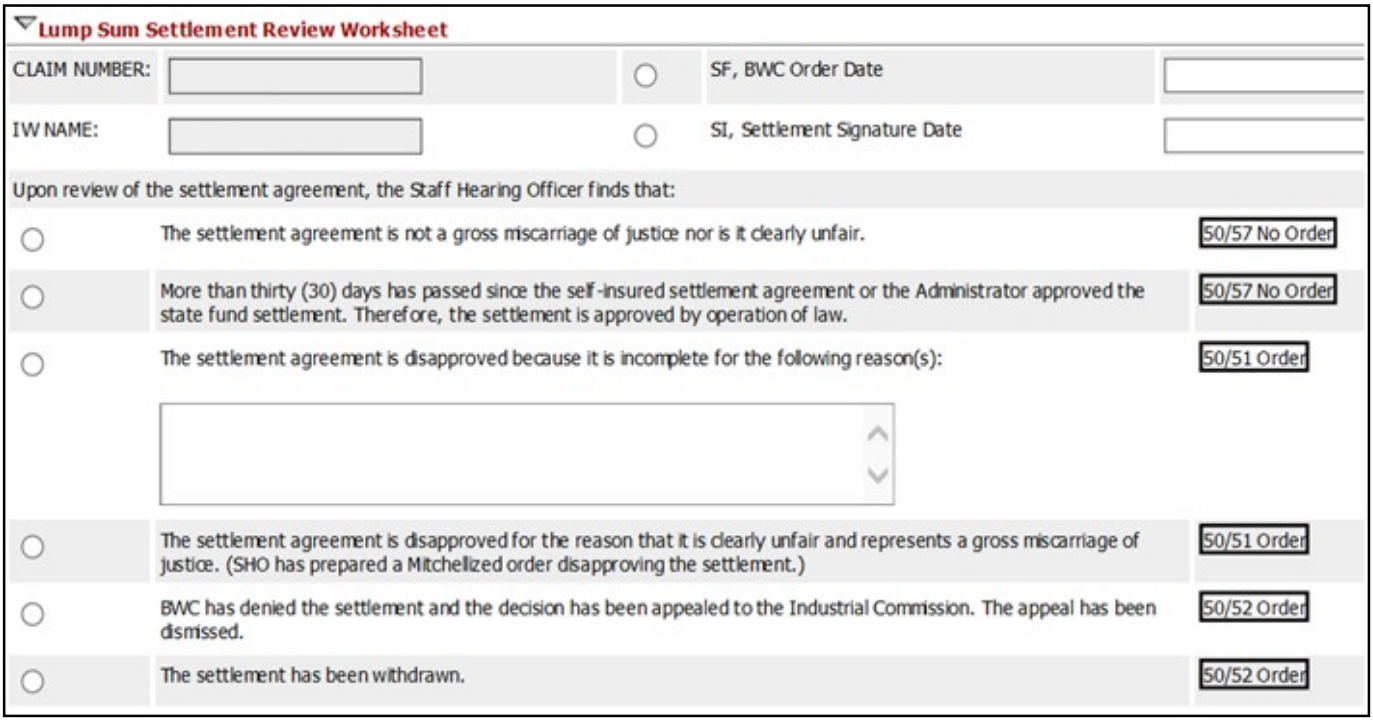
2. More than 30 days have passed since the self-insured agreement or the Administrator approved the state fund settlement. Therefore, the settlement is approved by operation of law.

3. The settlement agreement is incomplete for the following reasons: [be sure to clearly delineate what portions of the agreement are necessary and missing].

4. The settlement agreement is disapproved for the reason that it is clearly unfair and represents a gross miscarriage of justice. The Staff Hearing Officer must prepare a *Mitchellized* order to accompany this finding.

5. The BWC has denied the settlement and the decision has been appealed to the Industrial Commission. The appeal has been dismissed. The settlement has been withdrawn.

Lump Sum Settlement Review Worksheet:



Lump Sum Settlement Review Worksheet

CLAIM NUMBER:		○ SF, BWC Order Date	
IW NAME:		○ SI, Settlement Signature Date	

Upon review of the settlement agreement, the Staff Hearing Officer finds that:

○	The settlement agreement is not a gross miscarriage of justice nor is it clearly unfair.	50/57 No Order
○	More than thirty (30) days has passed since the self-insured settlement agreement or the Administrator approved the state fund settlement. Therefore, the settlement is approved by operation of law.	50/57 No Order
○	The settlement agreement is disapproved because it is incomplete for the following reason(s):	50/51 Order
○	The settlement agreement is disapproved for the reason that it is clearly unfair and represents a gross miscarriage of justice. (SHO has prepared a Mitchellized order disapproving the settlement.)	50/51 Order
○	BWC has denied the settlement and the decision has been appealed to the Industrial Commission. The appeal has been dismissed.	50/52 Order
○	The settlement has been withdrawn.	50/52 Order

CHAPTER FIVE: PERMANENT TOTAL DISABILITY

I. GENERALLY

A. R.C. 4123.58: Authorizes the payment of compensation for permanent total disability until the injured worker's death at (66 2/3% of the AWW, but above the PT min. and at or under the PT max. for the date of injury year).

II. STATUTORY PTD (4123.58(C)(1)

A. Loss of Two Body Parts: IW is automatically awarded PTD when he/she has lost, or lost the use of:

1. both hands or both arms, or

2. both feet or both legs, or

3. both eyes, or

4. any two body parts;

B. Loss of Entire Limb:

1. For DOI before 08/25/2006, the loss of use of one limb (e.g., arm and hand) does constitute the loss of use of two body parts.

2. DOI 08/25/2006 and after, the loss or loss of use of one limb **does not** constitute the loss or loss of use of two body parts.

C. Working: IW is entitled to PTD under this section even if they are working.

D. Irreparable Total Loss of Use:

1. Loss of use to support PTD requires, at a minimum, irreparable total loss of use as a prerequisite to recovery. *State ex rel. Szatkowski v. Indus. Comm.,* 39 Ohio St.3d 320, 530 N.E.2d 880 (1988) (IW suffered injury to his eyes resulting in cataracts, and eventually received PPD awards for total loss of vision in both eyes. IW then moved for PTD, but an ophthalmologist report indicated IW's vision was correctable to normal in each eye with contact lenses. PTD was denied).

2. Loss of use for purposes of statutory PTD means IW has lost the use of the affected parts **to the same extent as if amputated**.

a. This standard is stricter than the *State ex rel. Alcoa Bldg. Prods. v. Indus. Comm.*, 108 Ohio St.3d 341, 2014-Ohio-3166, 810 N.E.2d 946, ("all practical intents and purposes") standard.

b. The fact that an amputation of two or more fingers on each hand resulted in a vocational handicap which exceeded the norm does not indicate per se a loss of use of both hands to the same extent as if they had been amputated. *State ex rel. Gould, Inc. v. Indus. Comm.,* 40 Ohio St.3d 323, 533 N.E.2d 346 (1988) (IW's claim was allowed for amputation of the left index finger, left 2nd finger, left 3rd finger and amputation of 2/3rds of the right index finger, total amputation of the 3rd and 4th right fingers. IW received an award for the total loss of use of both hands by a BWC order finding IW's "disability in this claim exceeds the normal handicap." However, the Court disagreed.)

E. Process:

1. In claims where the loss is medically obvious, the claim is referred to a Staff Hearing Officer for review on a tentative order. If the Staff Hearing Officer grants the request and issues a tentative order, the parties are entitled to object within 30 days of receipt of the T.O., and a hearing is scheduled.

2. If the Staff Hearing Officer does not grant the statutory PTD, the Staff Hearing Officer refers the matter for hearing.

3. There is no worksheet to walk you through this process; use the order shells online as a guide. Use the shell labeled "PTDSTAT."

III. IMPAIRMENT (TRADITIONAL) PTD

A. The Standard: R.C. 4123.58(C)(2)

1. "The impairment resulting from the employee's injury or occupational disease prevents the employee from engaging in **sustained remunerative employment** utilizing the employment skills that the employee has or may reasonably be expected to develop."

B. Entitlement:

1. Pursuant to Ohio Adm.Code 4121-3-34(D)(1) & R.C. 4123.58(D), if you can answer "yes" to any of the following, PTD **shall not** be granted:

a. Is IW engaged in sustained remunerative employment?

b. Can IW return to the former position of employment?

c. Is the IW's inability to perform sustained remunerative employment **not** the direct result of impairment related to the allowed conditions?

d. Has IW refused a good faith offer of sustained remunerative employment made prior to the pre-hearing conference within IW's physical/mental capabilities?

e. Is IW's condition temporary/not at MMI?

f. Is IW's age the sole cause or primary obstacle against reemployment?

g. Are non-allowed conditions the proximate cause of IW's inability to work?

2. Part-time Work

a. Part-time work is sustained remunerative employment.

b. Previously, the Tenth District implemented a four-hour-per-day threshold. However, the Supreme Court of Ohio explicitly rejected that as without statutory or administrative authority. Accordingly, there is **no hourly standard** in determining whether an individual is capable of sustained remunerative employment. Instead, this must be decided on a case-by-case basis. See *State ex rel. Bonnlander v. Hamon*, 2017-Ohio- 4003.

3. PTD is *compensation of last resort*, to be awarded only when all reasonable avenues of accomplishing a return to sustained remunerative employment have failed. *State ex rel. Wilson v. Indus. Comm.*, 80 Ohio St.3d 250, 685 N.E.2d 774 (1997).

C. Analysis:

1. Physical capacity

a. An Injured Worker may be permanently and totally disabled based on **only one condition**, even if the others are not work prohibitive or at MMI.

b. If the Staff Hearing Officer finds the IW is PTD based on **medical or psychological impairment alone**, an evaluation of the non-medical disability (*Stephenson, infra*) factors is unnecessary and **should not** be included in the Staff Hearing Officer's order. See *State ex rel. Speelman v. Indus. Comm.*, 73 Ohio App.3d 757, 598 N.E.2d 192 (10th Dist. 1992); Memo G4.

i. An injured worker with multiple allowed conditions is not required to show that each condition, standing alone, is work- prohibitive. See *State ex rel. Galion Mfg. Div., Dresser Indus., Inc. v. Haygood*, 60 Ohio St.3d 38, 573 N.E.2d 60 (1991). Permanent total disability may appropriately be due to the aggregate effect of more than one allowed condition.

c. Ohio Adm.Code 4121-3-34(2) physical demand categories:

i. **"Sedentary work"** means exerting up to ten pounds of force occasionally (occasionally: activity or condition exists up to one- third of the time) and/or a negligible amount of force frequently (frequently: activity or condition exists from one-third to two- thirds of the time) to lift, carry, push, pull, or otherwise move objects. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met.

ii. **"Light work"** means exerting up to twenty pounds of force occasionally, and/or up to ten pounds of force frequently, and/or a negligible amount of force constantly (constantly: activity or condition exists two-thirds or more of the time) to move objects. Physical demand may be only a negligible amount, a job should be rated light work: (i) when it requires walking or standing to a significant degree; or (ii) when it requires sitting most of the time but entails pushing and/or pulling or arm or leg controls; and/or (iii) when the job requires working at a production rate pace entailing the constant pushing and/or pulling of materials even though the weight of those materials is negligible.

iii. **"Medium work"** means exerting twenty to fifty pounds of force occasionally, and/or ten to twenty-five pounds of force frequently, and/or greater than negligible up to ten pounds of force constantly to move objects. Physical demand requirements are in excess of those for light work.

iv. **"Heavy work"** means exerting fifty to one hundred pounds of force occasionally, and/or twenty to fifty pounds of force frequently and/or ten to twenty pounds of force constantly to move objects. Physical demand requirements are in excess of those for medium work.

v. **"Very heavy work"** means exerting in excess of one hundred pounds of force occasionally, and/or in excess of fifty pounds of force frequently, and/or in excess of twenty pounds of force constantly to move objects. Physical demand requirements are in excess of those for heavy work.

d. **Don't take the doctor's work-classification on its face**. Compare the designation to the

restrictions detailed to be sure it is in fact consistent. Sometimes a physician will select sedentary but then add additional restrictions, effectively restricting the IW to less than sedentary employment, or select sedentary when the IW is capable of light work.

i. Also, ensure the physician's physical strength rating questionnaire is consistent with any restrictions discussed in the narrative portion of the report.

e. If the IW retains some residual physical capacity to work, a *Stephenson* analysis identifying the effect of the IW's age, education, and work history **must** be completed. The analysis must identify these factors, explain how they are **positive, negative, or neutral**, and how they impact the IW's ability to work. Mere recitation of the factors is insufficient. See *State ex rel. Stephenson v. Indus. Comm.,* 31 Ohio St.3d 167, 509 N.E.2d 946 (1987); *State ex rel. Noll. v. Indus. Comm.,* 57 Ohio St.3d 203, 567 N.E.2d 245 (1991).

i. A *Stephenson* analysis will usually be restricted to a decision to deny PTD because this analysis is not required when an injured worker is medically foreclosed from all work. *See Speelman, supra*. Moreover, an injured worker's IC-2 Application will contain medical evidence in support of PTD.

ii. However, if there is some infirmity in the injured worker's medical evidence which necessitates exclusion (e.g., an *Eberhardt* issue), or you decide to rely on medical evidence that reveals some residual physical capacity, this analysis must be present in a decision to grant PTD. However, you must be careful in rejecting the IW's medical evidence for deficiencies that should have been rejected at the time of filing. See Ohio Adm.Code 4121-3-34(C)(1) and Section IV.A.1.b, *infra* at page 46.

2. Non-medical Disability Factors

a. Age

i. "Age" shall be determined **at time of the adjudication** of the application for permanent and total disability. In general, age refers to one's chronological age and the extent to which one's age affects the ability to adapt to a new work situation and to do work in competition with others. Ohio Adm.Code 4121-3- 34(B)(3).

ii. There is not an age at which reemployment is held to be a virtual impossibility as a matter of law. Age must instead be considered on a case-by-case basis. To effectively do so, the commission must deem any presumptions about age rebuttable. Equally important, age must never be viewed in isolation. A college degree, for example, can do much to ameliorate the effects of advanced age. *State ex rel. Moss v. Indus. Comm.,* 75 Ohio St.3d 414, 1996-Ohio-306, 662 N.E.2d 364.

iii. Extrapolating from prior case law, somewhere between the ages of 57 and 67 requires a more in-depth discussion of age. This is probably not a coincidence that the traditional age for retirement falls between these two numbers. For example:

a) In *State ex rel. Mobley v. Indus. Comm.,* 78 Ohio St.3d 579, 1997-Ohio-181, 679 N.E.2d 300, the Commission order denying PTD indicated IW was 67, had a 10th grade education, and worked as a sheet metal worker and a salesman. The order then elaborated on the effect of the IW's education and work history on his ability to work, but **did not further explain his age**. The Court held that regardless of the sufficient discussion of the IW's education and work history, the Commission was still obligated to do **more than just acknowledge IW's age and rather discuss it in conjunction with the other factors that may lessen or magnify**

the effects of IW's age.

b) But that same year, in *State ex rel. Blue v. Indus. Comm.*, 79 Ohio St.3d 466, 1997-Ohio-164, 683 N.E.2d 1131, the Court permitted a cursory reference to the IW's age (57), finding the flaw was not fatal. The Court found the IW was 57 years old, and although not a vocational asset, his age was not an insurmountable barrier to re- employment, and all of IW's remaining factors were positive.

b. Education

i. The Rule - Ohio Adm.Code 4121-3-34(B)(3):

a) **"Education"** is primarily used to mean **formal schooling or other training**, which contributes to the ability to meet vocational requirements. The numerical grade level may not represent one's actual educational abilities. If there is no other evidence to contradict it, the numerical grade level will be used to determine educational abilities.

(i) "*Illiteracy*" is the inability to read or write. An injured worker is considered illiterate if the injured worker cannot read or write a simple message, such as instructions or an inventory list, even though the person can sign his or her name.

(ii) *"Marginal education"* means **sixth grade level or less**. An injured worker will have ability in reasoning, arithmetic, and language skills which are needed to do simple unskilled types of work.

Generally, formal schooling at sixth grade level or less is marginal education.

(iii) *"Limited education"* means **seventh grade level through eleventh grade level**. Limited education means ability in reasoning, arithmetic and language skills but not enough to allow an injured worker with these educational qualifications to do most of the more complex job duties needed in semi-skilled or skilled jobs. Generally, seventh grade through eleventh grade formal education is limited education.

b) *"High school education or above"* means **twelfth grade level or above**. The G.E.D. is equivalent to high school education. High school education or above means ability in reasoning, arithmetic, and language skills acquired through formal schooling at twelfth grade education or above. Generally, an individual with these educational abilities can perform semi-skilled through skilled work.

ii. A college degree implies an above-average level of intelligence that would facilitate the acquisition of new skills that are conducive to sedentary work. A college education also suggests a measure of commitment, hard work, and discipline prospective employers value. *State ex rel. Ehlinger v. Indus. Comm.,* 76 Ohio St.3d 400, 1996-Ohio-191, 667 N.E.2d 1210.

c. Work Experience

i. The Rule - Ohio Adm.Code 4121-3-34(B)(3):

a) "Work experience":

(i) *"Unskilled work"* is work that **needs little or no judgment** to do simple duties that can be learned on the job in a short period of time. The job may or may not require considerable strength. Jobs are unskilled if the primary work duties are handling, feeding, and off bearing (placing or removing materials from machines which are automatic or operated by others), or machine tending and a person can usually learn to do the job in thirty days and little specific vocational preparation and judgment are needed.

(ii) *"Semi-skilled work"* is work that **needs some skills** but does not require doing the more complex work duties. Semi-skilled jobs may require close attention to watching machine processes or inspecting, testing, or otherwise looking for irregularities or tending or guarding equipment, property, material, or persons against loss, damage, or injury and other types of activities which are similarly less complex than skilled work but more complex than unskilled work. A job may be classified as semi-skilled where coordination and dexterity are necessary, as when hands or feet must be moved quickly in a repetitive task.

(iii) *"Skilled work"* is work that **requires qualifications** in which a person uses judgment or involves dealing with people, factors or figures or substantial ideas at a high level of complexity. Skilled work may require qualifications in which a person uses judgment to determine the machine and manual operations to be performed in order to obtain the proper form, quality, or quantity to be produced. Skilled work may require laying out work, estimating quality, determine the suitability and needed quantities of materials, making precise measurements, reading blue prints or other specifications, or making necessary computations or mechanical adjustments or control or regulate the work.

(iv) *"Transferability of skills"* are **skills that can be used in other work activities**. Transferability will depend upon the similarity of occupational work activities that have been performed by the injured worker. Skills which an individual has obtained through working at past relevant work may qualify individuals for some other type of employment.

(v) *"Previous work experience"* is **to include the injured worker's usual occupation, other past occupations, and the skills and abilities acquired through past employment** which demonstrate the type of work the injured worker may be able to perform. Evidence may show that an injured worker has the training or past work experience which enables the injured worker to engage in sustained remunerative employment in another occupation. The relevance and transferability of previous work skills are to be addressed by the adjudicator.

ii. Simple recitation of the IW's past jobs is insufficient. The IW's work experience must not only be detailed, but findings as to how that experience will further or hinder (or have a neutral effect) on future employability must be parsed out. *State ex rel. Levan v. Young's Shell Service*, 80 Ohio St.3d 55, 1997-Ohio-357, 684 N.E.2d 327.

iii. When common sense does not suggest the IW's prior work equipped him or her with skills transferable to the current physical demand level, identification of those transferable skills is necessary. *State ex rel. Haddix v. Indus. Comm.,* 70 Ohio St.3d 59, 1994-Ohio-443, 636 N.E.2d 323 (common sense suggested that neither the

position of gas station attendant nor press operator would provide skills transferrable to sedentary employment).

d. Other factors

i. This does **not** require consideration of non-allowed conditions. *State ex rel. Whetstone v. Bonded Oil Co.,* 73 Ohio St.3d 205, 1995-Ohio-143, 652 N.E.2d 762.

ii. Retraining/Vocational Rehabilitation

a) A lack of transferable skills does not mandate a PTD award. The non-existence of transferable skills is not of critical importance when the issue is whether IW can be retrained for another occupation. *State ex rel. Ewart v. Indus. Comm.*, 76 Ohio St.3d 139, 1996-Ohio-316, 666 N.E.2d 1125.

b) An IW's failure to make reasonable efforts to enhance his/her rehabilitation for re-employment potential can be a factor in a PTD determination. *State ex rel. Bowling v. Nat'l Can Corp*., 77 Ohio S.3d 148, 1996-Ohio-200, 672- N.E.2d 161.

c) Although it is not unreasonable to expect an IW to participate in return-to-work efforts to the best of his or her abilities or to take the initiative to improve re-employment potential, extenuating circumstances can excuse an IW's participation in re-education or re- training. *State ex rel. Wilson v. Indus. Comm.,* 80 Ohio St.3d 250, 685 N.E.2d 774 (1997).

d) The commission cannot deny PTD based on impairment and youth if the IW lacks the intellectual capacity to be retrained. *State ex rel. Hall v. Indus. Comm.,* 80 Ohio St.3d 289, 1997-Ohio-113, 685 N.E.2d 1245.

(i) But, illiteracy related to an IW's status as an immigrant as opposed to intellectual capacity is not the same. See, e.g. State ex rel. *Paraskevopolous v. Indus. Comm.,* 83 Ohio St.3d 189, 1998-Ohio-122, 699 N.E.2d 72.

3. Not Working for Reasons Unrelated to the Injury or Occupational Disease

a. Affirmative defense waived if not raised

i. IW's retirement precludes eligibility for PTD; it is an EOR defense that is waived if not raised. *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78, 1997-Ohio-71, 679 N.E.2d 706.

b. Timing

i. Where an IW is not working for reasons unrelated to the injury or occupational disease prior to becoming PTD, such IW is precluded from eligibility for PTD when the reason is not the direct result of impairment related to the allowed conditions.

ii. Where an IW is not working for reasons unrelated to the injury or occupational disease subsequent to becoming PTD, such IW is **not** precluded from eligibility, regardless of the nature or extent of the unrelated reason. *State ex rel. Baker Material Handling Corp. v. Indus. Comm.,* 69 Ohio St.3d 202, 1994-Ohio-437, 631 N.E.2d 138.

a) **EXCEPTION**: the principle that pre-PTD reason for not working, is not directly caused by the impairment from the allowed conditions, precludes eligibility for PTD compensation, has no application in cases involving long-

latent occupational diseases that arise after the IW is no longer working. An IW cannot tacitly surrender a right that did not exist and could not be foreseen. *State ex rel. Liposchak v. Indus. Comm.,* 73 Ohio St.3d 194, 1995-Ohio-138, 652 N.E.2d 753; *State ex rel. Reliance v. Elec. Co. v. Wright*, 92 Ohio St.3d 109, 2001-Ohio-108, 748 N.E.2d 1105.

c. Supporting evidence

i. Rejection of disability retirement benefits and election of Social Security Retirement (SSR) instead of Social Security Disability (SSD) is some evidence to support a retirement was not injury-induced. See *State ex rel. McAtee v. Indus. Comm.*, 76 Ohio St.3d 648, 1996-Ohio-297, 670 N.E.2d 234.

ii. Lack of contemporaneous medical evidence can be support for a finding of retirement not directly related to impairment related to the allowed conditions, but it does not mandate such a result as there may be other evidence that substantiates the connection between injury and retirement. *State ex rel. Cinergy Corp./Duke Energy v. Heber*, 130 Ohio St.3d 194, 2011-Ohio- 5027, 957 N.E.2d 1.

iii. Support for lack of direct result of impairment due to the allowed conditions for purposes of PTD and TTD is very similar.

D. Tentative Orders:

1. For claims in which the granting of PTD is medically obvious, a Staff Hearing Officer should issue a tentative order on PTD. These are utilized in situations where the granting of PTD is medically obvious (e.g., all the evidence on file supports PTD, **even if just based on one condition**). See Hearing Officer Manual Memo G3.

2. There is no worksheet guide for TOs, but it should be drafted like a traditional *Speelman* grant.

3. The parties have 14 days to object to the TO, or it becomes final. Objections are often based on legal defenses, despite the injured worker's inability to perform sustained remunerative employment.

4. A Memo G1 motion for re-adjustment/re-allocation may also be filed, as discussed in the next section below.

E. Readjustment/Reallocation (Memo G1):

1. Following an order granting PTD, the parties can file a motion requesting either a readjustment of the start date for compensation or a reallocation between claims.

a. If the request is not contested and the Staff Hearing Officer that issued the PTD order agrees, that Staff Hearing Officer will issue a supplemental order.

b. If the request is contested, the issue is scheduled for hearing before a different Staff Hearing Officer. The merits of PTD are not at issue during this hearing, but only the issue of readjustment or reallocation.

2. A Memo G1 motion can be filed following a tentative order or an order following a full hearing on the merits.

F. Suspension of PTD:

1. Incarceration

a. For dates of injury, diagnosis, or disability, on or after 1986, R.C. 4123.54(J) precludes the payment of compensation during a period of confinement to a penal institution.

b. For dates of injury, diagnosis, or disability, **prior** to August 26, 1986, the Commission may not suspend payment of PTD during an IW's incarceration. *See State ex rel. Brown v. Indus. Comm.*, 68 Ohio St.3d 45, 1993—141, 623 N.E.2d 55); *State ex rel. Hart v. Indus. Comm.*, 68 Ohio St.3d 506, 1994-Ohio-537, 628 N.E.2d 1375.

G. Termination of PTD:

1. Payment of PTD is inappropriate where there is evidence of any of the following: (1) actual sustained remunerative employment; (2) the physical ability to do sustained remunerative employment; or (3) activities so medically inconsistent with the disability evidence that they impeach the medical evidence underlying the award. These will be explained in detail below.

2. Inconsistent activities:

a. An IW is not required to remain housebound after being found PTD. Performance of **routine tasks**, regardless of their potential for remuneration, cannot be an automatic disqualification from compensation. *State ex rel. Lawson v. Mondie Forge*, 104 Ohio St.3d 39, 2004-Ohio-6086, 817 N.E.2d 880.

b. Tasks that potentially fall into the category of "routine life activities" will be thoughtfully considered and will not easily be deemed to preclude permanent total disability. *State ex rel. AT&T, Inc. v. McGraw*, 120 Ohio St.3d 1, 2008-Ohio-5246, 895 N.E.2d 842.

c. Numerical analysis of activities allegedly inconsistent with PTD is meaningless without context. *State ex rel. McDaniel v. Indus. Comm.,* 118 Ohio St.3d 319, 2008-Ohio-2227, 889 N.E.2d 93 (Simply comparing the number of activities this IW performed in relation to *Lawson* did not give an accurate picture when this IW's activities were beyond his restrictions and for which he received remuneration, unlike *Lawson*). See also *State ex rel. Lowe v. Cincinnati, Inc.*, 124 Ohio St.3d 204, 2009-Ohio-5864, 921 N.E.2d 205.

3. Physical Ability

a. The IW does not actually have to perform sustained remunerative employment, but only be capable of performing such employment.

b. For example, in *State ex rel. Frazier v. Conrad*, 89 Ohio St.3d 166, 2000- Ohio-127, 729 N.E.2d 723, the IW was granted PTD and then later began to learn how to install siding, training 1-2 days per week. Despite his argument his PTD shouldn't have been terminated until he gained the expertise to work as a subcontractor when his training was over, the Commission was entitled to terminate as of the date he began training because that showed he was capable of working at some level in the labor field.

4. The standard of **sustained remunerative employment** has been carefully examined in cases dealing with the termination of PTD.

a. Sustained

i. Work is "sustained" if it consists of an ongoing pattern of activity. *State ex rel. Schultz v. Indus. Comm.,* 96 Ohio St.3d 27, 2002- Ohio-3316, 770 N.E.2d 576.

ii. Remunerative employment that can be characterized as 'occasional' or 'sporadic' can be some evidence of a capacity for sustained remunerative employment beyond the

time periods of the occasional remunerative employment. *State ex rel. Alesci v. Indus. Comm.*, 97 Ohio St.3d 210, 2002-Ohio-5932, 777 N.E.2d 835 (The BWC was not required to show that IW had engaged, on a sustained basis, a continuous period of remunerative employment; BWC was only required to show that the IW had demonstrated a **capacity** for sustained remunerative employment).

b. Remunerative

i. An IW who performs sustained remunerable activity without pay demonstrates that he or she is capable of doing that same work for remuneration. See *Schultz, supra*.

c. Employment

i. Even though clergy members are specifically exempted from the definition of "employee" for workers' compensation, the right to PTD is based on whether an IW is capable of sustained remunerative employment. See *State ex rel. Jerdo v. Pride Cast Metals, Inc.*, 95 Ohio St.3d 18, 2002-Ohio-1491, 764 N.E.2d 1021 (finding the termination of PTD was proper).

ii. Illegal Activities

a) *State ex rel. Lynch v. Indus. Comm.,* 116 Ohio St.3d 342, 2007-Ohio-6668, 879 N.E.2d 193 (Sale of illegal drugs as exchange of labor for pay on a sustained basis was sustained remunerative employment justifying termination of PTD; IW could not use the illegality as a shield).

b) See also *State ex rel. McNeal v. Indus. Comm.,* 131 Ohio St.3d 408, 2012-Ohio-1296, 965 N.E.2d 992.

iii. Business Ownership

a) Although business ownership, without more, should not defeat eligibility for PTD, the "more" does not need to be physical activity. Sedentary activities, including those administrative and executive decisions necessary to the management of a business, can constitute sustained remunerative employment. *State ex rel. Ackerman v. Indus. Comm.*, 99 Ohio St.3d 26, 2003-Ohio-2448, 788 N.E.2d 1042.

IV. EVIDENCE

A. Medical:

1. The medical examination upon which a report supporting PTD is based must be performed within 24 months prior to the date of the filing of the IC-2. **If the exam was not performed within 24-months, the application is to be dismissed.**

a. This medical evidence must be filed prior to or contemporaneous with the IC-2. It need not be attached to the IC-2 and can be incorporated by reference.

b. Where it is determined at the time the application for permanent total disability compensation is filed that the claim file contains the required medical evidence, the application shall be adjudicated on its merits as provided in this rule absent withdrawal of the application. See Ohio

Adm.Code 4121-3-34(C)(1).

2. The employer has 14 days after the date of the IC acknowledgment letter to notify the IC if it intends to submit medical evidence on the issue of PTD. If the employer elects to submit this evidence, it must do so within 60 days from the acknowledgement letter. Even if the employer fails to make the election within 14 days, it can still submit evidence within 60 days, but the IC specialist exams just won't be delayed to wait for the evidence.

3. The IC will obtain specialist exams.

4. Staff Hearing Officers shall not consider medical evidence that was not timely filed unless prior approval of the Hearing Administrator has been given. See Ohio Adm.Code 4121-3-34; Memo G2.

B. Vocational Evidence:

1. A vocational expert's opinion is **insufficient on its own** to support PTD; however, it can be used as supporting evidence. The Commission (via the hearing officer) is the expert on vocational evidence.

2. Submission and Timeliness: Ohio Adm.Code 4121-3-34(C)(6)(b).

   a. After the IC-specialists' reports have been received, the hearing administrator will notify the parties they have 14 days within which to notify the Commission of intent to submit vocational evidence.

   b. If a party does not make this election, they waive the ability to submit vocational evidence.

   c. If a party timely makes this election, they have 45 days (from the date of the IC-medical) to submit the vocational evidence. A party may be granted additional time from the hearing administrator.

3. Uncontradicted Vocational Reports

   a. There is one **outlier** Supreme Court case that held the Commission abused its discretion in denying PTD when there was an uncontradicted expert vocational report. See *State ex rel. Hopkins v. Indus. Comm.*, 70 Ohio St.3d 36, 1994-Ohio-175, 635 N.E.2d 1257. Because it has not been explicitly overruled, claimants' attorneys may cite this case.

   b. Since *Hopkins*, however, several Supreme Court cases have discounted the case. The Court explicitly held "*Hopkins* * * * is contrary to established authority that the commission, as the exclusive evaluator of disability, is not bound to accept vocational evidence, even if uncontradicted. * * * The commission may credit offered vocational evidence, but expert opinion is not critical or even necessary, because the commission is the expert on this issue." *State ex rel. Jackson v. Indus. Comm.*, 79 Ohio St.3d 266, 1997-Ohio-152, 680 N.E.2d 1233.

   c. See also *State ex rel. Singleton v. Indus. Comm.*, 71 Ohio St.3d 117, 1994- Ohio-188, 642 N.E.2d 359 ("Claimant's challenge rests on the erroneous belief that the commission was bound by [the vocational expert's assessment of claimant's claim for permanent and total disability]. Part of the commission's authority to weigh and evaluate evidence, however, is the freedom to reject it as unpersuasive. Particularly as to vocational assessments, '[t]o bind the commission to a rehabilitation report's conclusion makes the rehabilitation division, not the commission, the ultimate evaluator of disability, contrary to [*Stephenson*].' *State ex rel. Ellis v. McGraw Edison Co. (1993),* 66 Ohio St.3d 92, 94, 609 N.E.2d 164, 166.")

C. Misconceptions in Medical Reports:

1. Former Jobs

   a. The only relevant inquiry in any PTD determination is not IW's ability to return to his former position, but is instead IW's ability to do any sustained remunerative employment. Accordingly, a doctor's misconception of IW's former job duties is not fatal to a PTD opinion. *State ex rel. Domjancic v. Indus. Comm.,* 69 Ohio St.3d 693, 1994-Ohio- 95, 635 N.E.2d 372.

   b. An examining doctor's lack of awareness of a job IW had years before he applied for PTD had no bearing on the IW's medical condition and capacity for work at the time of the examination. The lack of reference to that job in the medical reports did not, therefore, render the reports defective. *State ex rel. Meris v. Indus. Comm*., 108 Ohio St.3d 113, 2006- Ohio-247, 841 N.E.2d 300.

2. Last Date Worked

   a. Citing to *Meris*, the full Commission found that physician error as to the last date worked is not a fatal error and the report is still some evidence. As the issue in PTD is the current ability to perform sustain remunerative employment, when the IW last worked is completely immaterial to the question as to capacity. See *Commission Order*, Claim No. 94-406223 (Hearing Held 09/23/2014).

V. ORDER WRITING

A. Explanation & Elaboration:

1. First, be sure to indicate the claim allowances for each claim under consideration (if you're using a word processor, they will include this).

2. Make a finding as to whether the IW has reached MMI; **if not**, PTD would be denied, **unless** even one condition alone, which has reached MMI, is found permanently and totally disabling based upon the medical evidence. If the IW is at MMI, cite the evidence in support.

3. Make a finding as to the IW's physical capacity.

   a. If the IW is completely restricted from all work on a **medical** basis, make that explicit finding, cite *Speelman*, and **do not** address the *Stephenson* factors. **Note**: if there are psychological and physical conditions, an IW can still be medically-restricted from work based on psych even if there is little physical impairment. The reverse is also true: a psychological allowance may have no effect on an IW's ability to return to work. Be sure to address the residual functional capacity in regards to both physical and psychological conditions, if present.

   b. If the IW retains some residual capacity to work, engage in a *Stephenson* analysis to determine whether or not they are permanently and totally disabled.

   c. As mentioned above, mere recitation of the *Stephenson* factors is insufficient. You must explain, for each factor, how it is **positive, negative, or neutral** with regard to reemployment. Utilize the completed IC-2 Application in engaging in this analysis.

   d. A history of the mechanism of injury and claim-related surgeries may be relevant and should be included where it would be helpful to the order.

   e. The last date worked and any prior PTD-denials may also relevant.

4. If granting PTD, choose a start date (with supporting evidence) and, if appropriate, allocate the award between claims.

5. An array of sample PTD orders are attached.

B. Start Date:

1. The start date for PTD must be supported by some evidence in the record and **must be cited in the order**. Often this will correspond with the date of a medical report, but this is not always the case.

2. Exam/Report Dates

   a. The start date could be the date of a report or the date of the examination, if different, as it is the Injured Worker's physical capacity that renders them permanently and totally disabled, not the opinion.

   b. The start date should **never** be the date of a vocational report.

   c. It is common practice to choose the earliest medical report relied upon, but it is not required.

3. Following Termination of Temporary Total Disability

   a. A start date based on the termination of temporary total disability compensation, **absent supporting medical evidence**, is inappropriate. See *State ex rel. Marlow v. Indus. Comm.,* 10th Dist. Franklin No. 05AP- 970, 2007-Ohio-1464 (Mar. 29, 2007).

   b. In a *Speelman* order, if there is no medical evidence contemporaneous with the date of termination of temporary total disability compensation indicating permanent total disability, selecting a start date on this basis is always inappropriate.

      i. However, if there is medical evidence of permanent total disability that predates the termination of temporary total, selecting a start date of the day after would be supported.

   c. In a *Stephenson* order, although an opinion of permanent total disability isn't necessary, an opinion as to the Injured Worker's functional capacity for work (sedentary, light, etc.) is required and must be cited in support. This is because it's the Injured Worker's physical capacity combined with the Staff Hearing Officer's vocational analysis that culminates in a PTD finding.

4. R.C. 4123.52

   a. A start date cannot be more than two years prior to the filing of the IC-2 Application.

5. Prior Denials

   a. The start date cannot predate a prior order denying PTD.

6. Explanation

   a. Whatever date is selected for a start date, include an explanation. If the start date is the same date as a medical report, the explanation can be brief, indicating simply that "Permanent total disability compensation is awarded from **x date** based on the report of Dr. Smith of the same date."

   b. Elaborate more if the start date is not readily apparent a cited medical report in order to support

the chosen date.

C. Allocation:

1. When more than one claim is being considered for PTD, the Staff Hearing Officer must allocate the award by percentage to each claim. This could still mean that one claim receives 100% of the allocation of the award. Allocation is most important to the parties when there are different employers or different AWWs.

2. For Example:

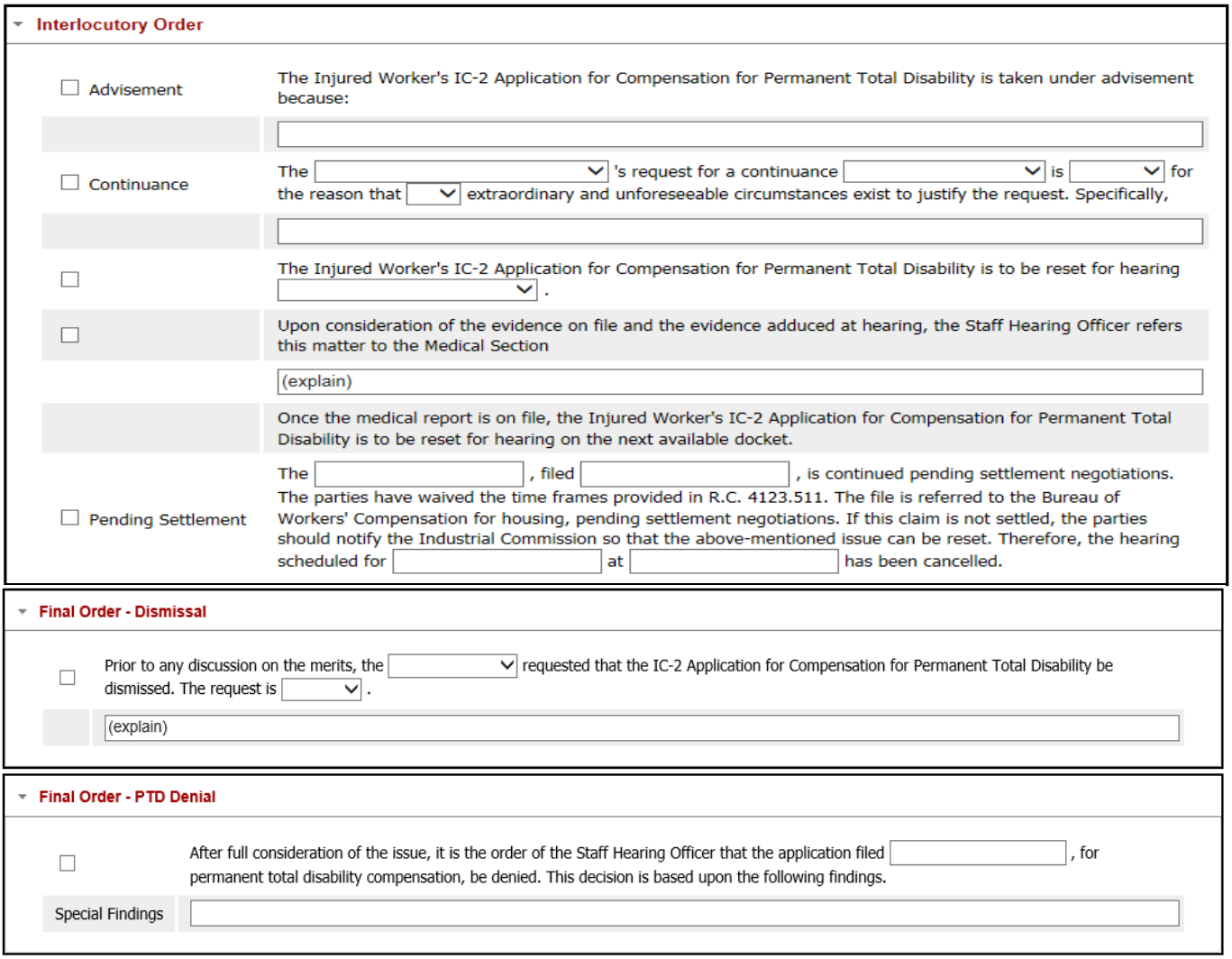
   a. If one claim is for a stubbed toe and another for catastrophic injuries, it is not unreasonable to allocate 100% to the serious claim.

   b. If only one claim has a psychological allowance and the Staff Hearing Officer finds the IW is PTD based on the psych condition(s), it is within the Staff Hearing Officer's discretion to allocate 100% of the award to the claim with the psych allowance. *State ex rel. Turner Constr. Co. v. Indus. Comm.*, 142 Ohio St.3d 310, 2015-Ohio-1202, 29 N.E.3d 969.

3. The last-injurious exposure doctrine is applicable only to the allowance of a claim, and not to the allocation of a PTD award. *State ex rel. Erieview Metal Treating Co. v. Indus. Comm.*, 109 Ohio St.3d 147, 2006-Ohio-2036, 846 N.E.2d 515.

4. Prior PPD% awards have no bearing on the allocation. *State ex rel. Hay v. Indus. Comm.*, 52 Ohio St.3d 99, 555 N.E.2d 965 (1990).

VI. CASE MANAGER WORKSHEET:



Interlocutory Order

☐ Advisement — The Injured Worker's IC-2 Application for Compensation for Permanent Total Disability is taken under advisement because:

☐ Continuance — The [ ] 's request for a continuance [ ] is [ ] for the reason that [ ] extraordinary and unforeseeable circumstances exist to justify the request. Specifically,

☐ The Injured Worker's IC-2 Application for Compensation for Permanent Total Disability is to be reset for hearing [ ] .

☐ Upon consideration of the evidence on file and the evidence adduced at hearing, the Staff Hearing Officer refers this matter to the Medical Section

(explain)

Once the medical report is on file, the Injured Worker's IC-2 Application for Compensation for Permanent Total Disability is to be reset for hearing on the next available docket.

☐ Pending Settlement — The [ ] , filed [ ] , is continued pending settlement negotiations. The parties have waived the time frames provided in R.C. 4123.511. The file is referred to the Bureau of Workers' Compensation for housing, pending settlement negotiations. If this claim is not settled, the parties should notify the Industrial Commission so that the above-mentioned issue can be reset. Therefore, the hearing scheduled for [ ] at [ ] has been cancelled.

Final Order - Dismissal

☐ Prior to any discussion on the merits, the [ ] requested that the IC-2 Application for Compensation for Permanent Total Disability be dismissed. The request is [ ] .

(explain)

Final Order - PTD Denial

☐ After full consideration of the issue, it is the order of the Staff Hearing Officer that the application filed [ ] , for permanent total disability compensation, be denied. This decision is based upon the following findings.

Special Findings

Final Order - PTD Grant

☐ After full consideration of the issue, it is the order of the Staff Hearing Officer that the Injured Worker's IC-2 Application for Compensation for Permanent Total Disability is granted. Permanent and total disability compensation is awarded from _____ (less any compensation that previously may have been awarded over the same period), and is to continue without suspension unless future facts or circumstances should warrant the stopping of the award. Such payments are to be made in accordance with R.C. 4123.58(A).

☐ The cost of this award is apportioned as follows:

_____ % in claim # _____ [,]

\+ −

This apportionment is based upon

_____

☐ Based upon the report(s) of Dr(s). _____ dated _____, it is found that the Injured Worker is unable to perform any sustained remunerative employment solely as a result of the medical impairment caused by the [ ] condition(s). Therefore, pursuant to *State ex rel. Speelman v. Indus. Comm.,* 73 Ohio App.3d 757, 598 N.E.2d 192 (10th Dist. 1992), it is not necessary to discuss or analyze the Injured Worker's non-medical disability factors. Permanent and total disability compensation is awarded from _____ based on

_____

Special Findings _____

Objection to Tentative Order

☐ TO Affirmed — It is the order of the Staff Hearing Officer the Tentative Order, issued _____, is affirmed.

The Staff Hearing Officer finds the Tentative Order was appropriate and was issued in accordance with Memo G3 of the Adjudications Before the Ohio Industrial Commission, as all the medical evidence on file relative to the issue indicates the Injured Worker is permanently and totally disabled, and no legal issues have been raised that would foreclose the payment of permanent total disability compensation.

☐ TO Vacated; Refer for Processing — It is the order of the Staff Hearing Officer the Tentative Order, issued _____, is vacated.

The Staff Hearing Officer finds the Tentative Order was inappropriate because there is a medical and/or legal dispute over the issue of permanent total disability. Specifically,

_____

Accordingly, the Tentative Order is vacated and the IC-2 Application for Permanent Total Disability Compensation is referred to the Hearing Administrator for continued processing in accordance with the rules.

Order Narrative

○ Written ○ Dictated to WinScribe

CHAPTER SIX: VIOLATIONS OF SPECIFIC SAFETY REQUIREMENTS

I. THE RULES

A. VSSR: Under Article II Section 35 of the Ohio Constitution, the Industrial Commission may give an injured worker an additional workers' compensation award of 15% - 50%. The injured worker (or dependent(s) if the injured worker is deceased) may file an application for a VSSR award if there is evidence that a violation has or may have occurred from the failure of the employer to comply with a specific safety requirement.

1. "[The Industrial Commission] shall have full power and authority to hear and determine whether or not an injury, disease or death resulted because of the failure of the employer to comply with any specific requirement for the protection of the lives, health or safety of employees, enacted by the general assembly or in the form of an order adopted by [the Commission]."

B. Ohio Adm.Code 4121-3-20: Prescribes the rules and procedures.

C. Penalty: The award is akin to punitive damages; it is a penalty. This is the only area of workers' compensation law that is construed in the employer's favor.

II. PROCEDURE

A. Form IC 8/9: File an application for VSSR.

B. After Filing: A copy is sent to the Employer who can file an Answer within 30 days. The Staff Hearing Officer may grant an extension not to exceed 30 days for good cause.

C. SVIU: The application is then sent to the BWC's Safety Violation Investigation Unit (SVIU) for a report.

D. Pre-Hearing Conference: A mandatory pre-hearing conference is scheduled. All initial filings of VSSR claims are handled in the Columbus Regional Office and forwarded to the district office that handles the IW's claim for the pre-hearing conference.

E. Merit Hearing: A merit hearing is held if the VSSR issue has not been settled. The Staff Hearing Officer must issue an order.

F. Requests for Re-Hearing: Requests may be filed within 30 days of receipt of the Staff Hearing Officer order. This is referred to a Staff Hearing Officer in the Columbus Regional Office for the decision to grant or deny. If granted, another merit hearing is held.

III. PRE-HEARING CONFERENCE

A. Representatives: Representatives must attend unless there is a signed VSSR settlement agreement.

B. Record Hearing: The parties will determine if a record hearing is requested:

1. New evidence:

   a. If a record hearing is held, both parties are permitted to introduce new evidence at the hearing on the application.

   b. If no request is made for a record hearing, no new documentary evidence or testimony will be accepted or will be submitted at the merit hearing. Clarifying evidence may be considered.

2. Court reporter: provided by the requesting party.

3. If the party that requested a record hearing later determines they do not want one, the party shall promptly notify the opposing party and their representative. If desired, the opposing party may secure their own court reporter so the hearing may proceed as a record hearing.

C. Civil Case: is there an intentional tort case pending? The VSSR issue can be stayed until resolution of the court case with the request and agreement of all the parties. The Commission does not look for a pending case, but waits to be notified by the parties.

D. Settlement Negotiations: what is the status? If settlement is a valid consideration, the agreement must be reached by the merit hearing date.

E. Scheduling the Merit Hearing: Along with the parties, the Staff Hearing Officer will choose a date and time for the merit hearing.

F. Merit Hearing Time: The amount of time required for the hearing will be determined- one hour is usually allowed for the merit hearing, but two or more hours can be allocated- the complexity of issues will be taken into account.

IV. RESETS, CONTINUANCES, & SETTLEMENTS

A. Resets and Continuances:

1. Hearings are not to be reset except in extreme circumstances such as weather or illness, etc.

2. Possible settlement is not a valid reason to reset.

3. A scheduling conflict for one of the parties is also not a valid reason to reset.

4. A mutually agreed time and date for the hearing is reached at the pre-hearing conference. The parties are made aware at that time that no resets will be granted due to scheduling conflicts or settlement negotiations.

5. If the party does not attend the pre-hearing conference, they are made aware of the time, date, and location of the hearing by letter.

B. Settlements:

1. At the pre-hearing conference, the parties will be told that they must submit settlement papers no later than the date of hearing.

2. If the parties appear and indicate that a settlement has been reached but do not have signed

settlement papers, the Staff Hearing Officer is to let them know the hearing will be considered to have gone ahead on the merits. If the parties do not appear, then the hearing officer should contact the parties to see if they have agreed to settle the application and if they have a signed settlement agreement. The parties will have been deemed to have waived their rights to a hearing on the merits and an order will be issued on the merits if a signed settlement agreement is not submitted and received within 30 days of the date of hearing.

V. SUFFICIENCY OF VSSR APPLICATIONS AND AMENDING APPLICATIONS

A. Timelines: Statute of Limitations

1. All claims prior to 09/15/2020: Two years from the date of injury, date of disability (if an occupational disease) or date of death.

2. All claims on or after 09/15/2020: One year from the date of injury, date of disability (if an occupational disease) or date of death.

3. This is true even if the claim is not administratively allowed until after the one or two years; the injured worker has an obligation to file a VSSR application to protect his or her interests before the two-year deadline. See *Commission Order 12- 871735* (Heard 08/18/2015).

4. Informal correspondence between the injured worker or his/her representative and the IC which does not set forth the facts predicating the alleged violation and the regulations involved, and of which the employer is not provided with copies is insufficient to satisfy the statute of limitations. See *State ex rel. Fruehauf Trailer Co. v. Coffinberry*, 154 Ohio St. 241, 95 N.E.2d 381 (1950) (a formal VSSR application was not filed until after two years after the date of injury. However, the Injured Worker's wife wrote a letter to the Commission request a VSSR application. The Commission wrote back and said the VSSR issue would be considered at a later date. Then the wife responded, again requesting a blank VSSR application. The Commission wrote back, stating the VSSR issue was being referred to the legal department. After the two-year limitation period had passed, the Commission then sent blank applications to the Injured Worker, who submitted a completed one a month later. The Court found these letters were insufficient to constitute an application. Additionally, the Court found the statute of limitations was not tolled, as the statute is clear and unequivocal in requiring application within two years.)

B. Statement of Facts

1. The application must set forth the facts which form the basis of the violation.

C. Amending an Application

1. Within the statute of limitations:

a. When an application is amended within two years following the date of injury, disability, or death, for claims arising before September 15, 2020 or within one year following the date of injury, disability, or death for claims arising on or after September 15, 2020, it may be amended to add **"any additional or alternative violation."** Ohio Adm.Code 4121-3-20(C)(1)(a).

2. Beyond the statute of limitations:

a. When an application is incomplete or has a mistake and the claimant is not notified of the deficiency, the application may be amended after the two-year statute of limitation following the date of injury, disability or death for claims arising before September 15, 2020 or within one year following the date of injury, disability or death for claims arising on or after September 15, 2020, if the amendment does not raise an unstated claim. The amendment must merely clarify a previously alleged violation in the claim and "shall not raise any unstated claim." See Ohio Adm.Code 4121-3-20(C)(1)(b); *State ex rel. Bailey v. Indus. Comm.,* 23 Ohio St.3d 53, 491 N.E.2d 308 (1986).

b. Form should not be elevated over substance.

i. An application may be amended to add a citation for a specific code section when the narrative information on the original application was sufficient to put the parties on notice to the new code sections added. See *State ex rel. Dillon v. Dayton Press, Inc.*, 6 Ohio St.3d 295, 453 N.E.2d 566 (1983*); State ex rel. Kirby v. S.G. Loewendick & Sons, Inc.*, 64 Ohio St.3d 433, 596 N.E.2d 460 (1992).

ii. Adequate notification to the employer of the omitted code sections may exist where the omitted regulation is obviously related to a regulation cited or is contained in a rule immediately proximate to the one cited. This information is sufficient to adequately apprise the parties of a potential violation. In such circumstances, the application may be amended to add the omitted regulations. See *Oliver v. S.E. Erectors, Inc.,* 76 Ohio St.3d 26, 1996-Ohio-160, 665 N.E.2d 1108 (citing Kirby, supra).

c. Timing

i. Amendments should be submitted within 30 days of receipt of the investigation. The injured worker may request an extension for an additional 30 days, if made in writing within the original 30-day period.

ii. Once filed, a copy is sent to the employer and its authorized representative by mail. The employer has 30 days in which to file an answer. If the employer shows good cause, he or she may be granted an additional 30 days.

d. The Commission assigns the application for an investigation or hearing without investigation. Ohio Adm.Code 4121-3-20 (C)(2).

VI. ENTITLEMENT TO A VSSR AWARD

A. Overview: Four Elements

1. Specificity

2. Applicability

3. Non-Compliance

4. Proximate Cause

Each element will be addressed in depth below.

B. Specificity:

1. The safety requirement(s) cited must be **specific** and not **general** in nature

   a. Was the requirement enacted for the protection of employees rather than for the general public's safety? e.g., it requires a particular and definite act be done.

   b. The requirement forewarns the employer and establishes a standard that should be followed to satisfy the requirement.

2. An alleged code section must be specific enough to plainly apprise an employer of his legal obligations toward his employees. See *State ex rel. Frank Brown & Sons, Inc. v. Indus. Comm.*, 37 Ohio St.3d 162, 524 N.E.2d 482 (1988). To plainly apprise an employer of his legal obligations, a code section need only set forth a specific requirement and a specific result to be accomplished thereby. *State ex rel. Jeep Corp. v. Indus. Comm.,* 42 Ohio St.3d 83, 537 N.E.2d 215 (1989).

3. Not all the requirements in the code are specific. Inclusion in the code does not in and of itself create a specific requirement.

4. A general requirement cannot be made specific through actions of the employer. See *State ex rel. Niebel v. Indus. Comm.,* 36 Ohio St.2d 86, 303 N.E.2d 885 (1973) (Injured Worker conceded the statute that prohibited an employer from failing to furnish, provide, and use safety devices and safeguards was general in nature, but argued that when machinery was equipped with a safety device provided by the manufacturer, the employer's removal converted the statute into a specific one by virtue of its affirmative act. The Court disagreed, finding the general nature was not changed by the employer's actions).

5. Examples:

   a. A safety requirement does not lose its specificity because it is not foolproof. The purpose of specific safety requirements is to provide **reasonable, not absolute, safety** for employees. *Jeep Corp., supra*.

   b. Words like "ample clearance" and recommendations of 10 feet are not sufficient to make a requirement specific. See *State ex rel. Hill v. Indus. Comm.*, 172 Ohio St. 115, 173 N.E.2d 890 (1961).

   c. In 1964, the Supreme Court found a rule that provided: "Whenever practicable, the platform of swing scaffold shall be so lashed or secured while in use that they cannot sway from the structure," **was** specific because the employer was left with no discretion in terms of what it should do in regard to the use of a particular piece of equipment, i.e., it required a "specific thing to be done in relation to the use of [a] scaffold." See *State ex rel. Fast & Co. v. Indus. Comm.,* 176 Ohio St. 199, 198 N.E.2d 666 (1964).

   d. Only some code sections incorporate a manufacturer's instructions regarding inspection and repair; the court will refuse to read this requirement into codes that do not specifically call for it. See *State ex rel. G & S Metal Prods., Inc. v. Moore*, 79 Ohio St.3d 471, 1997-Ohio-137, 683 N.E.2d 1135.

   e. However, a Staff Hearing Officer may consider industry standards as a means to interpret a specific safety requirement. See *State ex rel. Richmond v. Indus. Comm.,* 139 Ohio St.3d 157, 2014-Ohio-1604, 10 N.E.3d 683.

f. The requirements in Chapter 4109 for the employment of minors are specific safety requirements. See *State ex rel. Quality Stamping Prods. v. Ohio Bur. of Workers' Comp.*, 84 Ohio St.3d 259, 1998-Ohio-325, 703 N.E.2d 309.

g. Revised Code sections prescribing mine safety (previously R.C. 4123.33 and R.C. 4153.35, no R.C. 1563.33 and 1563.35) enacted as a means of ensuring the lives, health, and safety of the miners employed in the mine, and were therefore specific. See *State ex rel. Six v. Indus. Comm.*, 21 Ohio App.3d 22, 486 N.E.2d 125 (10th Dist. 1984).

h. Mine Statutes

i. R.C. 1563.33 and 1563.35 are specific safety requirements enforceable under Ohio Constitution, Article II, Section 35. See Memo P1.

6. Citation to Applicable Code or Statute

a. The application must cite the sections of the law and code which are applicable.

b. Narrative information may be satisfactory

i. The application may be satisfactory if it either cites a specific regulation, code section or the narrative information describing the alleged violation in sufficient detail to put the Commission or Employer on notice as to the specific safety requirement/code section claimed to have been violated. See *Bailey, supra*; *State ex rel. Thompson Bldg. Assoc. v. Indus. Comm.*, 36 Ohio St.3d 199, 522 N.E.2d 545 (1988).

C. Code Applicability:

1. Determine whether the specific safety code was **applicable** to the facts/situation in question.

a. For example, was the employment activity within the scope of the specific safety code/requirement to merit the award? E.g., was the injury situs a workshop or factory so that chapter would apply? Was the injured worker actually working above the height contingency? Was the injured worker the operator? Was the machine an installation or construction?

b. The "principal business test" and definition of workshops and factories as discussed later regard applicability.

2. Federal regulations are not applicable. Pursuant to Article II Section 35, only statutes enacted by the General Assembly or codes enacted by the Commission are applicable. See *State ex rel. Roberts v. Indus. Comm.*, 10 Ohio St.3d 1, 460 N.E.2d 251 (1984).

3. The code does not cover **nebulous hazards**. *State ex rel. Burchfield v. Pruitech Corp.*, 83 Ohio St.3d 169, 1998-Ohio-121, 699 N.E.2d 56 (As part of her duties of operating a book-binding machine, the Injured Worker would pick up books, walk four to five steps, and place the books in a box that was resting on a wooden skid. On the DOI, she was putting the books into a box when a co-worker inadvertently lowered the skid onto the Injured Worker's foot, causing injury. She sought a VSSR award based on the Employer's failure to provide foot protection. The Commission and court denied, finding the operation of a binding machine did not present a clear foot hazard, and therefore the code did not apply.)

4. If a term is not defined in a definitional section of the code, use the common ordinary dictionary definition.

5. Out of State Job Sites.

    a. Ohio specific safety requirements apply to out-of-state job sites if they are not in conflict with the codes of the state where the work is being performed. *State ex rel. Winzeler Excavating Co. v. Indus. Comm.,* 63 Ohio St.3d 290, 586 N.E.2d 1087 (1992).

6. Which code is applicable?

    a. See Section VIII, *infra* for specific situations.

7. Use of equipment contrary to design

    a. When equipment is used in a manner so that it mimics a different kind of equipment (e.g., a crane boom used as a scaffold), whether the employer specifically instructed the employee to use the equipment in an alternative manner is the germane question. See *State ex rel. Cleveland Wrecking Co. v. Indus. Comm.*, 35 Ohio St.3d 248, 520 N.E.2d 228 (1988) (the scaffold rules applied when the employer specifically instructed the injured worker to use the crane boom as a scaffold).

D. Code Noncompliance:

1. The central issue here is whether the code was complied with or not.

2. Practical inconvenience does not excuse noncompliance with a specific safety requirement. *State ex rel. Mosser Construction, Inc. v. Indus. Comm.,* 61 Ohio St.3d 445, 575 N.E.2d 193 (1991). See also *State ex rel. Cleveland Wrecking Co., supra*.

3. Correct/Proper Employer Issues: [control is the relevant issue]

    a. Temporary Agency Claims -The entity that controls the manner or means of performing the work is the proper employer who is subject to the specific safety code requirement. *State ex rel. Newman v. Indus. Comm.,* 77 Ohio St.3d 271, 1997-Ohio-62, 673 N.E.2d 1301. This will usually be the on-site/customer employer.

    b. Employer Control - An employer who neither owns nor is responsible for the condition and maintenance of a device used by his employee in doing work for the owner thereof, where the device violates a specific safety code requirement and that violation causes the injury, such employer is not "the employer" for purposes of the specific safety code requirement. *State ex rel. Reed v. Indus. Comm.*, 2 Ohio St.2d 200, 207 N.E.2d 755 (1965) (It would be unfair to punish the Employer for a condition which it did not create and which it had no authority to alter or correct, and thereby place it in the category of an ‘employer’ who failed to comply with a SSR).

    c. Subcontractor/General Contractor - In the case of a general contractor, there may exist the requisite degree of responsibility (or control) over a subcontractor and their equipment to warrant a specific imposition of a specific safety code requirement on the general contractor depending on the facts of the particular case. (The court stopped short of indicating what factors to look at). *State ex rel. Zito v. Indus Comm.*, 64 Ohio St.2d 53, 413 N.E.2d 787 (1980).

d. Employer Authority to Alter or Correct - Whether or not the employer had the authority to alter or correct the defective condition is a primary factor in determining liability. Merely citing a lack of ownership or maintenance is not enough. The employer must also show it had no authority to alter or correct the defective condition. This must be determined on a case by case basis and should not be predetermined by an employer's contractual status. *State ex rel. Lyburn Construction Co. v. Indus. Comm.*, 18 Ohio St.3d 277, 480 N.E.2d 1109 (1985*); State ex rel. Grunau Fire Protection Sys. v. Indus. Comm.,* 65 Ohio St.3d 320, 603 N.E.2d 1003 (1992).

e. Parent Corporation Liability - As a general rule, a parent corporation is not liable for a specific safety code requirement violation by a subsidiary, even if wholly owned. However, the parent corporation is liable where the other entity is a division or subdivision of the parent. *State ex rel. Lewis v. Indus. Comm.*, 23 Ohio St.3d 195, 491 N.E.2d 1142 (1986).

4. Strict Construction

a. A violation of a specific safety requirement is an employer penalty and every code section must be strictly construed in favor or the employer when determining whether or not the code section has been violated. *State ex rel. Burton v. Indus. Comm.*, 46 Ohio St.3d 170, 545 N.E.2d 1216 (1989).

b. **Caveat** - The facts of the case are not to be strictly construed in favor of the employer, just the **code section**.

E. Proximate Cause:

1. Did the non-compliance cause the injury or death? The focus is on the conduct of the employer, not the employee. But for the employer’s non-compliance, would the employee have been injured or killed?

a. The corollary to this question is: would compliance have prevented the injury or death? See *State ex rel. Bayless v. Indus. Comm.,* 50 Ohio St.3d 148, 552 N.E.2d 939 (1990).

b. What was the purpose of the rule? Was the rule intended to prevent the type of injury suffered?

2. If the cause of the accident is unknown, it becomes difficult (if not impossible) to establish proximate cause. *State ex rel. Ellis v. Indus. Comm.*, 53 Ohio St.3d 64, 559 N.E.2d 454 (1990); *State ex rel. Lott v. Indus. Comm.*, 10th Dist. No. 09AP- 407, 2010-Ohio-2063.

VII. DEFENSES

A. Unilateral Negligence:

1. Since the claimant has the burden of proof, the initial focus is upon the employer's actions and whether or not it met the specific safety code requirements since these requirements exist to protect employees against their own negligence or folly. Only after it is determined that the employer has met the code requirements can the injured worker's negligence be used to bar a Violation of a Specific Safety Requirement award. *State ex rel. Quality Tower Serv., Inc. v. Indus. Comm.*, 88 Ohio St.3d 190, 2000-Ohio-296, 724 N.E.2d 778 (“the

defense is not actually about an employee's negligence. The employer instead avoids VSSR liability when '[the] employee unilaterally violates a safety requirement,' that is, when the employee removes or ignores equipment or instruction that complies with a specific safety requirement. On the other hand, an employee's negligence in failing to protect himself from injury due to an employer's VSSR will never bar recovery because specific safety requirements exist to promote a safe work environment and to protect employees against their own negligence and folly.'")

2. No Duty of Constant Surveillance. There is no duty of constant surveillance by an employer over the equipment provided. If the employee fails to follow clear directives that would meet the code requirements, or fails to use provided safety equipment where the equipment meets the code section, then the injured worker's unilateral negligence bars recovery. See *Frank Brown & Sons, supra; N. Petrochemical Co., v. Indus. Comm.*, 61 Ohio St.3d 453, 575 N.E.2d 200 (1991).

3. Removal of Safety Equipment/Guards. If an employee removes or bypasses safety equipment or guards that meet the code requirements, then their unilateral negligence bars recovery for an award based on a violation of a specific safety requirement. *State ex rel. Cincinnati Drum Serv., Inc. v. Indus. Comm.,* 52 Ohio St.3d 135, 556 N.E.2d 459 (1990).

4. An employer cannot avoid liability for a violation of a specific safety requirement by asserting negligence by an employee other than the injured worker. *Weich Roofing, Inc., v. Indus. Comm.*, 69 Ohio App.3d 281, 590 N.E.2d 781 (10th Dist. 1990). Additionally, an employer cannot delegate code compliance responsibility to a supervisor.

B. Safety Equipment and Machinery Malfunction:

1. There is no violation for a **one-time malfunction** of the safety equipment when such was not foreseeable. *State ex rel. M.T.D. Prods., Inc. v. Stebbins*, 43 Ohio St.2d 114, 330 N.E.2d 904 (1975).

2. In a safety equipment malfunction case, the decision will depend upon the factual determination of whether:

   a. There was a one-time malfunction that the employer had no reasonable basis to expect, in which case there would be no violation; or

   b. The evidence showed a prior history of malfunctions and/or problems with the employer and he or she should have been, aware of those problems (violation); or

   c. For some other reason the employer should have been aware that there was a good chance that a malfunction would occur (violation).

3. The question before the commission is whether the employer had ever been forewarned of the malfunction on the date of injury by a prior malfunction of the safety device. See *State ex rel. Penwell v. Indus. Comm.,* 142 Ohio St. 3d 114, 2015-Ohio-976, 28 N.E.3d 101.

C. Impossibility

1. In *State ex rel. Jackson Tube Service, Inc., v. Indus. Comm.,* Slip Opinion No. 2018- Ohio-3892, the Supreme Court held that impossibility is a defense to a VSSR claim. To establish impossibility as an affirmative defense to a VSSR, an employer must show (1) that it would have been impossible to comply with the specific safety requirement or that compliance would have precluded performance of the work and (2) that no alternative means of

employee protection existed or were available.

VIII. CIVIL PENALTIES

A. R.C. 4121.47 and Ohio Adm.Code 4121-3-20(H): In addition to the VSSR award, R.C. 4121.47 and Ohio Adm.Code 4121-3-20(H) authorize a civil penalty of up to $50,000 against any employer that has had two or more safety violations in a 24-month period.

1. In fixing the exact penalty, the staff hearing officer shall base the decision upon the size of the employer as measured by the number of employees, assets, and earnings of the employer.

2. If the two VSSRs occur at the **same workplace**, the violations need not be of the same type or kind for a penalty to be assessed.

3. However, if the two VSSRs occur at two **different** workplaces owned, operated, managed, leased or otherwise controlled by the same individual, company or corporation, the violations must be for **the same specific safety requirements**.

4. "Workplace" and “specific safety requirements” are specifically defined in Ohio Adm.Code 4121-3-20(H).

B. Ohio Adm.Code 4121-3-20(G): Furthermore, Ohio Adm.Code 4121-3-20(G) provides that an employer that fails to comply with a directive to correct the violation within the time frame specified (contained within an order granting a VSSR), is deemed to have committed a second violation for purposes of R.C. 4121.47.

C. Procedure:

1. The assessment of a civil penalty in a VSSR case shall be independent of the merits of a VSSR order and requires the issue be specifically noticed.

2. Most often, these are heard on the Administrator’s motion following a failure to correct, as the civil penalty award is collected and deposited into the safety and hygiene fund, and is not awarded to the injured worker.

IX. SPECIFIC SITUATIONS

** In 2003, the codes were renumbered to Chapter 4123:1; prior to then, they were 4121:1. **

A. Chapter 4123:1-1 Elevators

1. 4123:1-1-01: Definitions

a. An elevator shaft is construction related to any elevator, therefore fitting within the definition and subject to the requirements. *State ex rel. Coss, Inc. v. Indus. Comm.*, 39 Ohio St.3d 350, 530 N.E.2d 1318 (1988).

2. 4123:1-1-02: Certificate

a. This section creates a rebuttable presumption that in the absence of a valid certificate or authorization, injury or death due to the elevator was because of a violation of this specific safety requirement.

b. The presumption can be rebutted by showing the absence of the certificate was due to factors beyond the employer's control (of which (C)(1) contains a list). The employer can also escape liability through establishing any such violation was not the proximate cause of the injury or death. *Coss, supra*.

B. Chapter 4123:1-3 Construction

1. 4123:1-3-01 Scope and Definitions

a. The "**Principle Business Test**"- The code covers construction activities of employees whose employer engages in such work as its principal business. It requires construction activities to be the employer's principal business; otherwise these code sections do not apply.

i. For example, the Court held the water department's principal business is to supply water to the county and not to engage in construction, so the codes were not applicable. See *State ex rel. Kilburn v. Indus. Comm.,* 1 Ohio St.3d 103, 483 N.E.2d 422 (1982).

b. Driving to a construction site has been viewed as a construction activity under the catchall phrase "and all operations in connection therewith," so that this chapter will apply. See *State ex rel. Lamp v. J.A. Croson Co.,* 75 Ohio St.3d 77, 1996-Ohio-319, 661 N.E.2d 724.

c. "Provide" means to make available.

i. *Greco v. Conrad*, 91 Ohio St.3d 105, 2001-Ohio-293, 742 N.E.2d 627.

a) "The equation of possession with availability is troubling. An employer can own safety equipment, but if it is locked in a remote warehouse, it is hardly 'available.' Possession is meaningless without an additional element—employee accessibility."

ii. *Toledo Neighborhood Housing Servs. v. Indus. Comm*., 92 Ohio St.3d 229, 2001-Ohio-151, 749 N.E.2d 739.

a) "[I]f a worker does not know that certain equipment exists, the employer has not provided it."

iii. *State ex rel. Avalotis Painting Co. v. Indus. Comm.*, 91 Ohio St.3d 137, 2001-Ohio-243, 742 N.E.2d 1124.

a) "[T]he commission did not abuse its discretion when it interpreted [former] Ohio Adm.Code 4121:1-3-03(J) to require the employer to have a lifeline **in place** in the area where their employees are instructed to work. A lifeline is useless if it's not in place for the employee to tie off."

b) *State ex rel. Highfill v. Indus. Comm.,* 92 Ohio St.3d 525, 2001-Ohio-1275, 751 N.E.2d 1029 affirmed *Avalotis*, holding the "purported

availability of an adjacent purlin [cross beam] did not relieve [the employer] of its responsibility to provide a lifeline as directed by the relevant specific safety requirement." E.g., to have a lifeline rigged up and in place.

d. *State ex rel. Mayle v. Indus. Comm.,* 86 Ohio St.3d 74, 1999-Ohio-348, 711 N.E.2d 687.

i. The Employer possessed the required safety equipment and the Injured Worker had the opportunity to obtain that equipment from the Canton home office before leaving for the Bellefontaine job site. Therefore, the Commission did not abuse its discretion in finding the Employer **did** provide the requisite safety equipment.

2. 4123:1-3-03(J) – "Personal protective equipment: Safety belts, harness lifelines and lanyards." See above cases regarding the definition of "provide." See also, *State ex rel. Curtin v. Indus. Comm.*, 86 Ohio St.3d 581, 715 N.E.2d 1162 (1999) (it was not an abuse of discretion for the Commission, in cases where the distance above the ground is at issue in relation to the operation being performed, to measure the distance from the employee's **feet** to the ground to assess applicability of the specific safety requirement at issue).

3. 4123:1-3-04(B)- "Floor hole" and "floor opening" are defined differently in the Construction code than they are in the Workshops and Factory code, so be cognizant. In this code:

a. "Floor hole" means an opening measuring **less than 12 inches** but more than two inches in its **least dimension** in any walking or working surface **six feet or more above the lower level**.

b. "Floor opening" means an opening measuring **12 inches or more** in its **least dimension** in any walking or working surface **six feet or more above the lower level.**

4. If a definition such as 4123:1-3-04 (B)(5) for "platform" is one which you can use, you should use it. If not, use the common ordinary dictionary definition.

5. 4123:1-3-04 (F)- **"Stairways" and hybrid ladders or steps -** beware of the hybrid ladder or step which does not fit into either category and which may possibly be covered by more than one section.

6. 4123:1-3-07(E) **"Cranes, hoists, and derricks: Proximity to overhead electric conductors"** - applies to scaffolds as "any other type of hoisting apparatus." See *State ex rel. Devore Roofing & Painting v. Indus. Comm.,* 101 Ohio St.3d 68, 2004- Ohio-23, 801 N.E.2d 435.

7. 4123:1-3-10 **"scaffolds" -** Applies to all scaffolds, regardless of the stage of construction. *State ex rel. Johnson v. Indus. Comm.*, 122 Ohio St. 3d 289, 2009- Ohio-3453, 910 N.E.2d 1030.

8. 4123: 1-3-13 **"Trenches"-** Angle of Repose. When dealing with trenches, you need to distinguish between solid rock, compacted angular gravel, slopes for average soils, etc.

9. 4123:1-3-18 **"Heating, Ventilating and Exhaust Equipment"**- This is a difficult area to understand. A safety expert may be needed when these issues are examined.

10. 4123:1-3-20 **"Steel erection"** - For construction of "solid web structural member" and "load," see *State ex rel. Orbit Movers & Erectors v. Indus. Comm.,* 65 Ohio St.3d 344, 603 N.E.2d 1021 (1992).

C. Chapter 4123:1-5 Workshops and Factories

1. 4123:1-5-01 Scope and Definitions

a. Definition of Workshops and Factories - The code does not define "workshops and factory." Instead, case law has interpreted these.

b. Not All Employers and Places Covered - Code 4123:1-5's reference to workshops and factories does not make it apparent that all employers and places of employment fall thereunder. Had such been intended the code would presumably have been used such language. *State ex rel. Double v. Indus. Comm.*, 65 Ohio St.3d 13, 1992-Ohio-39, 599 N.E.2d 259.

c. A "workshop" is a place located within some form of structural enclosure. "Our definition refers to a place wherein the relevant power machinery and manual labor is employed, not whereat these activities occur." *State ex rel. Waugh v. Indus. Comm.,* 77 Ohio St.3d 453, 1997- Ohio-252, 674 N.E.2d 1385 (citing *York Temple*).

d. Where the code regulates activities that can be performed indoors or outdoors, the code applies only to those activities that can be done indoors. However, where the activity to be regulated can only be done outdoors the code applies to such activity. *State ex rel. Parks v. Indus. Comm.*, 85 Ohio St.3d 22, 1999-Ohio-200, 706 N.E.2d 774 (electric utility and clearance tree-trimming industries cannot be performed indoors, so the regulations do apply to such outdoor activity).

e. A fenced-in compound is a workshop and factory. *State ex rel. Petrie v. Atlas Iron Processors, Inc.,* 85 Ohio St.3d 372, 1999-Ohio-391, 708 N.E.2d 716 (perimeter fencing around scrapyard rendered it a "workshop").

f. A workshop may also be located in other places that do not qualify as workshops in their entirety, like farms. See, e.g., *State ex rel. Buurma Farms v. Indus. Comm.,* 69 Ohio St.3d 111, 1994-Ohio-374, 630 N.E.2d 686.

g. Installation and Construction 4123:1-5-01(A) "**Grandfather clause**" - Installations or constructions built or contracted for prior to the effective date (shown at the end of each rule) of any requirement shall be deemed to comply with the provisions of these requirements if such installations or constructions comply either with the provisions of these requirements or with the provisions of any applicable specific safety requirement which was in effect at the time contracted for or built.

i. The words "installation" and "construction" customarily refer to something that can be installed or affixed to a structure. Size, relative permanence, and immobility are key components of an installation or construction. *State ex rel. Colliver v. Indus. Comm.*, 84 Ohio St.3d 476, 1999-Ohio-363, 705 N.E.2d 349.

ii. A mobile object is not a construction or installation; therefore, the Workshops and Factories code in effect on the **date of injury** applies. "*Colliver* did not say that a machine **must** be attached to a structure to be considered an installation or construction. It stated that it **could be** and, in

fact, often was, but that fact does not translate into a requirement." *State ex rel. Arce v. Indus. Comm.*, 105 Ohio St.3d 90, 2005-Ohio-572, 822 N.E.2d 795.

h. Material Alteration of a Machine - To change **the function of**, not just add a safety guard. One theory holds that when a machine which is already in place is materially altered, then the code section in effect on that date of the alteration is the one that should apply. A material alteration is one that changes the function of the machine/ equipment (for example, it would not be just the addition of a safety guard to the piece of equipment). This theory is based upon the "scope section" of the workshops and factories code. **There is no statute, code section or case law that explicitly supports this viewpoint.**

i. 4123:1-5-01(B)(28) "**confined space**" - The Commission is within its discretion to find a hopper that is completely open on the top has enough natural ventilation to remove it from the definition of confined space. See *State ex rel. Moore v. Indus. Comm.,* 79 Ohio St.3d 347, 1997- Ohio-145, 681 N.E.2d 924.

j. 4123:1-5-01(B)(55) and (56) "**floor hole**" and "**floor opening**" are different than the ones in the Construction code.

i. "Floor hole": an opening measuring **less than 12 inches but more than one inch** in its **least dimension** in any floor, pavement, or yard.

ii. "Floor opening": an opening measuring **12 inches or more** in its **least dimension**, in any floor, platform, pavement, or yard.

k. 4123:1-5-01(B)(69) and (70) "**guard**" and "**guarded**"- The definitions for guard and guarded govern only **accidental contact**.

i. "Guarding * * * against accidental contact does not impose a duty on the employer to provide a guard that is effective against **any** contact, but only to provide a guard where accidental contact could reasonably be expected." **State ex rel. Cincinnati Drum Serv., Inc. v. Indus. Comm.,** 52 Ohio St. 3d 135, 556 N.E.2d 459 (1990).

ii. This section requires coverage for reaching or stumbling in, but not expulsion. See *State ex rel. Burt v. Indus. Comm.,* 87 Ohio St.3d 175, 1999-Ohio-19, 718 N.E.2d 900 (in strictly construing the statutes requiring the shielding of an **object** from accidental contact, the Court held the guarding provisions were not enacted to protect employees from accidental expulsion, but instead to protect employees from accidental contact with the machine or its moving parts).

l. 4123:1-5-01(B)(74) "**hazardous concentration**" - What is the degree to which contamination should be known by the employer? (see 4123:1-5- 01(B)(4) "air contaminants").

m. 4123:1-5-01(B)(102) "**press**" - This is an important section. Check this section when dealing with 4123:1-5-10, "Mechanical Power Press" citations and 4123:1-5-11 hydraulic and pneumatic presses.

n. 4123:1-5 -01(B)(119) "**scaffold**" - This section does not define a scaffold, but describes various types of scaffolding. The hearing officer can get a definition from

4123:1-3-10(B)(30) in the Construction code.

2. 4123:1-5-02(D) “**elevated platforms, runways, and walkways**” - For the exception of special purpose runways, see *State ex rel. Wheeling-Pittsburgh Steel Corp. v. Indus. Comm.*, 100 Ohio St.3d 26, 2003-Ohio-4831, 795 N.E.2d 664 (Where operating conditions necessitate the omission of standard guard railing, alternative protection is not required).

3. 4123:1-5-04 "**mechanical power transmission apparatus**" - Please see the 1964- 77 edition for auxiliary equipment problems. The scope section is limited to mechanical power transmission apparatus and eliminates conveyor belts.

4. 4123:1-5-05(C) “**power-driven conveyors**” - For construction of (C)(2) re: conveyors exposed to contact, see *State ex rel. Ford v. Indus. Comm.,* 67 Ohio St.3d 121, 616 N.E.2d 228 (1993).

5. 4123:1-5-08

   a. (D)(1)(d) "**circular saws**" - Under the "alternative method" for guarding circular saws, it should be noted that a scrap of wood may be a substantial jig.

   b. (D)(2)(a) “**circular rip saw: guarding**” - This section requires the saw have both a table and feed rolls. “The guard's placement is determined directly by the feed rolls. Without these rolls there is no point of reference or measurement for the guard.” *State ex rel. Sanor Sawmill, Inc. v. Indus. Comm.*, 101 Ohio St. 3d 199, 2004-Ohio-718, 803 N.E.2d 802.

6. 4123:1-5-10 "**mechanical power press**" - Under this section, a power press versus a press break.

7. 4123:1-5-11(E)(4) “**pull guard**” - The pull guard must pull the operator’s hands from the danger zone during the operating cycle. This includes the duty to **properly adjust** the pull guard prior to the injured worker’s operation of the press so that the operator’s hands are pulled from the danger zone during the operating cycle. See *State ex rel. Amanda Bent Bolt Co. v. Indus. Comm.,* Tenth Dist. Franklin No. 14AP-295, 2015-Ohio-3487.

8. 4123:1-5-14 “**power-driven cranes and hoists**”

   a. (G)(1) “Defective safety devices or load-carrying equipment” – when an employer’s attempt to repair the equipment inadvertently creates a subsequent defect that later leads to injury, the safety requirement has not been complied with. See *State ex rel. Int’l Truck & Engine Corp. v. Indus. Comm.*, 122 Ohio St.3d 428, 2009-Ohio-3502, 912 N.E.2d 85.

9. 4123:1-5-15 “**Abrasive grinding and cutting, polishing and wire buffing equipment**” - See *State ex rel. Hirschvogel, Inc. v. Miller*, 86 Ohio St.3d 215, 1999- Ohio-96, 714 N.E.2d 386.

10. 4123:1-5-17 “**personal protective equipment**”

    a. (E) "**Foot (toe) protection**" - For a hazard to require a foot protection, it must be real and concrete, not nebulous. This is a gray area and one requiring a factual determination. In *Burchfield, supra*, the Court indicated a nebulous hazard is one that exists as a part of everyday life. Furthermore, a claimant need not prove the **extent** to which safety equipment (foot protection) would have reduced or

eliminated the injury. Claimant still must demonstrate proximate cause. *State ex rel. S&Z Tool & Die Co. v. Indus. Comm.*, 84 Ohio St.3d 288, 1999-Ohio-351, 703 N.E.2d 779.

b. (F) "**respiratory protection**" - The presence of an occupational disease does not necessarily establish that hazardous concentrations of contaminant existed, since a person may have contracted an occupational disease because of abnormal sensitivity to or because of hazardous concentrations of a contaminant. *State ex rel. Gilbert v. Indus. Comm.*, 116 Ohio St. 3d 243, 2007-Ohio-6096, 877 N.E.2d 979.

11. 4123:1-5-23 "**electrical conductors and equipment**" - Instructing the employee to turn power off before handling conductors connected to a power supply does not render the conductors "isolated from all possible sources of voltage." *State ex rel. Coffman v. Indus. Comm.*, 109 Ohio St. 3d 298, 2006-Ohio-2421, 847 N.E.2d 427.

12. **Operator** - Sometimes a code section applies only to the person who is the **operator** of the machine or equipment in question. Whether a person is an **operator** will depend on how the machine works and the person's duties with regard to the machine. See *Scott Fetzer Co., Halex Div. v. Indus. Comm.,* 81 Ohio St.3d 462, 1998-Ohio-457, 692 N.E.2d 195 ("Regardless of what [the Employer] chose to call claimant, he was actively involved in the machine's operation. Claimant started, inspected, and cleaned the die. He operated the linkage mechanism and set die heights. He oiled the die and checked for defective parts. He was responsible for lodged parts and correcting malfunctions. He was not, therefore, a casual observer with no responsibility for or participation in the machine's function.")

13. **Press Operating Cycle** - The "**operating cycle**" of a press is not statutorily defined, but has been interpreted to mean both intentional and accidental press activation by the machine's operator. See *State ex rel. Advanced Metal Precision Prods. v. Indus. Comm.*, 111 Ohio St.3d 109, 2006-Ohio-5336, 855 N.E.2d 435 (overruling *Aspinwall* and *Garza* which limited the phrase to intentional press activation, finding the definition too restrictive).

14. Evaluation of how equipment/machine works and is required to be used.

a. The normal use of an object is immaterial. Code applicability is based on the manner in which the employer requires the claimant to use the equipment or machinery. Also see *State ex rel. Volker v. Indus Comm.,* 75 Ohio St.3d 466, 1996-Ohio-155, 663 N.E.2d 933. The Commission may determine the applicability of a code section by the way the equipment in question is used or by the way it is constructed, whichever is most appropriate for the facts of the case. See *Greene v. Martin Sprocket & Gear*, 90 Ohio St.3d 531, 2001-Ohio-12, 740 N.E.2d 248.

15. **The Bankrupt Employer Buyout** - When a new employer buys out a prior, bankrupt employer and takes over use of the bankrupt employer's building and machinery; then the date on which the bankrupt employer's building and machinery were "installed or contracted for" should be the date used to determine which version of the Workshops and Factories code should apply. The reason why this date should be controlling is due to the fact that the purchase date appears to be the date the code section describes as contracted for. This rationale is consistent with the fact that when a new employer purchases used equipment from another employer/manufacturer and places it in his or her own building, the installation date or date contracted for would be the date on which the equipment was purchased and installed by the new owner. It would not be the original owner's date of installation. There is no statute, code section or case law that explicitly supports this viewpoint.

D. Chapter 4123:1-7 Metal Casting

1. 4123:1-7-01 contains a grandfather clause like in construction/installations.

E. Chapter 4123:1-9 Steel Making, Manufacturing, and Fabricating

F. Chapter 4123:1-11 Laundering and Dry-cleaning

G. Chapter 4123:1-13 Rubber and Plastic Industries

H. Chapter 4123:1-17 Window Cleaning

I. Chapter 4123:1-21 Fire Fighting

X. STEP-BY-STEP GUIDE TO REVIEW EACH CLAIM

A. Application:

1. What code sections are cited?

2. What is the description of injury?

B. Investigation Report:

1. Evaluate statements of the parties and/or witnesses

2. Evaluate description of the instrumentality involved

3. Scrutinize photos. Sometimes, the issues are overwhelming and it is often difficult to visualize operational aspects from the narrative description.

4. Examine any manuals filed as evidence.

5. Was the investigator denied access to information? This will be listed in the report discussion section. Denial of access may be relevant to the employer's credibility.

6. If the information in the report is deficient, send it back for further investigation specifying what needs to be obtained.

7. Second investigations are rare, but check the file to be sure.

C. Amendments: check all of them so you know all the violations alleged.

D. Evidence:

1. Is there new evidence?

a. Is this a record hearing?

2. Was the evidence timely submitted?

3. Read all the evidence not part of the investigation report.

E. Code sections:

1. Have any new ones been added?

2. Check the scope section of each rule cited.

3. Read the definitional terms.

4. Look for any limitations or exculpation language.

XI. CONDUCTING THE MERIT HEARING

A. Procedural:

1. Rule on objections to questions.

2. Rule on procedural objections.

   a. E.g., whether a record hearing was timely requested.

3. Dismiss those issues that are not relevant, and explain why.

4. Rule on tardiness, timeliness, and continuance issues that arise.

   a. For example, if a large volume of evidence is submitted at the table of a record hearing, the other side may request a continuance to have time to review the new evidence so as not to be prejudiced.

B. Code Sections:

1. If the injured worker cites no specific code section, an entire rule, or a large number of specific sections, ask which particular sections are being alleged and request the party dismiss those no longer alleged.

2. If they will not specify or dismiss, be sure to notify them they must keep their arguments within the time allotted.

C. Order of Presentation & Factors to Consider:

1. Order

   a. As it is the injured worker's application, he or she proceeds first, presenting their basis, argument, and any witnesses.

   b. Employer cross-examination.

   c. Redirect and rebuttal.

   d. Employer's basic arguments, witnesses, cross, redirect, and rebuttal.

2. Explanations

   a. Have the injured worker, employer, and witnesses explain what happened, how

equipment functions, and how the accident occurred in a manner you (the Staff Hearing Officer) can understand and visualize.

b. Use narratives, photos, videos, and OSHA reports.

c. Some people will have a difficult time articulating what happened. Probing questions may be required; do not let a witness escape without answering all of your questions.

d. Spend as much time as is necessary for you to understand the process and what the injured worker did. Do not let the hearing end if you don't understand.

3. Witnesses

a. Separate, if necessary.

b. Be aware of badgering, and try to prevent as much as possible.

4. Scope

a. Do not rule on a scope issue until all sides have had a chance to argue.

5. Risk

a. Questions may arise regarding the proper risk; remember, you are not to rule on risk, just the proper employer.

6. Announcing

a. Almost never should you announce your decision at the table; sometimes your decision will change after you start to write the order.

XII. ORDER WRITING

A. Decision: before you begin writing, make your decision for each allegation.

B. Form:

1. Begin with the facts of the case: devote a paragraph to how the injury happened and, if applicable, how the machine in question works.

2. Break down each code section and describe it.

3. Write the decision one code section at a time.

a. Sometimes, different code sections can be resolved with the same analysis or reasoning. If so, group them together.

b. Be sure to address each violation/code section alleged. Some hearing officers address them in order, for ease. Tip: make a checklist of all the sections and be sure each was ruled upon.

4. For Grant Orders:

a. Evidence

i. Direct evidence is not required, but inferences may suffice. See, e.g., *State ex rel. Shelly Co. v. Steigerwald*, 121 Ohio St.3d 158, 2009-Ohio-585, 902 N.E.2d 970 (where there were no witnesses to the accident, evidence that truck's backing alarm was not working immediately after could support the inference it was not working prior to the incident, resulting in the decedent's death).

ii. Manufacturer and industry standards: although the commission may not adopt external standards as the sole basis for a VSSR award, it may look to those standards as relevant factors to inform its interpretation of an SSR and its determination whether the employer violated that SSR. *State ex rel. Richmond v. Indus. Comm.*, 139 Ohio St. 3d 157, 2014-Ohio-1604, 10 N.E.3d 683.

b. Award

i. Choose a percentage (15-50%) for the award.

ii. The award should be based on the **severity** of the injury and the **outrageousness** of the employer's actions, as well as the number of violations. See *State ex rel. Martin Painting & Coating Co. v. Indus. Comm.*, 78 Ohio St.3d 333, 1997-Ohio-45, 678 N.E.2d 206.

iii. Consider:

a) How dangerous was the violation? E.g., would a violation result in a funeral or stitches? This isn't about how bad **This** injured worker was hurt, but how bad they **could** have been hurt.

b) Was the violation easily ascertainable? E.g., was it something only an expert would have foreseen or known about, or would a layperson have or should have known?

iv. You are **not** required to give any support for your award in the order. See *State ex rel. St. Mary's Foundry v. Indus. Comm.*, 78 Ohio St.3d 521, 1997-Ohio-25, 678 N.E.2d 1390. The above factors are just for your consideration. It is suggested that you **do not** list the reasons, as that opens up the possibility of a factual error that could be the basis for a reconsideration or mandamus action.

v. Custom dictates 5% incremental increases (e.g., 15, 20, 25, 30, etc.)

c. Correction

i. The order must state that the violation must be corrected within a specified time period. The amount of time is completely discretionary. There are no guidelines in the rule or statute. [12 weeks is common.]

ii. If the violation has already been corrected or no longer exists, the order **must** specify this instead.

C. Temporary Agencies:

1. If the claim is against the temp agency but the on-site employer is liable for the VSSR (most-common), be sure to indicate in your order who the responsible employer is.

D. IT Note:

1. VSSRs are not processed in Case Manager (yet); paper worksheets are still used and orders are done in CAS.

E. Samples: An array of sample VSSR orders (and accompanying rehearing orders, if applicable) are attached.

XIII. REHEARING - OHIO ADM.CODE 4121-3-20(E)

A. Timing:

1. Within 30 days of the **receipt** of the order of the Staff Hearing Officer order, either party has the right to file a motion requesting a rehearing.

2. The opposing party has 30 days in which to file an answer.

3. A motion for rehearing is not to be adjudicated until the answer has been received or the expiration of the 30-day period.

B. Procedure & Criteria:

1. Staff hearing officers in Columbus review all requests for rehearing.

2. After the expiration of the answer time, a staff hearing officer shall review the motion for rehearing under the following criteria:

a. The motion shall be accompanied by **new and additional** proof **not previously considered** and which **by due diligence could not be obtained prior** to the prehearing conference, or prior to the merit hearing if a record hearing was held and relevant to the specific safety requirement violation.

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

3. If the motion for rehearing does not meet the criteria, the motion shall be denied without further hearing.

4. If the motion for rehearing is granted, the staff hearing officer shall either:

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

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

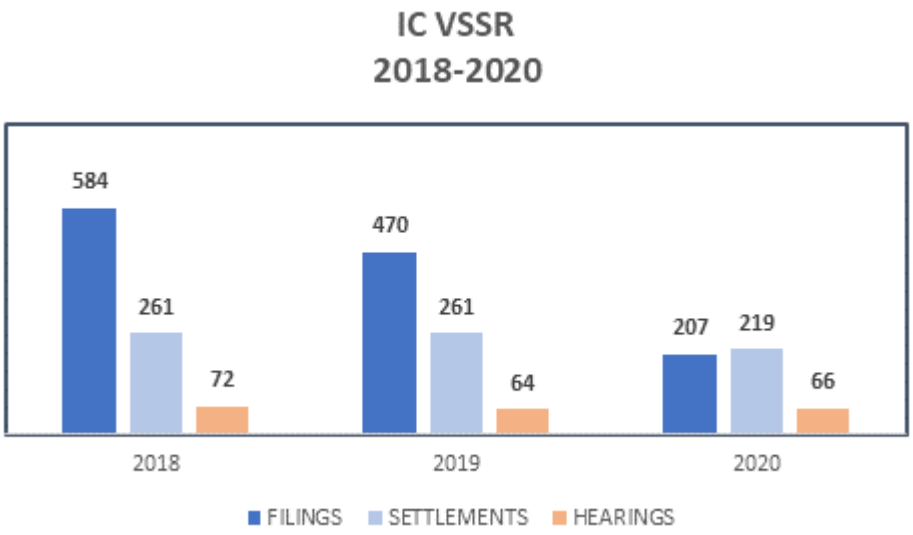
5. An order on the merits following a rehearing is final. In no case shall a rehearing be granted from an order adjudicating a rehearing. **Make sure the second merits order following a rehearing does not contain the standard language regarding time frames to file a request for a rehearing, as the parties do not get another chance.**

6. The payment of the additional award shall be stayed during the pendency of the motion for rehearing.

XIV. VSSR STATISTICS

A. Statewide VSSR Filings, Hearings and Settlements:

IC VSSR: FILINGS, HEARINGS, & SETTLEMENTS



B. SHO Breakdown of Docket Types (3 Year Average):

IC STAFF HEARING OFFICER DOCKET ALLOCATION 2018-2020

OFFICE	DHO LEVEL		SHO LEVEL				
	ALLOW	C-92	APPEAL	PTD	RECON	VSSR	MISC
AKR	35%	4%	54%	2%	4%	0.4%	1%
YOU	18%	2%	71%	4%	3%	0.4%	1%
AKR REGION	**27%**	**3%**	**62%**	**3%**	**3%**	**0.4%**	**1%**
CIN	46%	4%	46%	2%	1%	0.2%	1%
DAY	32%	3%	58%	2%	3%	0.5%	1%
CIN REGION	**40%**	**4%**	**51%**	**2%**	**2%**	**0.3%**	**1%**
CLE REGION	**22%**	**3%**	**67%**	**2%**	**4%**	**0.2%**	**2%**
COL	18%	2%	70%	5%	3%	0.2%	2%
CAM	35%	3%	53%	5%	2%	0.2%	1%
LOG	36%	3%	52%	5%	2%	0.2%	1%
MAN	37%	4%	51%	3%	3%	0.4%	1%
POR	34%	3%	54%	6%	2%	0.3%	1%
COL REGION	**32%**	**3%**	**56%**	**5%**	**2%**	**0.2%**	**1%**
TOL	56%	5%	35%	3%	0%	0.2%	1%
LIM	52%	4%	38%	4%	2%	0.3%	1%
TOL REGION	**53%**	**4%**	**37%**	**3%**	**1%**	**0.2%**	**1%**
STATEWIDE	**32%**	**3%**	**57%**	**3%**	**3%**	**0.3%**	**1%**

IC Staff Hearing Officers hear claims at both the District and Staff hearing levels. The allocations indicate average time spent conducting hearings for the applicable docket types in a given office.

Note: These figures are rounded to the nearest percent; because VSSR hearings make up less than one percent of hearings in every region and statewide, it appears as zero. This is to illustrate the small volume of VSSR hearings.