



Adjudicator

IC responds to Unauthorized Practice of Law Case

In *Cleveland Bar Association v. CompManagement*, the Ohio Supreme Court stated that "Non-lawyers who appear and practice in a representative capacity before the Industrial Commission and the Bureau of Workers' Compensation in conformity to Industrial Commission Resolution No. R04-1-1 are not engaged in the unauthorized practice of law." Many questions have arisen regarding interpretation of the Commission's resolution. The following is a compilation of those concerns together with appropriate guidance for proper interpretation.

Interpretation and Guidance Concerning Commission Resolutions R04-1-01 and R04-1-03

I. Notice of Appeal

1. Does filing of the claim include signing a notice of appeal by a TPA on behalf of an employer as a permitted activity by a TPA? Does it make a difference if the signature on the notice of appeal is the signature of the TPA employee? What if the TPA signs the name of the employer? Completing notices of appeal (IC-12 forms) for submission at the IC and the BWC, as well as the mechanical aspect of filing notices of appeal with the IC and the BWC, are permitted activities by a non-attorney representative of a party, including the signature of a non-attorney representative on the notice of appeal. A non-attorney representative should not execute the signature of a party. Prohibited activities include attaching briefs, copies of agency rules, statutes, or case law to a notice of appeal, or supporting a notice of appeal with reference to such authorities. The Commission will revise the IC-12 Notice of Appeal form as well as revise the notice of appeal form on ICON in order to provide the ability of a non-attorney representative that completes the notice of appeal to indicate whether the non-attorney representative has been provided authority by the party in the claim to complete and file the notice of appeal. [*Reference: (A)(2) and (B)(1) to (B)(6).*]

2. Is the determination to file a notice of appeal part of the determination of "without making any legal determination respecting such claims or appeals" that is prohibited in (A)(2)? The determination whether to file an appeal is made by the party. The decision to file an appeal is not to be made by a non-attorney representative. A party may direct that a non-attorney representative complete and file a notice of appeal. However, a party cannot delegate the authority to make the determination of whether to appeal a Commission or Bureau

order to a non-attorney representative.

[*Reference: (A)(2) and (B)(3).*]

3. Does filing a notice of appeal on ICON result in the different outcome? In other words, can a TPA file a notice of appeal under a representative ID number through ICON? The reply to the first inquiry is "No". The reply to the second inquiry is "Yes". Completing the information on ICON for filing an appeal and the actual filing of a notice of appeal is a permitted activity for non-attorney authorized representatives as described in Inquiry #1. The Commission will revise the notice of appeal form on ICON in order to provide the ability of a non-attorney representative that completes the notice of appeal on ICON to indicate whether the non-attorney representative has been provided authority by the party in the claim to complete and file the notice of appeal. Once the online notice of appeal form is revised on ICON, there will be an indication on the notice of appeal as to whether the party provided specific authorization to file such a notice of appeal.

[*Reference: (A)(2) and (B)(1) to (B)(6).*]

4. Can a non-attorney representative for an employer make the determination to file a notice of appeal without obtaining specific authority from the employer to file such notice of appeal? Instead, can such authority be provided to the TPA by the employer in "blanket fashion" such as "you have the authority to file an appeal with the IC that you deem proper?" No. There must be specific authority from the party provided to the non-attorney representative to file a notice of appeal. But such authority need not be in written format. The determination as to whether to file a notice of appeal cannot be delegated by a party to a non-attorney representative. For example, blanket authority cannot be provided to, or sought by, a non-attorney representative from an employer such as, "You (non-attorney representative) are authorized to file a notice of appeal with the Commission whenever you as a non-attorney representative deem the same to be in the interest of the employer." The Commission will revise the IC-12 notice of appeal form as well as revise the notice of appeal form on ICON in order to provide the ability of a non-attorney representative that completes the notice of appeal to indicate whether the non-attorney representative has been provided authority by the party in the claim to complete and file the notice of appeal.

[*Reference: (A)(2), (B)(5) and (B)(3).*]

What's inside

Due to the importance of this issue, all pages of the Summer Adjudicator have been devoted to explaining the practice of hearings in the wake of the Supreme Court decision on the Unauthorized Practice of Law.

The complete text of Industrial Commission Resolutions R04-1-01 and R04-1-03 can be found on the IC's Web site at www.ohioic.com

5. Can an employee of an employer that is not an attorney sign such an appeal? Yes. An employee of an employer that is not an attorney can complete, file and sign a notice of appeal on behalf of an employer if the employer's employee is acting pursuant to authority provided by the employer. See reply to Question #1 in Category I.

6. Can a non-lawyer employee of an employer determine whether to file an appeal on behalf of the employer without being in violation of (A)(2)? Yes, as long as the employee of the employer is acting under the authority of the employer. See reply to Question #1 under Category I.

7. Can a non-attorney representative file a request for reconsideration of a final IC order? No. A request for reconsideration as described in IC Resolution 98-1-03 cannot be filed by a non-attorney representative since such action is prohibited as described in Resolution (B)(3). [*Reference: (B)(3).*]

8. Can non-attorney representative of an employer or injured worker file a motion for the Commission to exercise continuing jurisdiction under the provisions of 4123.52? No. For example a non-attorney representative cannot complete and file a request for reconsideration of a final Commission order requesting that the Commission exercise continuing jurisdiction. But if a request is made for failure to receive a notice of hearing, a non-attorney representative can complete, file and sign form IC-52 upon direction of the party. However, the prohibitions and limitations in the Resolution apply. For example, if the request results in the need for a hearing, a non-attorney representative is prohibited from commenting upon or giving opinions with respect to the evidence, credibility of witnesses, the nature and weight of evidence, and the legal significance of the contents of the claim file, and from citing, filing or interpreting statutory or administrative provisions, or case law as well as prohibited from engaging in the other activities set forth in Part (B) of Resolution R-04-01. [*Reference: (B)(3), (A)(4) and (A)(6).*]

*The same questions listed above in #1 to #8 are also raised as far as their application to union representatives is concerned. Same responses to Questions #1 to #8.

II. Filing Motions and Applications

1. Is filing a motion for relief under 4123.522 a permitted activity by a TPA, employee of an employer or union representative? Yes. A non-attorney representative can complete, sign and file an IC-52 form and submit the same to a hearing administrator. But the prohibitions and limitations in the Resolution apply. For example, where the relief requested in the IC-52 results in the need for a hearing due to the fact that the matter is contested, a non-attorney representative is prohibited from commenting upon or giving opinions with respect to the evidence, the credibility of witnesses, the nature and weight of evidence, and the legal significance of the contents of the claim file, and from citing, filing or interpreting statutory and administrative provisions, or case law as well as prohibited from engaging in the other activities prohibited in Resolution R-04-1-01. [*Reference: (A)(4) and (A)(6). (B)(1) to (B)(6).*]

2. Is filing a motion to suspend a claim for refusal to appear at a medical examination scheduled by an employer a permitted activity? A non-attorney representative of an employer is permitted to complete, sign and file a motion with the Hearing Administrator

asserting that the claim be suspended due to the injured worker's refusal to appear at an examination set by an employer, or refusal to provide a medical release. The general view is that a non-attorney representative can note the overall action requested without being in violation of the standards in the Resolution. A non-attorney representative can also complete, sign and file an objection to a compliance letter issued by a hearing administrator. The objection filed should indicate whether the non-attorney representative has been provided authority by the party to complete and file the objection. However, the non-attorney representatives cannot provide an opinion on the credibility, weight, nature or significance of evidence that is relevant to the disputed issue that is the subject of a hearing or cite, file or interpret statutory or administrative rules, case law or agency rulings, or engage in the other activities prohibited by Resolution R-04-1-01. For example, it would be inappropriate for a non-attorney representative to make an assertion, comment on, or provide a conclusion concerning whether the standard of "without good cause" has or has not been demonstrated. [*Reference: (A)(4) and (A)(6). (B)(1) to (B)(6).*]

3. Is filing and signing a motion to terminate TT a permitted activity? Yes. See reply to Questions #1 & #2 under Category II.

4. Is filing and signing a motion to terminate TT by reason of MMI a permitted activity? Yes. A non-attorney representative may complete, sign, and file such a motion. However, the content of the motion may not violate the prohibitions of (B)(1) through (B)(6) of the Resolution. Also see reply to Questions #1 and #2 under Category II.

5. Is it proper for a hearing officer to dismiss a motion signed by an actuary requesting a finding of maximum medical improvement? No.

6. If the answer to the above question is yes, is it proper for a Staff Hearing Officer to vacate such an order and, instead of getting to the merits of the issue, refer the matter back for another District Hearing Officer decision? N/A

7. Is filing and signing a motion to terminate TT due to an employee "working" a permitted activity? Yes. But non-attorney representatives must adhere to the prohibitions set forth in Resolution (B)(1) through (B)(6). Also see reply to Questions #1 and #2 under Category II.

8. Is filing a motion to terminate TT for the reason that the injured worker engaged in employment a permitted activity? Yes. Also see reply to Questions #1 and #2 under Category II.

9. Is filing and signing a motion for wage loss or to terminate wage loss a permitted activity? Yes. Also see reply to Questions #1 and #2 under Category II.

10. Can TPAs attend hearings and "agree" to permanent partial percentage awards? Yes. From the perspective of an employer, there will likely be a direct actuarial impact on the employer as a result of an award under 4123.57(A), and based on the view that the non-attorney representative of an employer is acting as the agent of the employer with the understanding that the non-attorney representative has been given specific authority by the employer to enter into an agreement. [*Reference: (A)(2), (A)(6) and (A)(8).*]

11. Under (A)(4) what does "completion of forms promulgated by the IC and BWC" mean as far as a form for notice of appeal (IC-12) and C-86 motion as far as the questions raised in issue #1 and #2 are concerned? See reply to question #1 and #2 under Category I and #1 and #2 under Category II.

12. May a non-attorney representative of an employer negotiate on behalf of the employer during the settlement process? While the negotiation process concerns the actuarial and financial impact of a settlement on an employer, the settlement process also requires the employer to approve any settlement agreement. Therefore, a non-attorney representative of an employer must obtain the signature of the employer or an attorney for the employer on the settlement agreement.

III. Attendance at Hearing

1. Is a TPA limited to only apprising the hearing officer of certain documents in the claim or portions of documents in the claim without making any other comments about such documents? A non-attorney representative can apprise a hearing officer of factual matters that are part of the specific contents of the file. Also see reply to Question #4 in Category III. [*Reference: (A)(3).*]

2. Is a non-attorney representative permitted to notify the hearing officer that the injured worker suffered another injury assuming that such information is part of the record? Yes. See reply to Question #4 in Category III.

3. Is a non-attorney representative permitted to state that the injured worker was terminated from employment for failure to follow a work rule of an employer assuming that such evidence is part of the record? Yes. See reply to Question #4 in Category III.

4. Are TPA personnel permitted to read from physicians' reports, notes, etc. or must they simply "point out" the portions of the report (e.g., page 3, paragraph 2, line 4 of Dr. Smith's report, dated...)? Yes. Non-attorney representatives can read from a portion of the documents that the non-attorney representative desires to apprise the hearing officer, unless the hearing officer finds that reading the document or portion of a document by the non-attorney representative interferes with the conduct of the hearing or unreasonably delays the hearing and unless reading of the document(s) is otherwise prohibited by the standards set in the resolution such as reading a court decision, reading a statute, a rule, or an agency resolution. However, if the non-attorney representative is permitted to read from a claim file document such as a medical report, the exact words in the report are to be read. The non-attorney representative is prohibited from paraphrasing the content of the report, or providing an opinion of the content of the report, or commenting on the nature, weight, credibility or significance of such a report. For example, a non-attorney representative can apprise the hearing officer of the existence of an ER report that is on file. The non-attorney representative can state that the report sets forth various facts, but the representative is prohibited from expressing a view or providing an opinion of what is not in the ER report. In other words, a non-attorney representative cannot state that the report does not contain a statement that the incident described in the ER report was a work-related incident when there is, in fact, no such express statement in the ER report. Another example is the situation where a medical report is submitted where a physician notes that the injured worker has reached MMI. A non-attorney representative is permitted to apprise the hearing

officer of that portion of the medical report that contains the physician's statement. However, a non-attorney representative is not permitted to state that a physician has rendered an opinion that the injured worker has reached MMI, or the physician "meant" that the injured worker has reached MMI when the physician has not actually stated the specific language of "MMI" in the medical report under review. [*Reference: (A)(3) and (B)(1) to (B)(6).*]

5. Can a non-attorney representative quote and or read from a previous IC order? No. Resolution (B)(2) provides that non-attorney representatives cannot cite or interpret administrative rulings. An IC order is an administrative ruling. However, a non-attorney representative can apprise a hearing officer of the existence of a specific order that is in the claim file folder. [*Reference: (B)(2).*]

6. What exactly is "apprising ... documents or parts thereof that are in the file..."? Does this mean they can read parts of a report? Yes. See reply to Questions #1 and #4 as noted above. [*Reference: (A)(3).*]

7. Is a non-attorney representative permitted to make comments regarding the interpretation to be provided to medical reports or to make recommendations regarding the credibility of evidence? No. [*Reference: (B)(4) and (B)(3).*]

8. Can a non-attorney representative be permitted to read sentences or paragraphs from a submitted medical report for the purpose of emphasizing the express opinion or findings set forth in a medical report? Yes. See reply to question #4. [*Reference: (A)(3).*]

9. Can non-attorneys representing a party to a claim interpret a doctor's opinion in a medical report? Per IC resolution, is this activity proper? No. [*Reference: (B)(4) and (B)(3).*]

10. Can a non-attorney representative use language which refers to legal principles based upon case law, such as the injured worker "voluntarily abandoned his employment" or the injured worker had an intervening injury? No. For example while a motion may be filed by a non-attorney representative to terminate TT, and while the non-attorney representative may "apprise" the hearing officer of a document that is on file, the non-attorney representative is prohibited from engaging in the activities that are set forth in part (B) of Resolution R04-1-01. Therefore, the non-attorney representative is prohibited from citing, filing or interpreting statutory, or administrative rulings or case law, as well as prohibited from making or giving legal interpretations with respect to the testimony, affidavits, medical evidence, or filing a brief, or commenting on, or giving opinions with respect to evidence, credibility of witness, the nature and weight of the evidence or the legal significance of the contents of the claim file. [*Reference: (B)(2) to (B)(6).*]

11. Can a non-attorney representative submit a copy of a court decision if no comment is made, or refer to a case name, or a legal principle of a known court decision? No. [*Reference: (B)(2), (B)(3) and (B)(6).*]

12. Are non attorneys who represent parties, solely limited to referring to a report by name and date? No. See reply to question #1 & #4.

13. Can a non-attorney representative submit a witness statement? Yes. A non-attorney representative can prepare and submit a witness statement. However, a witness "statement" submitted by a non-attorney representative does not meet the standards of the Resolution when such a statement consists of a series of questions posed by a non-attorney representative to the witness and a list of responses. Such a witness "statement" is in violation of the prohibition on direct examination and indirect examination of witness found in Part (B)(1) of the Resolution. A non-attorney representative cannot submit a document that is the written equivalent of oral direct examination or cross-examination of a witness that is prohibited under the Part (B)(1) of the Resolution. [Reference: (A)(1) and (B)(1).]

14. Can a non-attorney representative discuss matters within the independent knowledge of the representative? Yes. But such knowledge must have been obtained independently by the non-attorney representative through personal observation or a similar process. [Reference: (A)(3), (B)(1) to (B)(6).]

15. Is it improper for the hearing officer to permit the non-attorney representative to vary from the standards set forth in the IC resolution? Does it make a difference if there is no objection from the opposing party? Yes. Hearing officers do not have the discretion to choose whether to make exceptions to the standards set forth in the Resolution or to adopt greater or lesser standards. It makes no difference if there is no objection raised by an opposing party to the conduct of the non-attorney representative that is inconsistent with the standards within the Resolution.

16. Does a Hearing Officer have responsibility to ensure compliance with (A)(3) and (B)(1) to (B)(4) so as not to permit violation of the IC Resolution? Hearing officers should ensure that non-attorney participants in the hearing process that represent parties follow the standards in the Resolution in the hearing room. Hearing Officers are to orally notify those non-attorney representatives whose hearing room conduct fails to meet such standards and specifically inform the non-attorney representative of the specific standard that has not been met. Hearing Officers should provide notification to the non-attorney representative in an appropriate and professional manner. By taking an active role in such a situation the hearing officer will tend to avoid the perception that silence on the part of a hearing officer means that the conduct of a non-attorney representative in the hearing room is deemed to meet the standards in the Resolution or is meant to signal tacit acceptance and authorization of the actions of the non-attorney representative by the Commission.

17. Does a Bureau employee that serves as an adjudicator at administrative hearings conducted by the Bureau have responsibility to ensure compliance with (A)(3) and (B)(1) to (B)(4) so as not to permit violation of the IC Resolution? Yes. See reply to Question #16.

18. What action must a hearing officer take if a non-attorney representative continues to violate the standards in the Resolution in (A)(3) and (B)(4) or any other prohibition set forth in the Resolution? If a hearing officer finds a continuing pattern of conduct of a non-attorney representative that violates the standards in the Resolution, even after the non-attorney representative has previously been notified by the hearing officer, the hearing officer should bring the matter to the attention of the hearing offi-

cer's supervisor. The Commission will then take further necessary action. It is recognized that while hearing officers as attorneys are governed by the Code of Professional Responsibility, attorneys representing the parties in a workers' compensation claim are also governed by the Code and thus also maintain responsibility.

19. What action must a Bureau employee that serves as an adjudicator at administrative hearings at the Bureau take if a non-attorney representative continues to violate the standards in the Resolution in (A)(3) and (B)(4) or any other prohibition set forth in the Resolution? Should a BWC employee that serves as an adjudicator at administrative hearings conducted by the Bureau of Workers' Compensation find that a continuing pattern of conduct of a non-attorney representative of an employer that violates the standards in the Resolution continues, even after the non-attorney representative has been notified by the adjudicator, the adjudicator should bring the matter to the attention of the Industrial Commission.

20. What will the Commission do to prevent future "outbursts" regarding the UPL issue i.e., non-attorney representatives who do not follow the Commission guidelines? What will the IC do about them? Will there be a central (in-house) place to lodge a complaint regarding violations of the standards? What should a HO do? Should he or she file with the UPL committee? Should the IC attempt to take care of problems at the agency level regarding the habitual offender versus the one-time "oops" sort of situation? See reply to Question #16 and Question #18.

21. Are hearing officers under a responsibility (either ethically or professionally) to report such conduct to an entity of a bar association as provided by the Rules of the Code of Professional Responsibility or any other rules adopted by the Ohio Supreme Court? See reply to Question #18 and also Question #16.

22. What are the limitations for non-attorney representatives who appear on behalf of parties at the Bureau administrative hearings? The same standards that apply to hearings at the Commission that are set forth in the Commission Resolution also apply to administrative hearings held by the Bureau.

23. Do the standards in the Commission Resolution apply to non-attorney employees of the Bureau of Workers' Compensation that appear at an administrative hearing at the Bureau to provide background information as to the Bureau's actions on an issue that is in dispute? For example, a Bureau employee from the Risk Department may attend a hearing of the Adjudicating Committee to provide factual information. The employee of the Bureau that appears at such a hearing appears as a witness. A Bureau employee can apprise the Bureau adjudicator of the facts of the risk matter that is part of the record and provide background information to the adjudicator on the action taken by the Bureau unit that made the initial determination that is the subject of the dispute. In other words, the Bureau employee can testify as to procedure and practice followed by the Bureau employee's unit and the action taken by the Bureau unit on the issue that is in dispute. However, a Bureau non-attorney employee cannot provide an interpretation of an administrative rule.

IV. Orders received by TPA

1. Does a TPA violate the IC resolution by recommending to the employer that an appeal be filed? Can a TPA provide advice to

the employer that an order might impact the employer without being in violation of the IC Resolution? Yes. Non-attorney representatives are not to recommend to a party whether an appeal should or should not be filed. However, a non-attorney representative of an employer can advise an employer as to the actuarial and financial impact on an employer of an order that is issued by the Commission or BWC. A non-attorney representative of an injured worker can provide advice to an injured worker as far as the financial impact of an order on an injured worker.

[*Reference: (A)(2), (A)(8), (B)(5) and (B)(6).]

2. Can a TPA provide the employer with the "import of the information" in the notice of hearing or notice of findings" for any purpose, whether under 4123.522 or other portions of Chapters 4123 and 4121? A non-attorney representative of an employer is not authorized to advise an employer of the legal ramifications of Commission orders. The "import" of the order is beyond the scope of a non-attorney representative of an employer and notice received by a non-attorney representative cannot be imputed to the employer for purposes of Section 4123.522 O.R.C. However, a non-attorney representative of an employer may advise the employer of the actuarial and financial impact of a Commission or Bureau order on the employer. A non-attorney representative of an employer may report any action taken at a hearing to the employer.

3. Should hearing officers "sign-off" on final settlement agreements that are signed by a non-attorney representative of an employer? No. See reply to Question #12 under Category II.

[*Reference: (A)(6), (A)(4) and (A)(8).]

V. Actions outside of IC facilities

1. Do the prohibitions set forth in (B) of the IC Resolution apply to the actions of non-attorney representatives outside of the IC and BWC facilities? Both the permitted activities as well as the prohibited activities set forth in the Resolution, apply to actions within as well as outside of agency hearing rooms with regard to workers' compensation matters. [*Reference: (B)(1) to (B)(6).]

VI. Stand Alone Representation - Part (B)(7) of IC Resolution

1. What does stand-alone representation mean? As set forth in (B)(7) of the Resolution, stand-alone representation was meant to refer to paralegals and other similar situated individuals who are not TPAs, are not attorneys, and are not authorized union representatives who hold themselves out, on their own, to represent injured workers or employers before the IC or the BWC for a fee.

[*Reference: (B)(7).]

2. If a TPA asks an individual that is not an employee of the TPA and not an attorney to take a hearing on behalf of the TPA is that action permitted or prohibited? Can a TPA designate a non-employee agent that is not an attorney to stand in for an employee of the TPA at an IC hearing? A TPA cannot designate an individual that is not an attorney and not an employee of the TPA to appear at an IC hearing on behalf of the TPA (that is the authorized representative of the employer) for a fee specially associated with attending the hearing. [*Reference: (B)(7).]

3. The IC should be aware that some representatives that come into the hearing room think that authorization cards or an authorization letter is not required. (We need to know if the person is representing the TPA or the law firm.) The hearing

officer should make inquiry at the hearing if the hearing officer has any question as far as whether the individual that appears in the hearing is appearing on behalf of the employer or on behalf of the TPA. The consensus was that the Commission should require written notification from the attorney that appears at a hearing, unless it is clear from the claim file records as far as which entity the attorney is representing. It is believed that in the case of an attorney that appears at an IC or BWC hearing when such attorney is asked to appear at the last minute, and when the hearing officer makes inquiry of the attorney, the hearing officer should take the "word" of the attorney as far as the identity of the entity that the attorney is representing at the hearing in those cases where it is not clear from the record. In such a situation, the attorney is expected to provide written notification specially providing clear identification of the entity that the attorney is representing to the claim file after the hearing takes place and no later than the close of business on the day of the hearing. In cases where an attorney is asked to appear on behalf of a TPA, the attorney is limited to the standards set forth for non-attorney representatives set forth in the Resolution.

Attorneys asked to appear at IC hearings by TPA instead of the employer

4. If such a practice exists, isn't it true that the attorney who is asked to appear at an IC hearing is limited to the same standards as the TPA assuming that there is no attorney-client relationship in existence between the employer and the attorney asked to appear at an IC hearing by a TPA? See response to inquiry immediately preceding this inquiry.

5. In the situation described in question #3 in Category VI, what proof should be sufficient for a hearing officer to demonstrate that there is an attorney-client relationship between an employer and an attorney that appears at a hearing stating that he or she is representing the employer and desires to address all legal issues in the claim? An oral statement to the hearing officer by an attorney stating that the attorney is representing the employer is sufficient. The attorney should be notified by the hearing officer that the appropriate written notification is to be made part of the claim file folder no later than the close of the business on the date of the hearing, if such written notification has not already been submitted. Also see reply to Question #3.

VII. Forms

1. Can a C-88 be filed, signed and completed by a non-attorney? Yes.

2. Can a C-9 be completed? N/A.

3. Can a C-84 be filed by a union representative? Yes. A C-84 can be filed by a union representative. However, a C-84 application cannot be signed by a union representative.

4. Can motions be filed by a union representative? Can such motions be signed by a union representative? Can such motions be completed by a union representative? The outcome is the same as with non-attorney representatives for employers.

*References to provisions in Resolution R04-1-01.