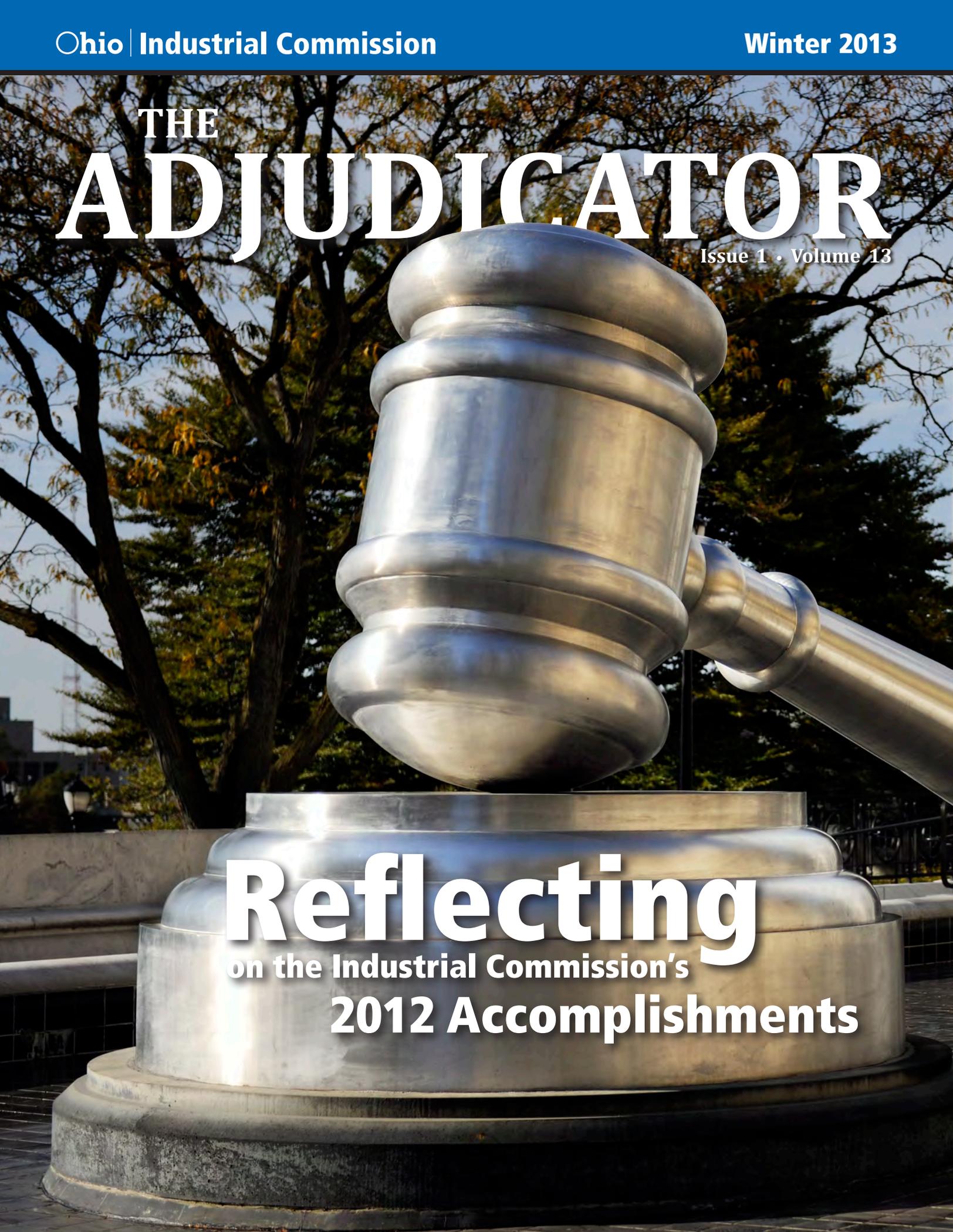


THE ADJUDICATOR

Issue 1 • Volume 13



Reflecting
on the Industrial Commission's
2012 Accomplishments



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Reflecting on 2012

Adam Gibbs, *Director of Communications*

Last year was a busy year for the Ohio Industrial Commission, but the hard work paid big dividends for IC customers.

“Our agency’s accomplishments can be attributed to our strong core of knowledgeable and reliable employees,” Chairperson Jodie Taylor said. “In all 12 IC offices, I believe our employees are dedicated to serving Ohio’s injured workers and employers to the best of their abilities.”

Taylor said that the IC’s technological breakthroughs have been the high points for the agency.

“Whether it’s enhancing our public

website or improving ICON, we have made remarkable progress in utilizing technology to improve our agency’s efficiency,” she said.

Taylor commended the IC’s staff for their dedication to the agency’s mission.

“I can see the passion our employees bring to their jobs every day,” she said. “We have accomplished a lot in every IC office throughout the state because of our talented people.”

Among the Commission’s achievements that were started or fully completed in Fiscal Year (FY) 2012:

- Cut administrative rates for three of four Ohio employer groups for 2013. The fourth group, while not realizing a reduction, will remain stable with no rate increase.
- Installed metal detectors and security cameras in all hearing areas to elevate protection for our customers.

“Remaining on a fiscally responsible course is absolutely necessary for our agency’s success.”

- Enhanced the IC’s Facebook page to improve communication with our stakeholders.
- Reduced storage space in each office with the newly created electronic records repository.
- Achieved ADA compliance of the IC’s website.
- Pictures and video added to ECM and ICON.
- Reduced the size of the IC’s workforce without sacrificing the quality of service.
- Re-structured the Operations

Support, Medical Services and Claims Management Departments to improve effectiveness.

- Drastically slashed ICON downtime.
- Held a successful Statewide Hearing Officer Training at Maumee Bay State Park to offer outstanding instruction to the staff and the public.
- Created customer service standards that were applied to all employee performance evaluations.
- Composed the IC’s first Workforce Strategic Plan, which was used as a model for other state agencies.
- Completed the first two phases of the Commission-level hearings (discretionary appeals and reconsiderations) being added to Workflow.
- Executed the representative and employer keycard project to allow frequent visitors to register at each office quickly.
- Implemented online Equal Employment Opportunity training for all staff and completed an EEO Strategic Plan, which was used as a model for other state agencies.

“Remaining on a fiscally responsible course is absolutely necessary for our agency’s success,” Taylor said. “Whether it is improving the hearing process or meeting our workforce needs, we must always be conscious of how we use our funds.”



Chairperson Jodie M. Taylor

Taylor stressed that she is always open to new ideas and is looking forward to a bright future for the agency.

“I welcome input from our customers,” she said. “Many of the best ideas to improve agency processes have come from members of the workers’ compensation community.”

Commissioner Gillmor and Administrator Buehrer Host



Roundtables with Ohio Business Leaders

Adam Gibbs, *Director of Communications*

In several joint appearances throughout Ohio over the summer and autumn months, Commissioner

Karen L. Gillmor and Bureau of Workers' Compensation Administrator Stephen Buehrer met with hundreds of business leaders about current workers' compensation issues, developments, and trends.

"As Ohio rebounds from the economic recession of the previous five years, both the Industrial Commission and Bureau of Workers' Compensation are looking at innovative ways to operate the workers' compensation system," Gillmor said. "By keeping the public up-to-date on current issues, we welcome input regarding how the agencies can improve the system."

BWC and IC staff members joined Commissioner Gillmor during the business roundtable discussions.

"I am thrilled to speak with businesses and public entities about how the Industrial Commission is striving to make certain that the hearing process is fair, timely, and

cost effective," Gillmor said. "We are more aggressively tracking agency outcomes and monitoring trends to better assess where additional improvements may be needed."

Most recently, Chairperson Jodie Taylor has reviewed this forum and feels these types of discussions positively contribute to the workers' compensation system.

"I am looking forward to working with Administrator Buehrer to further improve the business climate in Ohio," Taylor said.

She also welcomes suggestions to improve the system.

"If a customer has a new idea that will improve the process, then I believe it should receive serious consideration," Taylor said.

"I'm looking forward to working with the BWC to further improve the business climate in Ohio."

New Chief Legal Counsel Welcomes

New Challenges and a New Business Card



Adam Gibbs, *Director of Communications*

For over three decades, Gerry Waterman's business card did not change much. There were changes in addresses and job titles, but his business card always read: Ohio Attorney General - Workers' Compensation Section.

"Anytime someone would ask to see my resume, I would just hand over my business card," Waterman said.

In October 2012, for the first time since April 7, 1975, Gerry received a different business card that read: Chief Legal Counsel - Ohio Industrial Commission.

"I am grateful that this wonderful position was offered to me," he said. "I am looking forward to using my knowledge and experience to better serve the Industrial Commission."

Before coming to the IC, Waterman was a Principal Assistant Attorney General in the Workers' Compensation Section of the Ohio Attorney General, which provides legal counsel and advice to the Ohio Bureau of Workers' Compensation and the Ohio Industrial Commission.

Over the course of 37 years, Waterman, a University of Akron Law School graduate, served nine Ohio attorneys general. He saw 185 of his cases go to the Ohio Supreme Court and argued before the court more than two dozen times.

"My proudest moment took place in 1986 when Ohio Supreme Court Justice Andrew Douglas quoted from a brief I had written," he said. "Four pages of the Justice's decision, in the bound volume, were a direct quotation from my brief filed in an earlier case, and he said the position was eloquently stated."

A native of Steubenville, Ohio, Waterman resides in Reynoldsburg with his wife, Stephanie. Waterman's entire legal career took place with the Ohio Attorney General, but now he is looking forward to a new chapter.

"I hope to be able to serve the IC well and build on my reputation within the workers' compensation community," he said.

"I am looking forward to using my past experiences to better serve the Ohio Industrial Commission."



Reps: Sign Up Now to Receive IC Correspondence Faster

Nilima Sinha, *Director of Information Technology*

With a few clicks of the mouse, workers' compensation representatives no longer have to wait for the mail carrier in order to have access to IC hearing orders and notices.

The IC's Information Technology Department continues to focus on improving business processes while introducing efficiency through the use of technology. On December 4, 2012, IC Information Technology launched electronic delivery of all hearing-related correspondence through ICON. The program will provide better and faster service to IC customers while reducing printing and mailing costs for the agency.

Representatives choosing the service can go to their ICON profile page and revise their personal mail preference. If a representative opts for the service, the IC will no longer print and mail paper copies of hearing notices, orders, and letters. The correspondence may be accessed as individual PDFs or as a complete zip file that may be saved to a computer desktop. If a representative does not like the new service, he or she may opt out at anytime.

After signing up, representatives may view their electronic notices, orders,

and letters by using the daily correspondence link available on ICON. The procedure is designed to make the process more efficient

by saving paper, reducing printing and mailing costs, and encouraging the active use of ICON among representatives. In addition, law firms will no longer need to use runners to pick up flat mail from IC Customer Service. With as much paper as the IC handles on a daily basis, this innovative approach will not only simplify the hearing process, but also save the agency money on paper, ink, and work hours devoted to mail delivery.

Although the service was only recently launched, 38 representatives have already signed up to receive their correspondence online. Take advantage of the service today so you can begin receiving your documents and notices in the most expeditious manner possible!

"This innovative approach will not only simplify the hearing process, but also save the agency money."



The Great William Green Building Flood of 2012

Mike Feeney, *Director of Operations Support*

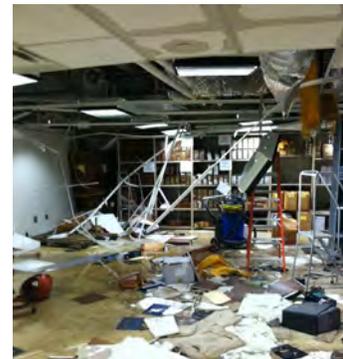
How much water was in the basement of the William Green Building when the main water line burst on November 30, 2012? More than 750,000 gallons.

That's 90,000 more gallons of water than is contained in a swimming pool at the 2012 Summer Olympics.

Some staffers called the incident, "The Great William Green Building Flood of 2012." Judging from the damage it caused, the flood lived up to its name. Here is what happened: In the middle of the night, a 10-inch water line coming into the building broke in the mailroom, but all of the doors in the mailroom open inwards, so the water pressure kept the doors closed and minimized the flooding initially. However, as four feet of water filled the mailroom, the front counter was lifted up, broke through the wall, and then the water flooded the entire floor. From the west side of the building to the east, more than 750,000 gallons of water gushed from the mailroom throughout the basement. The hardest hit areas were the IC mailroom, IT storage lab, and the stock supply center. Computers and office supplies floated around the basement after being ruined by the water.

This disaster could have been devastating

to agency operations, but because the IC team pulled together, remained calm, and activated an effective recovery



plan, the destruction was reduced substantially. IC team members worked tirelessly alongside one another to keep the agency running smoothly, despite the extensive damage in the William Green Building basement. Because of the IC's teamwork, hearing orders and other mail items were not delayed a single day.

Cleanup efforts started immediately and will continue for another six to eight weeks as saturated drywall, carpet and tile are replaced and walls throughout the entire area are repainted. Ideally, the basement mailroom will be operational by early March.

J.C. Penny founder James Cash Penney once said, "The best teamwork comes from men who are working independently toward one goal in unison." The IC's reaction to "The Great William Green Building Flood of 2012" shows that a great team of men and women can overcome any adversity.



Medical Services: Past and Present

Terrence B. Welsh, M.D., *Chief Medical Advisor*

As I read Dr. Binkley's account (pg 16) of the IC Medical Division, I could not help but let my mind wander as to how it might have been to practice medicine in 1914. X-rays were discovered about twenty years prior and were just coming into clinical use. MRI technology was still sixty years in the future. There were a few crude antibiotics available. Penicillin would not start saving lives until World War II. General anesthesia was still, well, a bit dicey. Robotic surgery would have been thought absurd. Treatment of a heart attack was rest, and then prayers that the heart did not fail. Abraham Flexner published his report for the Carnegie Foundation in 1910 surveying the state of medical practice and education. This report ushered in the era of "modern medicine" in an attempt to reign in rogue, unscientific practices. In the last 100 years, we have moved on from snake oil to fish oil.

Yet, I found myself struck not so much by what has changed, but more by what has stayed the same. Ninety-nine years ago, the Chief Medical Examiner was promoting the importance (and simplicity) of the First Report of Injury (FROI). Even without the benefit of the World Wide Web, he aimed to put together a network

of specialists "to aid in the determination of medical facts." He worked through some of the same administrative challenges we face today, using some of the same "nuts and bolts," yet in a completely different world.

More importantly, Dr. Binkley's detailed account of the works of the IC Medical Division in 1914 reflected many of the same qualities and values held by the Medical Services Department today: integrity, common sense, good stewardship of our clients' resources, fairness, quality of care, customer service, timely handling of matters put before us, and a high level of professional expertise.

We move into the next century of the Industrial Commission equipped with more advanced information technology, and more sophisticated medical tests and treatments than were available to Dr. Binkley. These methods will bring new opportunities and challenges. Moving forward, we know that when we ask the question, "Why a Medical Division?", we will answer with his same confidence, thanks to our strong heritage of service.



HEARING OFFICER MANUAL UPDATES

Jurisdiction over the issue of Maximum Medical Improvement Memo C3, September 10, 2012

In order for a Hearing Officer to proceed on the issue of Maximum Medical Improvement (MMI), it is necessary that Temporary Total Disability (TTD) be an issue in the claim.

A Hearing Officer has the ability to proceed on the issue of MMI when the injured worker is: (1) receiving TTD compensation, or is requesting TTD compensation, at the time a party files a request that the claimant be found to have reached MMI, and/or (2) when the claimant is receiving TTD compensation, or is requesting TTD compensation, at the time of the hearing. A hearing notice that lists TTD compensation and/or termination of TTD compensation as issues to be heard is sufficient to allow a hearing officer to address MMI.

When terminating ongoing TTD compensation due to the issue of MMI, TTD compensation should be paid through the date of the hearing at which TTD compensation is being terminated.

Salary Continuation Memo C4, September 10, 2012

Numerous questions and concerns have been raised as to how hearing officers should handle salary continuation and what impact salary continuation has on the payment of temporary total disability (TTD) compensation. Following is a variety of circumstances with a discussion of how hearing officers should handle those circumstances:

- 1. Wage Agreements:** Salary continuation is not the same thing as a wage agreement. Wage agreements are provided for in Ohio Adm.Code 4123-5-20.
- 2. Finding of Temporary Total Disability and Rate of Payment:** Generally, when hearing officers are aware that an injured worker received wages over a period of TTD, the hearing officer should state that TTD compensation is paid less wages received. Also, hearing officers should include, in their orders, a statement that the injured worker was temporarily and totally disabled despite the fact that salary continuation may have been paid by the employer. However, to the extent that TTD compensation exceeds the after tax amount received by the injured worker through salary continuation, the excess amount should be paid in TTD compensation to the injured worker, so that the injured worker receives the same net amount of money as they would if he or she was paid only TTD compensation. The after tax amount should be measured against 72 percent of the FWW for the first twelve weeks of disability, and 66 2/3 percent of the AWW thereafter. For example, if the injured worker is disabled from the time of injury, and the employer pays salary continuation for six weeks, the after tax amount of salary continuation should be measured against 72 percent of the FWW, and six weeks of TTD compensation should then be paid at 72 percent of the FWW.



HEARING OFFICER MANUAL UPDATES

Salary Continuation Continued

- 3. Termination of Benefits/MMI:** Hearing officers do not have jurisdiction to terminate salary continuation benefits. In addition, hearing officers do not have jurisdiction to make a declaration of maximum medical improvement (MMI) in claims where TTD compensation is not being paid or requested. However, salary continuation benefits may be discontinued by either the employer or the injured worker at any time without any regard to the requirements of R.C. 4123.56.
- 4. Waiting Period for Permanent Partial Disability.** Prior to June 30, 2006, R.C. 4123.57 requires that an injured worker wait forty-weeks from the last payment of compensation under R.C. 4123.56, or forty weeks from the date of injury. If the injury occurred on, or after June 30, 2006, or the occupational disease was contracted on, or after June 30, 2006, R.C. 4123.57 requires that the injured worker wait twenty-six weeks from the last payment of compensation under R.C. 4123.56, or twenty-six weeks from the date of injury, or date the occupational disease, was contracted. If the employer pays salary continuation at a rate high enough to prevent the BWC from paying TTD benefits, then no benefits under R.C. 4123.56 would have been paid. The injured worker would only need to wait the applicable waiting period from the date of injury, or date of contraction of the occupational disease, to apply for permanent partial disability benefits.
- 5. Application of *Crabtree/Russell* to Salary Continuation:** As previously stated, hearing officers do not have jurisdiction to terminate salary continuation benefits. However, where ongoing TTD benefits are not being paid due to salary continuation benefits being paid by the employer, and salary continuation benefits cease, TTD benefits shall commence, or be ordered to commence. If a request is filed to declare the injured worker MMI, *Russell* applies, and that period of disability shall be deemed continuous and not a new period of disability. Thus, if an injured worker's TTD benefits are terminated based upon a finding of MMI, TTD benefits are terminated as of the date of the hearing.
- 6. VSSR Awards:** If a VSSR award is made in a claim where salary continuation was paid for some period of time, the VSSR award is applied to the amount of TTD compensation that would have been paid had salary continuation not been paid.

Documentation Submitted by Physician Assistants, Advanced Practice Nurses, Certified Nurse Practitioners, and Clinical Nurse Specialists Memo M5, September 10, 2012

Medical documentation submitted by an Advanced Practice Nurse (APN), a Certified Nurse Practitioner (CNP), or a Clinical Nurse Specialist (CNS), operating within the scope of his or her standard care arrangement (SCA), or by a Physician Assistant (PA), who is practicing under an approved supervision agreement, is evidence to be considered by a hearing officer. An APN, CNP,



HEARING OFFICER MANUAL UPDATES

Documentation Submitted by Physician Assistants, Advanced Practice Nurses, Certified Nurse Practitioners, and Clinical Nurse Specialists Continued

or CNS, depending upon his or her area of specialization, may submit documentation regarding the evaluation of the injured worker's (IW) wellness; regarding preventive or primary care services required by IW; and regarding care for the IW's complex health problems. Under an approved supervision agreement, a PA may submit documentation assessing injured workers and developing and implementing treatment plans for injured workers, which are within the supervising physician's normal course of practice and expertise, and, which are consistent with the approved physician supervisory plan, or the policies of the health care facility, in which the PA is practicing. Such medical evidence is not sufficient to justify the payment, or non-payment, of compensation under the provisions of R.C. 4123.56 through R.C. 4123.60.

Prescription drug and therapeutic device documentation submitted by a PA, APN, CNS, and CNP, who has been granted prescriptive authority under the provisions of Chapter 4723 or 4730 of the Revised Code or Chapter 4723 or 4730 of the Administrative Code, is evidence to be considered by a hearing officer.

Documentation may be submitted by a PA, APN, CNP or CNS on office letterhead, appropriate BWC forms and other similar evidence. Documentation must be signed by the APN, CNP or CNS authorized to treat in the SCA, or by the PA practicing under an approved supervision agreement.

Commission Hearings – Court Reporters Memo R2, September 10, 2012

Parties wishing to have a court reporter present for any Industrial Commission (IC) hearing shall notify the Hearing Administrator at least seven (7) days prior to hearing. Such party shall indicate the amount of extra time, if any, that the party expects the hearing to take.

If a party brings a court reporter to a hearing, without prior notice to the IC, the Hearing Officer shall inquire as to the amount of extra time which may be necessary to complete the hearing. The Hearing Officer must decide whether to proceed as scheduled, hold the hearing at the end of the hour, or at the end of the docket, or reset the hearing with appropriate hearing time. A Hearing Officer should not delay other scheduled hearings in order to proceed with a lengthy surprise court reporter hearing.

If a party brings a court reporter to an IC hearing, that party shall submit a copy of the transcript to the claim file. Such party is not obligated to provide a certified copy to the other side. If the other side requests a copy of the transcript, such copy shall be made by the submitting party from the transcript submitted to the file.



HEARING OFFICER MANUAL UPDATES

Use of Audiovisual Evidence Memo R7, September 10, 2012

The use of audiovisual evidence is permitted in Industrial Commission (IC) hearings.

A written synopsis of the audiovisual evidence shall accompany the audiovisual evidence that is filed with the IC. At the time that a party files audiovisual evidence with the IC, said party shall provide a copy of the synopsis to the opposing party, except in cases where the opposing party is represented. In the latter cases, the party shall provide a copy of the synopsis to the representative of the opposing party. A party that intends to present audiovisual evidence at the hearing must request additional time, in writing, if additional time will be required. The request for additional time must accompany the appeal, or motion, that is creating the issue at the hearing, or be filed when it is evident that the contested matter will result in a hearing.

The IC will make every effort to ensure that audiovisual evidence that is filed will be made available as a document in ICON and be viewable at the hearing on the hearing officer's computer. It is the obligation of the party filing audiovisual evidence to ensure that the IC is able to format the evidence for viewing. If the IC is unable to make the audiovisual evidence available, it is the obligation of the party offering the audiovisual evidence to bring, to the hearing, the equipment required for the presentation of the audiovisual evidence. It is also the obligation of the party that introduces such audiovisual evidence to submit a complete copy of the evidence for the file.

The date and time of the recording of the audiovisual evidence should be clearly incorporated into the audiovisual medium during the presentation of the audiovisual evidence.

Any time a Hearing Officer encounters a situation where it appears a hearing will disrupt a docket due to length or otherwise, the Hearing Officer shall take available steps to minimize the disruption. Such steps may include moving the hearing to the end of the hour or the end of a docket. The Hearing Officer may also seek assistance of other Hearing Officers not scheduled for hearings that day. Only in extraordinary circumstances should a hearing be reset to another day.



SUPREME COURT CASE UPDATES

State ex rel. Corman v. Allied Holdings, Inc., 132 Ohio St.3d 202, 2012-Ohio-2579, 970 N.E.2d 929

An injured worker who voluntarily retires from employment is not entitled to temporary total disability compensation without contemporaneous evidence of a medical inability to perform other work during the post-retirement years

Decided: June 14, 2012

Issue: Whether the Industrial Commission (IC) abused its discretion by (1) finding that the Injured Worker (IW) voluntarily retired from the workforce; and (2) finding that the IW's retirement, at a time when he was unable to return to his former position of employment, precluded the reinstatement of temporary total disability compensation (TTDC).

Holding: The Ohio Supreme Court affirmed the decision of the Tenth District Court of Appeals, denying the IW's request for a writ of mandamus. The Ohio Supreme Court specifically held that TTDC is to compensate for the loss of earnings while an IW heals and that there can be no loss of earnings where an IW abandoned the active work force, relying upon the holding in *State ex rel. Pierron v. Indus. Comm.*, 120 Ohio St.3d 40, 2009-Ohio-5245, 896 N.E.2d 140. The Ohio Supreme Court rejected the IW's argument that *Pierron* was inapplicable. The Injured Worker argued that, unlike in *Pierron*, his retirement was injury-induced. The Ohio Supreme Court noted that the Injured Worker's did not affect its decision since there was no contemporaneous evidence of a medical inability to perform other work during the years since his retirement.

Case Summary: The IW suffered an injury, on 01/30/2002, while working as a car hauler and truck driver. The claim was allowed for a right knee strain and right medial meniscus tear. The IW underwent three surgeries in April 2002 and then began an aggressive regime of physical therapy. In January 2003, the IW's attending physician indicated that the IW could return to work with restrictions, but did not provide a specific return to work date. Later the same month, the Employer had the IW examined by Dr. Randolph. Dr. Randolph opined that the IW's allowed conditions reached maximum medical improvement (MMI) and that the IW was capable of returning to work with the permanent restrictions of no prolonged sitting or standing, no squatting, no walking on uneven surfaces, and no climbing of stairs and ladders.

On 04/03/2003, the Employer filed a motion requesting that TTDC be terminated based upon Dr. Randolph's report. Thereafter, on 04/07/2003, the IW sent a letter to his retirement fund indicating that he is retiring on 04/01/2003. On 07/14/2003, a District Hearing Officer (DHO) granted the Employer's motion by finding the IW attained MMI and terminated TTDC.

Two days later, the IW filed a motion requesting the additional allowance of aggravation of pre-existing osteoarthritis right knee based upon Dr. Lawhon's 06/03/2003 office note, wherein Dr. Lawhon indicated that he agreed with Dr. Randolph's MMI opinion. The IW later submitted the 12/09/2003 and 12/23/2003 reports of Dr. Bender as further support for his motion. Dr. Bender opined that the requested condition is related to the claim and that it had not yet attained MMI since the IW was a candidate for a total right knee replacement. In the later report, Dr. Bender



SUPREME COURT CASE UPDATES

2012-Ohio-2579 Continued

noted that if the IW did not proceed with the right total knee replacement surgery, then his allowed conditions were at MMI. The IC granted the motion in January 2004.

Despite the recommendation for surgery, the IW did not undergo surgery until 03/30/2009. Thereafter, the IW filed a motion requesting TTDC from the date of surgery and to continue. On 06/10/2009, a DHO denied the request for TTDC by finding that the IW's voluntary retirement, on 04/01/2003, precluded the reinstatement of TTDC. The DHO relied upon the IW's hearing room testimony regarding the higher payment a regular retirement afforded him, the IW's 04/07/2003 letter, and the fact that the IW had not worked since the date of his retirement. The DHO additionally rejected the IW's argument that he was entitled to TTDC since he was receiving TTDC on the date of his retirement. The DHO specifically distinguished the decisions in *State ex rel. OmniSource Corp. v. Indus. Comm.*, 113 Ohio St.3d 303, 2007-Ohio-1951, 865 N.E.2d 41, and *State ex rel. Reitter Stucco, Inc. v. Indus. Comm.*, 117 Ohio St.3d 71, 2008-Ohio-499, 881 N.E.2d 861. Both decisions involved terminations for a violation of a written work rule. The IW appealed and filed an affidavit in which he alleged that he retired secondary to his allowed conditions. On 09/01/2009, a Staff Hearing Officer affirmed the DHO's order by finding that the IW's retirement was voluntary and an abandonment of the workforce. The SHO relied on the IW's 04/07/2003 letter, the IW's testimony, and *Pierron*, 120 Ohio St.3d 40, 2009-Ohio-5245, 896 N.E.2d 140.

The IC refused the IW's appeal, and the IW filed a complaint in mandamus in the Tenth District Court of Appeals. In 2010, the Tenth District Court of Appeals denied the requested writ by finding that the IC did not abuse its discretion in finding that the IW voluntarily abandoned the entire workforce upon his retirement in April 2003 and in finding that the IW's abandonment precluded the reinstatement of TTDC. The Tenth District Court of Appeals held that a departure from the entire workforce for reasons unrelated to an industrial injury precludes an award of TTDC since any loss of earnings is not causally related to the industrial injury. The IW's appeal to the Ohio Supreme Court followed.

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

An injured worker is ineligible to receive temporary total disability compensation if the injury is not the reason that an injured worker could not return to former position of employment

Decided: February 15, 2012

Issue: Whether the Industrial Commission (IC) abused its discretion when it found that the allowance of an additional condition is evidence of new and changed circumstances sufficient to justify its exercise of continuing jurisdiction to award a new period of temporary total disability



SUPREME COURT CASE UPDATES

2012-Ohio-542 Continued

compensation (TTDC) following the injured worker's (IW) refusal of suitable light-duty work.

Case Summary: In January 2007, the IW sustained a lumbar sprain while at work and received TTDC for a few weeks. The IW returned to work in February 2007 to a light-duty position. Subsequently, in March 2007, the IW's attending physician reduced the IW's work restrictions. The Employer responded by increasing the IW's job duties. On 04/11/2007, the IW complained to his attending physician that his increased job duties were causing him pain. Despite his complaints, the physician recommended the same work restrictions. Thereafter, the IW complained to the Employer that he could not perform his light-duty job secondary to his increased pain. In response, the Employer offered him another position within his physical capacity; however, the IW refused the position and resigned his employment. Four months later, the IW requested TTDC from 04/24/2007 through 11/04/2007. A Staff Hearing Officer (SHO) ultimately denied the request by finding that the requested period of disability was unrelated to the industrial injury and was, rather, the result of his refusal of suitable light-duty employment.

In March 2008, the claim was amended to include the condition of substantial aggravation of pre-existing hypertrophy at the L4-L5 facet joints. The IW requested TTDC from November 2007 and to continue based upon the additional allowance. A District Hearing Officer (DHO) denied the request based on the IW's refusal of a good-faith, light-duty job offer and upon the lack of proof that the newly allowed condition resulted in different work restrictions that prevented the IW from performing the light-duty job. On appeal, an SHO vacated the DHO's order and granted the IW's request. The SHO specifically found that the newly allowed condition, in combination with new, more restrictive functional restrictions, was evidence of new and changed circumstances and that this change justified the award of TTDC. Thereafter, the IC refused the Employer's appeal, and the Employer filed a complaint in mandamus.

A magistrate recommended that the Tenth District Court of Appeals grant the requested writ by finding the IC abused its discretion by concluding that there was sufficient evidence of new and changed circumstances since its prior finding that the IW had refused a valid light-duty job offer. The magistrate found that there was no evidence that the IW's condition worsened since his refusal of the Employer's light-duty offer. The Tenth District Court of Appeals agreed that the file lacked evidence supporting a finding of new and changed circumstances. The Tenth District Court of Appeals noted that the increase in treatment, and physical restrictions, following the additional allowance, did not demonstrate the IW was unable to perform the light-duty work. The IW's appeal to the Supreme Court followed.

Com.
Bulletin of

The Industrial Commission

"The Evil It Seeks To Remedy Is
One That Calls Loudly For Action."
—Chief Justice Fullerton.

of Ohio

"An Admirable System That Is
Doubtless Unsurpassed Anywhere."
—The Late Mayor Gaynor of
New York City.

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OHIO STATE COLLEGE

41

Building Up to Our 100th Year

Adam Gibbs, *Director of Communications*

Since its beginning in 1913, the Ohio Industrial Commission's mission has remained the same: Expediently adjudicate workers' compensation disputes in a fair and impartial manner.

As the IC embarks into a new century of devoted public service, this section of the Adjudicator is dedicated to looking back into the 100-year history of the agency.

Sometimes the best way to see where an agency is going is to look at the journey that the agency has traveled.

The following is an article that was published on June 1, 1914 in the agency's newsletter, "The Bulletin of the Industrial Commission of Ohio."

In the article, Chief Medical Examiner A.W. Binkley offers a comprehensive list of the duties performed by the Medical Division within the IC.

Binkley delves into the responsibilities of the newly created division while detailing its plan for the future.

The IC's Medical Division of 1914

At its creation, the Medical Division was very different from the current Medical Services Department, which is responsible for processing permanent total disability applications, composing statements of fact, preparing medical information packets, scheduling medical examinations, and processing medical reports to prepare claim issues for hearing. Unlike the 1914 Medical Division, the modern Medical Services Department is charged with recruiting and training independent, impartial physicians throughout Ohio to perform medical exams on behalf of the IC.

The differences between the past and present are vast, but one thing has remained the same: For 100 years, the IC has dedicated itself to providing excellent customer service in an environment of professionalism and fairness while adhering to a philosophy of fiscal accountability with unwavering conviction.

WHY A MEDICAL DIVISION.

DR. A. W. BINCKLEY,
Chief Medical Examiner.

One of the most important duties imposed upon this Department by the Commission is to be of aid in determining medical facts and in approving the proper medical aid and the fee bills rendered for such aid.

The rate of compensation and amounts for specified disabilities are fixed by statute but in the majority of cases, it is necessary that it be determined from a medical standpoint, as to the *exact nature and extent of the injury, with the resultant proper disability*. The Commission looks to its medical division for the proper consideration of these medical facts.

This Department consists of three physicians and the chief medical examiner at the home office, a local medical examiner for each and every county and a special eye and X-Ray examiner for special districts in the state. This Department is well equipped and ready to aid in the proper determination of medical facts. It is easily appreciated that there is, and always will be, a certain number of cases in which the determination of medical facts must necessarily be de-

layed. These cases are very few in proportion to the number filed. The delay in handling a case, in such cases that are delayed, is due, as a rule, to causes which are avoidable, and inasmuch as delay is a thing to be avoided, we will classify the causes of delay as follows:

1. Causes which delay the hearing of a claim and which are avoidable.
2. Causes which delay the hearing of a claim and which are unavoidable.

CAUSES WHICH DELAY THE HEARING OF A CLAIM AND WHICH ARE AVOIDABLE.

Too much attention cannot be given to this subject. When a case is completed it can be assembled in the claims department, considered as to medical facts and fees by the Medical Division, examined by the claim examiner who computes the compensation, be presented, considered and decided by the Commission in *not to exceed a greater period of time than two days*. This is being done with more than 200 cases per day, and the method of handling cases is so systematized that our capacity cannot be

exceeded by the number of accidents which occur in this state.

A claim is composed, as a rule, of three component parts. First, the preliminary application, which must be sent in within a week of the date of the injury. Second, an attending physician's report and fee bill, which is sent to the physician on the same day that the notice of injury is received, with the request that the report be returned at once and the fee bill returned when the treatment is completed. Third, of a supplemental application blank, which is sent to the injured employee on the same day on which we receive the first notice of injury report. This blank is not difficult to fill out and is to be signed by the injured employee and certified to by his employer. This system is simple, and therefore not complicated. Why, therefore, the delay in these cases that are delayed? *In practically all of the cases, the answer is that there has been either a failure to promptly send in these report blanks which must comprise a claim, or, if sent in, they are not properly filled out.* Note that there are three parties interested, the employer, the employee and the physician. The delay in the claim is therefore due to failure on the part of one or more of the three parties interested.

Further explaining the case of delay, let us take up the three component parts of the claim and note what happens when either of the parts is not promptly sent in.

First—Preliminary Application.

Failure to send in the preliminary application by the employee within a week of the date of the injury, makes the employee liable not to receive compensation for his injury, if the injury incapacitates him for more than a week. If it lasts less than a week, the injured man is not affected but his attending physician's fee bills are not paid until three months after the date of injury. Failure in this regard causes many hundreds of letters to be written by employees, asking in

regards to their compensation, or by physicians asking in regards to whether or not they are to receive blanks or why they have not received them, or why they cannot receive compensation for the medical services rendered in the case. If the preliminary application report is not properly filled out, it necessitates its return, or when the injury is not clearly defined on the notice, it necessitates a local medical examination. If this report is not promptly filed and is delayed, it makes medical facts hard and sometimes almost impossible to be obtained and determined. We appreciate, from reports of many physicians that employers and employees are "taking chances in not reporting their minor injuries." This is being gradually corrected for the reason that the physicians do not expect to stand the loss of payment for medical treatment in a case, simply because the injury is not reported and are now notifying us of treatment rendered to injured employees for which they have not received their report blanks. This condition is further being corrected, for the reason that many of these trivial injuries do not always remain trivial, especially if 'blood poisoning' occurs. The employer and employee cannot afford to take chances on this kind of cases.

Second—The report of the physician.

Failure to send this report in promptly is the very frequent cause of delay in a claim and the consequent withholding from the injured man of compensation which he is depending on during the period of his disability. Failure in this respect necessitates that we again write to the physician for the report, or if we are unable to obtain it in this way, to then notify the injured man, or the employer, as to the cause of delay in the case. Failure in this regard, further makes it difficult to obtain a clear idea of the medical facts, or if the physician's report is not clearly reported or is incorrectly stated, or the diagram on

the back of the report, on which must be indicated the loss of certain parts of the body, or injuries to these parts, is not clearly marked and described, it delays the determining of medical facts.

Third—The supplemental application blank.

If the injury lasts more than a week, and the injured employee fails to send in this supplemental application, the man receives no compensation. Failure to send in this blank promptly, seems to be due to the fact that the injured employee thinks that if he "signs up" this blank, it closes his case. *The fact that the injured employee signs this blank does not close his case but opens it, so that compensation can be started. The case is not closed until the disability ceases and if it is closed at the time that the disability is considered to have ceased, the Commission can RE-OPEN THE CASE, UPON PRESENTATION OF FURTHER FACTS.*

The injured employee does injustice to himself in many of these cases by not thoroughly understanding this fact. In many other cases we find that the injured employee does not file this supplemental application blank because his injury does not cause a disability of more than a week, and there is no compensation due him. But, it is important that this blank be filled out for the injury, even if it lasts less than a week, in order that the Commission is enabled to promptly consider the physician's fees in the case. Failure in this regard also causes a great amount of unnecessary correspondence, particularly from the physician. The Commission has adopted a rule to take care of these cases, in which the employee does not file his final application and the disability lasts less than a week, so that the physician's fee bill can be paid in each and every case. But this delay can easily be obviated by the prompt filing of the

application in injuries lasting less than a week.

The above enumerated causes of delay are those that certainly can be called "unnecessary causes." They can be reduced to a minimum and cause no hardship to any one concerned, if given attention.

UNAVOIDABLE CAUSES OF DELAY IN THE HANDLING OF CLAIMS.

These cases are very few in proportion and may be classified, briefly, as follows:

First:—Permanent partial disabilities of a severe nature, such as a permanent partial or total loss of sight of an eye, partial or total loss of, or loss of use of, finger or fingers, hand, arm, foot, or leg, and for which the exact disability cannot be immediately determined. In these cases the Commission requires its medical division to estimate a period over which compensation, as temporary total disability, can be justly and safely considered, until the exact permanent disability present can be determined. It is appreciated that it would not be just to consider these important cases in any other way.

Second:—A small number of death claims in which medical facts or the exact causes of death are not clearly shown. These cases necessitate the obtaining and determining of the exact causes and medical facts.

Third:—Long continued temporary total disabilities of a severe nature, in which further examination must be made to determine the actuality of continued disability.

Fourth—Cases of exaggeration, malingering, etc.

Another important duty, imposed on this Department by the Commission is the consideration of medical fees to be paid from the state insurance fund, which is composed of employers' premiums. The Commission realizes that this question is of vast importance and it is made the duty

of this Department to approve, after a full consideration of medical facts presented or obtained, the proper medical fees. The nature and extent of the injury, and unusual or exceptional treatment enter into the consideration of the fee bill. It is, and always will be necessary to maintain a uniformity as to charges for treatment of the same kind of injuries. It is further necessary to consider each case in connection with medical facts as presented and absolutely impartially. It is needless to state that we cannot consider any one surgeon's services to be of more value than another surgeon's services and for the treatment of the same kind of an injury. It is further needless to assert that all fee bills cannot be approved as rendered.

The Commission recognizes the fact that the injured employee has a certain right as to preference in the selection of his attending physician. If the injured man does not exercise and insist on this right, then it is most certainly the right and the duty of the employer to provide the best surgical attention possible for his injured employees. This Department finds that this principle is generally adhered to by employers and we believe it to be the right one, inasmuch as it gives an equal opportunity to all physicians in the treatment of industrial accidents. The physician best qualified in this work will advance himself, the one least qualified will eliminate himself, this for the reason that the employer *must of necessity observe the medical aid, owing to the effect that it will have on his premium*, and the employee will observe the effect of the treatment given and the disability that is obtained.

We believe a strict adherence to this principle will make for good surgical attention in the future in the treatment of industrial accidents. We further find that employers, employees and every one concerned appreciates that the physician's services in the treatment of an industrial ac-

cident is of the greatest importance and of great value and that the best treatment is the most economical in the long run.

This Department has given conscientious consideration to each and every case filed, and owing to the fact that each case is given thorough consideration from the time that the first notice of injury report is filed to the time that the case is finally disposed of by the Commission, our medical average paid per case, including hospital and nursing attention, is \$9.00, while the closest average of any workmen's compensation Act which we can find is fifty per cent less and for the same kind of services. This high average is maintained in spite of the fact that the employers' premiums are less for workmen's compensation insurance and the benefits to the injured man higher, than the majority of other acts.

Other questions of great interest to employers, employees and physicians, and which are of a medical nature, will be taken up in the future and are as follows:

1. The subject of malingering and exaggeration, how detected and prevented.

2. The necessity for a medical division, to be independent and not in the same relation to the injured man as the attending physician whose rendering of facts and unbiased judgment is often difficult owing to his dependency, to such community for his clientele. This necessity is further shown when it comes to determining the real medical facts which are often confusing, owing to the misrepresentation of such facts in different ways and for different purposes, with the idea of beclouding the real facts.

3. What difficulties arise in special examinations and what are the causes of such difficulties. What the subject first aid, infection, hernia and grave disabilities really mean to employers and employees.

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