

CBA Workers' Compensation Committee

Case Law Update

January 12, 2006

Temporary Total Disability Compensation

1. State ex rel. Eckerly v. Indus. Comm. 105 Ohio St.3d 428, 828 N.E.2d 97, 2005-Ohio-2587. (7-0 decision). Supreme Court held that TTC is confined to situations in which a *working* claimant is prevented from doing his or her job by an industrial injury. Because there was no evidence that the claimant was working during the period of time TTC was requested, the claimant was not eligible for TTC. The Court opined that the claimant should seek wage loss compensation under that scenario.
2. State ex rel. Nick Strimbu, Inc. v. Indus. Comm. 106 Ohio St.3d 173, 833 N.E.2d 286, 2005-Ohio-4386. (7-0 decision) Supreme Court held that the evidence supported Industrial Commission's finding that discharge of workers' compensation claimant, for omitting company from the list of former employers that he had recorded on his employment application, did not constitute a voluntary abandonment of his employment, so as to bar temporary total disability compensation (TTC). The court took the initiative to explain that in order to constitute falsification of an employment application, the omission had to be deliberate and motivated by intent to deceive, and claimant stated that the omission was inadvertent and that he simply forgot company while attempting to recount all of his employers over the past decade. The Court noted that the parties reached a consensus in argument regarding the fact that falsification needed to be deliberate and motivated to deceive.

Permanent Total Disability Compensation

1. State ex rel. International Paper v. Trucinski 106 Ohio St.3d 203, 2005-Ohio-4557. (7-0 decision). Supreme Court held that a scheduled loss for the loss of a leg triggers entitlement to statutory permanent total disability compensation regardless of whether the claimant is capable of working. This decision upholds State ex rel. Thomas v. Indus. Comm. 97 Ohio St.3d, 2002-Ohio-5306 which was a 4-3 decision.

Last year Senate Bill 7 had language in it to eliminate statutory PTD for someone who has lost one limb by making it clear that one limb would not constitute two body parts. However, that Bill was last assigned to the State and local government committee where it has stalled.

2. State ex rel. Sagert v. Indus. Comm. 106 Ohio St.3d 48, 831 N.E. 2d 421, 2005-Ohio-3670. (5-2 decision). Retroactive payment of workers'

compensation for permanent total disability (PTD) for amputation of arm below elbow began two years before claimant's motion for statutory PTD, not date of Industrial Commission order declaring a total loss of use of the right arm (or what would have been 9 years earlier). Court focused on the provisions in the Ohio Revised Code that only allow for the claimant to go back two years when seeking any retroactive compensation.

Workers' Compensation Practice

1. Ward v. Kroger Co. 106 Ohio St.3d 35, 830 N.E.2d 1155, 2005-Ohio-3560. (7-0 decision). The Supreme Court held that claimant on appeal could seek to participate in the fund only for those medical conditions that had been addressed in the administrative order from which his appeal was taken, and thus claimant should not have been allowed to amend his complaint to add conditions that had not been addressed by the Industrial Commission.
2. State ex rel. Jeany v. Cleveland Concrete Construction, Inc. 107 Ohio St.3d 20, 836 N.E.2d 554, 2005-Ohio-5828. (7-0 decision). Factual stipulations entered into between claimant, employer, and BWC at stage of earlier proceedings to which Industrial Commission was not a party, relating to alleged disability reasons for claimant's retirement, were not binding on the Industrial Commission in subsequent proceedings, over ten years later, to recover "impairment of earning capacity" compensation.

In a lawsuit, the claimant and employer made factual stipulations that the claimant retired from his employment due to his work injury. Ten years later the claimant filed for an impaired-earning-capacity award and the Commission denied the request finding that claimant had voluntarily retired. The Court concluded that because the Commission was not a party to the prior lawsuit, the factual stipulations were not binding for the purpose of the IEC hearing.

Psychological Conditions

1. McCrone v. Bank One Corporation. 107 Ohio St.3d 272, 839 N.E.2d 1, 2005-Ohio-6505. (5-2 decision). Supreme Court held that psychological or psychiatric conditions that do not arise from a compensable physical injury or occupational disease are excluded from the definition of "injury," and the exclusion does not violate equal protection. The Court added language providing the legislature with some of the factors that should be taken into consideration when determining if mental only claims should be compensable. Court also seemingly adopts a view that there only needs to be a physical injury involved in order for the psychological claim to be compensable, rather than focus on the fact that the psychological condition should flow directly from the physical injury.

Unauthorized practice of law

On December 15, 2004, the Supreme Court of Ohio issued its decision regarding the Recommendations from the Ohio Supreme Court's Board on the Unauthorized Practice of Law which originated from a Complaint filed by the Cleveland Bar association. The Court concluded that non-lawyers who appear and practice before the Industrial Commission and BWC must act in conformity with the Ohio Industrial Commission Resolution R04-1-01 (The Industrial Commission issued R04-1-03 to permanently adopt the interim R04-1-01 as the standard of conduct).

The Supreme Court then remanded the case back to the Board on the Unauthorized Practice of Law to make a recommendation as to whether or not there was a violation of R04-1-01. Here were some of the Board's findings:

1. No violation for signing and filing documents.
2. Negotiating and involvement with settling claims was found to be a violation.
3. Direct and indirect examination of witnesses during a hearing was found to be a violation.
4. Presentation of employer concerns, arguments, summations of evidence, conclusions regarding the import of factual information and closing statements was found to be in violation.
5. Recommendation and advice to employers as to taking appeals and other legal action was found to be a violation.
6. Evaluation and advice or recommendation concerning whether an employer should retain an attorney to handle a claim before the Industrial Commission was found not to be a violation but gave a strong warning that their actions leading up to that "advise" may be a violation.

No monetary penalty was recommended for the violations found.

New Industrial Commission Resolutions in 2005

Reconsideration

Resolution R05-1-02

September 1, 2005

WHEREAS, the Industrial Commission issued Resolution R98-1-03 on May 6, 1998 adopting guidelines that apply to requests for reconsideration of final Industrial Commission orders; and

WHEREAS, Section 4123.52 of the Ohio Revised Code provides that the jurisdiction of the Industrial Commission over each case is continuing and the Industrial Commission may make such modification or change with respect to former findings or orders with respect thereto, as, in its opinion is justified; and

WHEREAS, the decision of State, ex rel. Gatlin v. Yellow Freight Company (1985), 18 Ohio St.3d 246, found that regardless of the existence of a legislatively prescribed court appeal, the

Industrial Commission has continuing jurisdiction to reconsider its orders for a reasonable period of time absent statutory regulations restricting the exercise of reconsideration; and

WHEREAS, the decision of State, ex rel. Nicholls v. Industrial Commission (1998), 81 Ohio St.3d 454, stated that continuing jurisdiction of the Industrial Commission is not unlimited and that its prerequisites are: (1) new and changed circumstances; (2) fraud; (3) clear mistake of fact; (4) clear mistake of law; or (5) error by inferior tribunal; and

WHEREAS, the Industrial Commission recognizes the technological advance in the retrieval of Industrial Commission and Bureau orders from electronic databases within the Bureau of Workers' Compensation and the Industrial Commission; and

WHEREAS, Section 4121.03(E)(1) of the Ohio Revised Code provides that the Industrial Commission is responsible for the establishment of the overall adjudicatory policy of the Industrial Commission; and

WHEREAS, the Industrial Commission finds it necessary and proper to adopt revised guidelines to apply to requests for reconsideration of final Industrial Commission orders.

THEREFORE BE IT RESOLVED that the following guidelines shall be adopted by the Industrial Commission and shall apply to requests for reconsideration of final Industrial Commission decisions:

- A. A party to a claim who desires to file a request for reconsideration of a Industrial Commission decision must file the request for reconsideration within fourteen days from the date of receipt of:
 1. An order issued by the members of the Industrial Commission;
 2. A final order issued by a staff hearing officer except for an order issued by a staff hearing officer under Section 4121.35(B)(2) and Section 4123.511(D) of the Ohio Revised Code; or
 3. An order issued pursuant to Section 4123.511(E) of the Ohio Revised Code refusing to hear an appeal from a decision of a staff hearing officer issued under Section 4123.511(D) of the Ohio Revised Code.

- B. All requests for reconsideration shall include the following:
 1. A recitation of the specific grounds upon which reconsideration is sought; and
 2. Identification of the relevant orders of the Administrator and the Industrial Commission from which reconsideration is sought as well as any other underlying orders addressing the issue in controversy; and
 3. Identification of relevant documents and proof contained within the claim file and, where appropriate, citations to the legal authorities relied upon to support the request for reconsideration; and
 4. If there exists newly discovered evidence which by due diligence could not have been discovered and filed by the appellant prior to the date of the order from which reconsideration is sought, such evidence shall be filed with the request for reconsideration.

Failure to comply with Section (B) may result in a denial of the reconsideration request.

- C. C. A copy of the request for reconsideration shall be sent to the opposing party and opposing party's authorized representative by the party that requests reconsideration at the time the request for reconsideration is filed with the Industrial Commission. Should

the opposing party desire to reply, the written reply must be filed with the Industrial Commission within fourteen days of that party's receipt of the request for reconsideration.

- D. If the requirements of Sections (A) and (B) are satisfied, hearing officers designated by the Industrial Commission shall review the request for reconsideration pursuant to the following criteria:
1. A request for reconsideration shall be considered only in the following cases:
 - a. New and changed circumstances occurring subsequent to the date of the order from which reconsideration is sought. For example, there exists newly discovered evidence which by due diligence could not have been discovered and filed by the appellant prior to the date of the order from which reconsideration is sought. Newly discovered evidence shall be relevant to the issue in controversy but shall not be merely corroborative of evidence that was submitted prior to the date of the order from which reconsideration is sought.
 - b. There is evidence of fraud in the claim.
 - c. There is a clear mistake of fact in the order from which reconsideration is sought.
 - d. The order from which reconsideration is sought contains a clear mistake of law of such character that remedial action would clearly follow.
 - e. There is an error by the inferior administrative agent or subordinate hearing officer in the order from which reconsideration is sought which renders the order defective.
- E. Requests for reconsideration that do not comport with the aforementioned criteria will be denied by a staff hearing officer without being presented to the Industrial Commission members.

BE IT FURTHER RESOLVED that the guidelines set forth in Resolution R05-1-02 are to become effective and shall apply to all final orders of the Industrial Commission published on or after September 6, 2005.

Appeals

R05-1-03

Guidelines for Filing Notices of Appeals from Staff Hearing Officers orders September 1, 2005

WHEREAS, on March 28, 1994, the Industrial Commission promulgated Resolution No. R94-1-6 providing guidelines for determining whether to hear appeals from orders of Staff Hearing Officers issued under Division (D) of Section 4123.511 of the Ohio Revised Code; and

WHEREAS, on November 23, 1994 in Resolution No. R94-1-18, the Industrial Commission adopted additional requirements to effectively implement Section 4123.511(E) of the Revised Code; and

WHEREAS, on July 2, 1996 in Resolution R96-1-03, the Industrial Commission provided that it shall consider whether self-insuring employers have timely paid compensation and/or benefits pursuant to Section 4123.511 of the Revised Code in deciding whether to permit an appeal filed by a self-insuring employer to be heard; and

WHEREAS, on June 10, 1997, in Resolution No. R97-1-05, the Industrial Commission provided that it shall inquire at the time of a hearing held under Section 4123.511(E) on an appeal filed by a self-insuring employer as to whether the self-insuring employer continues to be in compliance with the timely payment of compensation and/or benefits pursuant to order of the hearing officer issued under Section 4123.511 of the Ohio Revised Code, and

WHEREAS, the Industrial Commission finds it appropriate and beneficial to set forth the guidelines described in Resolutions R94-1-6, R94-1-18, R96-1-03, and R97-1-05 within one document, and

WHEREAS, the Industrial Commission recognizes the technological advance in the retrieval of Industrial Commission orders from electronic databases within the Industrial Commission and the Bureau of Workers' Compensation that eliminates the need for the appellant to attach actual copies of Industrial Commission orders to the notice of appeal filed pursuant to Section 4123.511(E) of the Ohio Revised Code; and

WHEREAS, the Industrial Commission desires to adopt revised guidelines for determining whether to hear appeals from orders of Staff Hearing Officers issued under Division (D) of Section 4123.511 of the Ohio Revised Code; and

A. THEREFORE BE IT RESOLVED that the Industrial Commission will permit appeals to be heard from orders of Staff Hearing Officers issued under Division (D) of Section 4123.511 of the Ohio Revised Code where:

1. The Industrial Commission determines the appeal presents issues for which the Industrial Commission desires to set policy or precedent or presents an unusual legal, medical, or factual question that the Industrial Commission members desire to hear.
2. There exists newly discovered evidence which by due diligence could not have been discovered and filed by the appellant prior to the date of the hearing held under Division (D) of Section 4123.511 of the Ohio Revised Code. Newly discovered evidence shall be relevant to the issue on appeal but shall not be merely corroborative of evidence that was submitted prior to the date of the hearing held under Division (D) of Section 4123.511 of the Ohio Revised Code.
3. There is the possible existence of fraud in the claim.

BE IT FURTHER RESOLVED that if the Industrial Commission determines not to hear the appeal within fourteen days after filing notice of appeal, the Industrial Commission shall issue an order to that effect and provide written notification to the parties and their respective representatives.

BE IT FURTHER RESOLVED that notice of appeal filed under Division (E) of Section 4123.511 of the Ohio Revised Code shall specify the grounds upon which the appeal is sought.

BE IT FURTHER RESOLVED that the appellant filing notice of appeal under Division (E) of Section 4123.511 of the Ohio Revised Code shall mail a copy of the notice of appeal to the opposing party's representative, if the opposing party is represented, or to the opposing party, if the opposing party is not represented, at the time the notice of appeal is filed with the Industrial Commission.

B. BE IT FURTHER RESOLVED that notices of appeal filed from orders of Staff Hearing Officers issued under Section 4123.511(D) of the Ohio Revised Code shall include the following:

1. Identification of all the underlying administrative orders from which the notice of appeal is filed;
2. Identification of all relevant documents that are within the claim file and where appropriate, citation to legal authority relied upon, to support the request that the notice of appeal be accepted for hearing under Section 4123.511(E);
3. If there exists newly discovered evidence which by due diligence could not have been discovered and filed by the appellant prior to the date of the hearing held under Division (D) of Section 4123.511 of the Ohio Revised Code that is relevant to the issue on appeal, but is not merely corroborative of evidence that was submitted prior to the date of the hearing held under Division (D) of Section 4123.511 of the Ohio Revised Code, such evidence shall be submitted with the notice of appeal.

C. BE IT FURTHER RESOLVED that notices of appeal filed by self-insuring employers from orders issued under Section 4123.511(D) of the Revised Code shall include a statement on the face of notice of appeal that certifies whether the self-insuring employer has paid, or will timely pay, compensation and/or benefits pursuant to Section 4123.511 of the Revised Code.

BE IT FURTHER RESOLVED that the Industrial Commission shall consider whether the self-insuring employer has paid, or will timely pay, compensation and/or benefits pursuant to Section 4123.511 of the Revised Code in deciding whether to permit an appeal filed by a self-insuring employer to be heard under Section 4123.511(E) of the Revised Code.

BE IT FURTHER RESOLVED that the Industrial Commission shall inquire at the time of hearing held under Section 4123.511(E) as to whether the self-insuring employer continues to be in compliance with the timely payment of compensation and/or benefits pursuant to Section 4123.511 of the Revised Code.

BE IT FURTHER RESOLVED that the Industrial Commission shall consider whether the self-insuring employer has timely paid compensation and/or benefits pursuant to Section 4123.511 of the Revised Code in deciding whether to permit an appeal set for hearing pursuant to Section 4123.511(E) to proceed to be heard on the merits.

D. BE IT FURTHER RESOLVED that Resolution R05-1-03 shall apply to notices of appeal filed on or after September 6, 2005 from orders of staff hearing officers issued under Section 4123.511(D) of the Revised Code and that Resolution R05-1-03 shall supersede Resolutions R94-1-6, R94-1-18, R96-1-03, and R97-1-05 for notices of appeal filed on or after September 6, 2005 from orders issued pursuant to Section 4123.511(D) of the Revised Code.