

IN THE SUPREME COURT OF OHIO

STATE OF OHIO ex rel. : CASE NO. 06-1889
MOSIER INDUSTRIAL SERVICES :
CORPORATION, :
Appellee, : On Appeal from the
 : Franklin County Court of Appeals,
 : Tenth Appellate District
-vs- : Court of Appeals
 : Case No. 05AP-1096
INDUSTRIAL COMMISISON OF OHIO, :
Appellant. :

MERIT BRIEF OF APPELLEE, MOSIER INDUSTRIAL SERVICES CORPORATION

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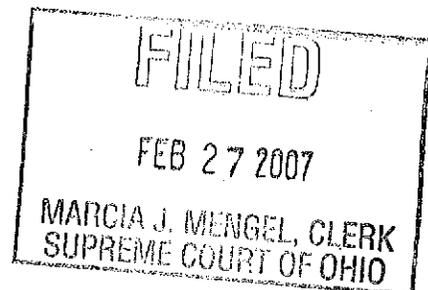


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STATEMENT OF FACTS

This case arose as an original action in mandamus filed in the Tenth Appellate District by Appellee, Mosier Industrial Services Corporation, (hereinafter referred to as “Mosier”). Mosier filed its Complaint in Mandamus asserting that the Appellant, Industrial Commission of Ohio, abused its discretion by refusing to accept jurisdiction to consider Mosier’s Motion to determine the nature and extent of claimant Walker’s disability and to find respondent, Shawn Walker, to have reached maximum improvement. (Supp. 1.) The basis for the Commission’s conclusion was that Mosier was paying wage continuation and not temporary total disability compensation even though such wage continuation was being paid pursuant to an order of the Bureau of Worker’s Compensation and consequently, the Commission asserted it had no jurisdiction under O.R.C. §4123.56 to consider termination of wage continuation. (Supp. 19-20.) It is the position of the Commission that wage continuation is different than temporary total disability compensation as it is allegedly voluntarily paid, not referred to in Ohio Revised Code §4123.56, and therefore termination of the same cannot be adjudicated by the Commission. (Id.)

The injured worker, Shawn Walker, (hereinafter referred to as “Walker”) was injured on August 12, 2003 while working for Mosier. (Supp. 2.) Walker filed a workers’ compensation claim which was allowed for the conditions of sprain thoracic region, sprain lumbrosacral, contusion of right knee, tear medial meniscus right knee, disc herniations at L4-L5, and aggravation of bulging/herniated discs at L3-4 and L5-S1. (Supp. 6, 8, 17, 18.) On September 9, 2003 the BWC awarded Walker temporary total disability compensation from August 18, 2003 to September 14, 2003 and to continue upon submission of fully completed C-84 forms, based on

a C-84 form completed by Walker's physician's office. (Supp. 8.) Mosier, as a state-funded employer, complied with the BWC's order awarding temporary total disability. Mosier and Walker entered into an agreement for the payment of wage continuation so that Mosier would not lose its group rating which would result in an increase in workers' compensation premiums. (Supp. 10.) Mosier continued to pay wage continuation pursuant to the BWC order awarding temporary total disability compensation on September 9, 2003, and based upon the continued submission of medical evidence of disability provided by Walker's physician's office to Mosier and Mosier's third party administrator. (Supp. 10.)

Walker did receive temporary total disability compensation from August 18, 2003 to September 14, 2003 during the same period he was also paid wage continuation. In December 2003 Mosier requested a finding of an overpayment from August 18, 2003 to September 14, 2003. (Supp. 12.) The Industrial Commission accepted jurisdiction with regard to the issue of overpayment based on wage continuation benefits paid, and ordered on December 9, 2003 that:

"Injured worker received both temporary total disability compensation and wage continuation from August 18, 2003 to September 14, 2003; injured worker is therefore overpaid temporary total disability compensation from August 18, 2003 to September 14, 2003, to be collected, from future awards per 4123.511(J), pursuant to the Industrial Commission policy."

(Supp. 12.) Neither party appealed the DHO's order.

On March 17, 2004, Walker filed a C-86 motion requesting the allowance of an additional condition. (Supp. 17.) On May 16, 2005, Mosier filed a C-86 motion with the Commission requesting the Industrial Commission to determine the nature and extent of Walker's disability, to terminate temporary total disability, and declare claimant to have reached maximum medical improvement. (Supp. 16.) Mosier's motion and Walker's March 17, 2004

motion requesting additional allowances for L3-4 and L5-S1 disc herniations, were heard simultaneously at a DHO hearing on June 21, 2005. (Supp. 17.) The DHO found jurisdiction to consider both motions and granted Walker's motion for the additional allowances requested, but denied Mosier's motion based on the medical evidence submitted. (Supp. 17-18.) The DHO found "the injured worker has not yet received maximum medical improvement in regard to the allowed conditions in the claim. pending the decompressive (sic) lumbar spine surgery recommended by Doctors Lawrence and Fontanez." (Supp. 18.) Further, the DHO also ordered temporary total to be paid as the DHO found "[T]herefore, further temporary total disability compensation, subsequent to March 30, 2005, is to be paid by the administrator of the Bureau of Worker's Compensation upon submission of competent medical proof of disability due to the allowed conditions in this claim." (Id.) As the DHO found entitlement for continued payment of temporary total, Mosier continued to pay wage continuation in lieu of temporary total disability. Mosier appealed the DHO's order.

On or about July 26, 2005, a staff hearing was held and the SHO modified the DHO's order. (Supp. 19.) The SHO affirmed the allowance of the additional conditions for Walker, but held that the Commission had no jurisdiction to address the temporary total disability issue in the context of Mosier's motion to terminate temporary total disability as Mosier was paying wage continuation and Walker was not receiving temporary total disability compensation. (Supp. 20.)

The Staff Hearing Officer specifically ordered in pertinent part as follows:

"This Staff Hearing Officer finds no jurisdiction to address the issue of Temporary Total Disability Compensation. Although, Temporary Total Disability Compensation was initially ordered in this claim in 2003, the employer elected to provide wage continuation as an alternative to Temporary Total Disability Compensation. Therefore, a prior finding found an overpayment of Temporary

Total Disability based upon the wage continuation.

This Staff Hearing Officer finds that wage continuation is not the same as Temporary Total Disability Compensation, and therefore, there is no jurisdiction to consider the issue of Maximum Medical Improvement or Temporary Total Disability Compensation, as there is no compensation ongoing nor any request for compensation pending at the time the Motion was filed, on the date of the hearing, or at the time of the Appeals. Therefore, again, there is no jurisdiction to address an issue of Temporary Total Disability Compensation as there is no Temporary Total Disability Compensation or request pending.”

(Supp. 20.) Mosier requested reconsideration of the SHO order, but the request was denied.

(Supp. 21.)

As the Commission denied Mosier’s request for reconsideration, Mosier filed a Complaint in Mandamus with the Tenth District Court of Appeals based upon the Industrial Commission’s refusal to exercise jurisdiction over Mosier’s motion requesting that the Commission determine the extent of Walker’s disability, find him to have reached maximum improvement and terminate the prior order of temporary total disability compensation ordered by the BWC and subsequently the DHO and SHO. (Supp. 1-5.) In the Magistrate’s Decision rendered on April 27, 2006, the Magistrate held “the bureau order placed a continuing duty upon the bureau to pay TTD compensation if all conditions precedent are met.” (Appellant’s Appx. 15.) The Magistrate found “the employer’s agreement to pay wages did not have the effect of vacating the bureau order, ***.” (Id.) The Magistrate found that “the Commission had jurisdiction to modify the bureau’s September 9, 2003 order by finding MMI has been reached.” (Id.) The Commission objected to the Magistrate’s decision.

The Tenth District Court of Appeals overruled the Commission’s objections. (Appellant’s Appx. 4.) The Court of Appeals found that the Bureau’s order not only granted temporary total

disability for a specified closed period of time, it also granted TTD for future periods of time upon the submission of properly completed C-84 forms. (Appellant's Appx. 6.) The Court further held that the fact the claimant had not been receiving TTD payments due to the existence of a wage continuation agreement had no bearing on the Commission's continuing jurisdiction to adjudicate realtor's motion and thereby potentially modify its September 9, 2003 order. (Appellant's Appx. 7.) The Court of Appeals further held that "[A]lthough the claimant may not have a right to receive TTD payments because of the wage continuation agreement, the commission had continuing jurisdiction to address the underlying TTD award." (Id.) The Court of Appeals overruled the Commission's objections and adopted the Magistrate's decision granting the Mosier's writ of mandamus and ordering the Commission to vacate that portion of its order holding that the Commission lacked jurisdiction to adjudicate realtor's May 16, 2005 motion and further ordered the Commission to enter an amended order that adjudicated the realtor's motion. (Id.)

Appellant, Industrial Commission, appealed the Court of Appeals' decision and filed a Notice of Appeal to the Ohio Supreme Court on October 11, 2006. (Appellant's Appx. 1.) On or about December 4, 2006, the Clerk of the Ohio Supreme Court filed notice of filing the record in the above captioned case. On or about January 9, 2007, Appellant, Industrial Commission, filed a Stipulation by all parties for an extension of an additional twenty (20) days for Appellant to file its Merit Brief until February 5, 2007. On or about February 2, 2007, Appellant filed its Merit Brief.

Appellant in its Merit Brief argues that wage continuation and TTD compensation are not the same. Appellant argues that as wage continuation is an agreement between an employer and

employee, that such wage continuation is not a form of compensation that the Industrial Commission can order an employer to pay under the workers' compensation statute. Further, Appellant argues that as the claimant did not submit additional C-84 forms there was no evidence to support continued temporary total disability. Appellant contends that as the claimant was not receiving temporary total disability, the Commission had no jurisdiction to determine the issues of MMI or terminate temporary total disability.

Appellee files herein its Merit Brief in the above captioned action in response to Appellant's Merit Brief.

LAW AND ARGUMENT

Standard of Review

Mandamus is a writ issued in the name of the state to an inferior tribunal, a corporation board or person, commanding the performance of an act which the law specifically enjoins as a duty arising from an office trust or station. R.C. §2731.01 (Appx. 1.) To be entitled to a writ of mandamus, a realtor must establish a clear legal right to the writ and that the inferior tribunal, the Industrial Commission in this case, had a duty to provide relief sought. *State ex rel Pressley vs. Industrial Commission* (1967), 11 Ohio St.2d 141. An adequate remedy at law includes the right of appeal. Under Chapter 4123 of the Revised Code, either the claimant or the employer may appeal to the Court of Common Pleas from an order of the Commission made under division (E) of R.C. §4123.511 in any case involving injury or occupational disease. R.C. §4123.512(A). The right of appeal provided by R.C. §4123.512 is limited to the question of whether the claimant is entitled to participate in the worker's compensation fund. *Afrates vs. Lorain* (1992), 63 Ohio St.3d 22. Where causation is not an issue, there is no right of appeal and mandamus is the proper

remedy. *State ex rel Ross vs. Industrial Commission* (1999), 84 Ohio St.3d 364. The case at bar does not involve a question of the claimant's right to participate in the fund, but rather whether the claimant, Mr. Walker, can be declared MMI thereby terminating further entitlement to TTD. Therefore, there is no adequate remedy at law for any party in this case and mandamus is the proper remedy to test the validity of the Commission's order.

Proposition of Law No. I:

The Industrial Commission of Ohio does have continuing jurisdiction to address whether the claimant has reached maximum medical improvement and to discontinue entitlement to temporary total disability compensation, and the Industrial Commission's refusal to accept jurisdiction denied Appellee Mosier equal protection under the law.

Appellant argues as it did in the Court of Appeals that it did not have jurisdiction to determine whether the claimant had reached maximum medical improvement because the claimant was not receiving TTD payments, but was receiving wage continuation. Appellant contends that wage continuation is not the same thing as temporary total disability, and that it was not a party to the wage continuation agreement which was entered into between Appellee Mosier and the claimant, Walker. Appellant has raised a new argument in its Merit Brief to this Court which it did not raise in the Court of Appeals. Appellant argues that even assuming that the claimant, Walker, was receiving temporary total disability compensation based on the BWC's September 9, 2003 order, that his entitlement to ongoing temporary total disability under that order ceased because he did not submit subsequent proof of entitlement, specifically C-84 forms, to the Bureau or Industrial Commission, which would establish all conditions precedent for the continued payment of temporary total disability. Even assuming Appellant can raise a new

argument at this late stage, sufficiency of medical evidence to continue or deny entitlement to temporary total rests with the commission and would in and of itself necessitate a remand to the Commission after the issue of jurisdiction is decided.

The significance of the September 9, 2003 BWC order is that it not only granted temporary total disability for a specified closed period of time, August 18, 2003 through September 14, 2003, but it also authorized future periods of temporary total disability upon the submission of completed C-84 forms which would establish all conditions precedent for the payment of temporary total disability. (Supp. 8.) Therefore, the September 9, 2003 Bureau order placed a continuing duty upon the Bureau to pay temporary total compensation if all conditions precedent were met. *State ex rel Crabtree vs. Ohio Bur. of Workers' Comp.* (1994), 71 Ohio St.3d 504, 508. Appellee Mosier elected to pay claimant, Walker, his wages through wage continuation agreement rather than allow the Bureau of Workers' Compensation to pay temporary total disability on the advice of its third party workers' compensation administrator to maintain its group rating and prevent a tremendous increase in premiums. (Supp. 9-11.) Pursuant to statute, employers are authorized to enter into wage continuation agreements. However, the wage continuation was paid only pursuant to the specific order of the Bureau of Workers' Compensation of September 9, 2003 which granted Walker, as an injured worker, temporary total disability for the closed period of August 18, 2003 through September 14, 2003 and to continue upon submission of medical evidence establishing disability. (Supp. 8.) The Bureau's September 9, 2003 order was not appealed by any party. Therefore, the order remained in effect.

Mosier entered into an agreement with Walker to pay wage continuation which Walker accepted. Temporary total compensation was in fact initially paid pursuant to the order of the

BWC at the same time that wage continuation in the sum of Six Hundred Eighty Dollars (\$680.00) per week was paid. (Supp. 9-11.) Wage continuation benefits continued with the physician of record submitting additional documents extending disability as accepted and ordered by the Commission. In this case, Appellant recognized wage continuation as a set-off to the payment of temporary total disability by the Ohio Workers' Compensation Fund and approved Mosier's payment of wage continuation in its overpayment order of December 9, 2003. (Supp. 12.)

Although wages in lieu of compensation is not a form of compensation the Bureau or Commission can order an employer to pay, the payment of wage continuation has significant consequences recognized by the workers' compensation statutes. Legislatively, the workers' compensation statute provides for payment of wages or compensation in lieu of temporary total disability compensation normally paid by the BWC on behalf of state funded employers. Ohio Revised Code §4123.56(A) states in pertinent part as follows:

"If any compensation under this Section has been paid for the same period or periods for which temporary non-occupational accident and sickness insurance is or has been paid pursuant to an insurance policy or program to which the employer has made the entire contribution or payment for providing insurance or under a non-occupational accident and sickness program fully funded by the employer, compensation paid under this section for the period or periods shall be paid only to the extent by which the payment or payments exceeds the amount of the non-occupational insurance or program paid or payable."

O.R.C. §4123.56(A), (Appx. 12-13).

In contradiction to Appellant's assertion that the wage continuation agreement is independent of the Bureau and Commission, and outside the realm of workers' compensation,

Ohio Revised Code §4123.52 which delineates the continuing jurisdiction of the Commission specifically recognizes “wages in lieu of compensation” as having consequences for the limitation period of the claim. Ohio Revised Code §4123.52 states in pertinent part as follows:

The jurisdiction of the industrial commission and the authority of the administrator of workers’ compensation over each case is continuing, and the commission may make such modification or change with respect to former findings or orders with respect thereto, as, in its opinion is justified. No modification or change nor any finding or award in respect of any claim shall be made with respect to disability, compensation, dependency, or benefits, after six years from the date of injury in the absence of the payment of medical benefits under this chapter, in which event the modification, change, finding, or award shall be made within six years after the payment of medical benefits, or in the absence of payment of compensation under section 4123.57, 4123.58, or division (A) or (B) of section 4123.56 of the Revised Code or *wages in lieu of compensation* in a manner so as to satisfy the requirements of section 4123.84 of the Revised Code, in which event the modification, change, finding, or award shall be made within ten years from the date of the last payment of compensation.

O.R.C. §4123.52, emphasis added. (Appx. 10.)

Ohio Revised Code §4123.52 specifically states that “wages in lieu of compensation” are treated as compensation, the payment of which tolls the running of the limitation period. (Appx. 10.) Courts have also recognized the ability and sometimes necessity for state funded employers to pay wages in lieu of workers’ compensation benefits. Courts have recognized set-offs to temporary total disability compensation paid. An employee who receives regular wages during periods of temporary total disability is not entitled to compensation from the Ohio Workers’ Compensation from such disability under Revised Code §4123.56. *State ex rel Bunch vs. Industrial Commission* (1980), 62 Ohio St.2d 423. Moreover, Courts have considered the issue of terminating prior orders of the Industrial Commission concerning the payment of temporary total

disability compensation where wage continuation is paid in lieu of temporary total by a state funded employer. (See *State ex rel Gracie Ganu vs. Industrial Commission*, Franklin App. No. 04AP-331, 2005 Ohio 2296.)

Wage continuation has been construed by the Industrial Commission synonymously with temporary total disability compensation. To deny a state funded employer such as Mosier the right to seek redress through the Industrial Commission to terminate a prior order of temporary total under which the employer is paying wage continuation is a denial of equal protection under the law to such employers. *Clifford vs. Daugherty* (1980), 62 Ohio St.2d 414, 417; *Felske vs. Daugherty* (1980), 64 Ohio St.2d 89.

In *Clifford*, the Court held that the prior version of R.C. 4123.52 violated the equal protection clause of the Ohio and United States Constitutions. The Ohio Supreme Court refused to uphold the classifications at issue, treating injured workers receiving wage continuation differently than those receiving temporary total disability compensation. The *Clifford* Court explained in pertinent part as follows:

The stipulated facts reveal that if claimant had not been paid wages in 1971, he would have received temporary total disability compensation under R.C. 4123.56, which would have empowered appellants to entertain claimant's application and requests filed more than six years after the date of his injury. Thus, we must determine whether it is a violation of the Equal Protection Clause for appellants to refuse to entertain claimant's application for disability compensation and requests for continued payment for medical expenses filed more than six years after the date of his injury for the *sole* reason that claimant, within six years from the date of his injury, accepted wages during his periods of temporary total disability in lieu of receiving disability compensation.

Under the Equal Protection Clauses of the Ohio and United States Constitutions, a legislative classification, which implicates neither a suspect classification nor a fundamental interest, is valid if it is rational, *i.e.*, if it is not wholly arbitrary and bears a reasonable relationship to a permissible governmental objective. *McGowan vs. Maryland* (1961), 366 U.S. 420; *Williamson vs. Lee Optical* (1955),

348 U.S. 483; *National Tube Co. vs. Peck* (1953), 159 Ohio St.98, paragraph six of the syllabus; *Porter vs. Oberlin* (1965), 1 Ohio St.2d 143, paragraphs two and three of the syllabus. Moreover, such a classification is presumed to be valid and will be upheld unless no reasonable state of facts can be conceived to support it. *Lindsey vs. Natural Carbonic Gas Co.* (1911), 220 U.S. 61.

Notwithstanding the above judicial deference, we cannot uphold the classification at issue. The difference between a claimant who accepts wages in lieu of disability compensation and an otherwise similar claimant who rejects or is not offered wages during his disability (and is therefore paid temporary total disability compensation under R.C. 4123.56) is an arbitrary basis for determining whether a claimant's entitlement will continue for more than six years after the date of his injury. We find no reasonable state of facts which will support this classification, nor have appellants offered any. Thus, we hold that the above classification is violative of the Equal Protection Clause of the Ohio Constitution. (Footnotes omitted.)

Id. at 417-418.

In *Felske vs. Daugherty* (1980), 64 Ohio St.2d 89, wage continuation claims were determined to be the same as those involving payment of temporary total disability compensation. *Id.* In *Felske*, the claimant suffered an injury in 1969. *Id.* The injured worker neither applied for nor received compensation pursuant to Ohio Revised Code §4123.56, 4123.57, or 4123.58, even though he had several periods of temporary total disability during the years following his injury during which he was paid wage continuation. *Id.* at p.91. More than eight years after the date of the injury, the claimant filed an application for the determination of permanent partial disability. *Id.* The Commission and Court of Common Pleas ruled that the Commission lacked jurisdiction to consider the claim after six years from the date of injury as it was considered a medical claim only as no temporary total was paid during the six year period. *Id.* The Tenth District Court of Appeals and this Court disagreed and found the construction of Ohio Revised Code §4123.52 adopted by the Commission to be unconstitutional as it denied the

claimant equal protection under the law. *Id.* This Court found that to apply the statute of limitations under R.C. 4123.52 as applied in the *Felske* case by the Commission, was to create a distinctly different type of classification of injured workers who received wage continuation or sick leave benefits in lieu of temporary total disability compensation. *Id.* at p.92. This Court in *Felske* held that it is the recognition of and payment for a disability which triggers continuing jurisdiction of the Commission beyond six years from the date of injury, not whether the injured worker elects to accept wage continuation or continues to receive temporary total disability compensation as paid by the BWC. *Id.* at p.93.

Similarly, in the case at bar, it is the act of paying Walker for his disability which triggers the continuing jurisdiction of the Industrial Commission, not whether he receives temporary total disability compensation. Although *Clifford* and *Felske* both involve claimant's rights, the principles annunciated by this Court apply to employers as well. Under the circumstances presented by this case, the Industrial Commission is attempting to establish a difference without a valid distinction, and in doing so denies Appellee Mosier equal protection under the law as that enjoyed by other state funded employers who choose not to pay wage continuation. The imposition of such an arbitrary classification is impermissible and cannot be constitutionally upheld. By refusing to accept jurisdiction, the Commission denied Appellee Mosier due process and failed to afford it equal protection under the law.

Appellant has raised a new argument in its Merit Brief to this Court which it did not raise in the Court of Appeals and which was not argued before the Industrial Commission. Appellant now argues that even assuming that the claimant, Walker, was receiving temporary total disability compensation based on the BWC September 9, 2003 order, that his entitlement to

ongoing temporary total disability ceased because he did not submit subsequent proof of entitlement, specifically C-84 forms, to the Bureau or Industrial Commission to establish all conditions precedent for continued payment of temporary total disability. Wage continuation in this case continued to be paid by Appellee Mosier pursuant to the BWC/Industrial Commission order of September 9, 2003 based upon documents provided to the employer and employer's TPA by claimant's physician. (Supp. 9-11.) Appellee Mosier paid wage continuation from August 18, 2003 through August 29, 2005 and to continue indefinitely into the future. (Supp. 10.) Claimant Walker submitted to the employer and employer's TPA through his physician off work slips continuing to take him off work due to the fact he was temporary and totally disabled. (Second Supp. 1, 2, 3.) Additionally, a physician's report of workability from Walker's physician, Dr. Randall, dated November 18, 2004 took him off work as totally disabled from March 19, 2004 to January 30, 2005 as an estimated return to work date. (Second Supp. 3.) Therefore, the injured worker, Walker, did submit subsequent proof of entitlement to temporary total disability to the employer and the employer's TPA upon which they continued to pay wage continuation. If Appellee Mosier discontinued the wage continuation, then the claimant would have sought temporary total disability compensation under the original order of the BWC to pay compensation and receive it. If the claimant received temporary total disability compensation, such an action would result in the claim becoming a lost time claim affecting Appellee Mosier's group rating. (Supp. 10-11.) Mosier's workers' compensation program would result in the loss of group rating regardless of whether the temporary total disability compensation was terminated by a subsequent order. (Supp. 10-11.) The loss of group rating would have resulted in an increase in

worker's compensation premiums in a sum in excess of One Hundred Fifty Thousand Dollars (\$150,000.00) per year to Appellee Mosier. (Supp. 10.) The statute authorizing wage continuation agreements serves to protect similarly situation employers.

Moreover, the District Hearing Officer at the hearing on June 21, 2005 addressing Appellee Mosier's C-86 motion requesting to terminate temporary total disability and for a finding of maximum medical improvement, found that the reports of Walker's consulting neurosurgeons, Dr. Lawrence and Dr. Fontanez, established that the claimant was not maximum medically improved and temporary and totally disabled establishing all the conditions precedent for payment of temporary total disability. (Supp. 18.) The District Hearing Officer in his order states in pertinent part as follows:

It is the finding of this District Hearing Officer that two separate consulting neurosurgeons, Edmond P. Lawrence, Jr., M.D. and Medesto Fontanez, M.D., both recommended surgery for the disc conditions at the L3-4, L4-5, and L5-S1 levels. Therefore, it is the finding of this District Hearing Officer that the injured worker has not reached maximum medical improvement, in regard to the allowed conditions in this claim, pending the decompressive (sic) lumbar spine surgery recommended by Doctors Lawrence and Fontanez. Therefore, the employer's C-86 motion, filed May 16, 2005, which requested a finding of maximum medical improvement is hereby DENIED.

Therefore, further temporary total disability compensation, subsequent to March 30, 2005, is to be paid by the administrator of the Bureau of Workers' Compensation upon submission of complete medical proof of disability due to the allowed conditions in this claim.

(Supp. 18.)

If Appellee Mosier discontinued wage continuation, the claimant would have filed for temporary total disability with the Commission which would have resulted in the loss of group rating and increased premiums for Appellee Mosier which would have negated the purpose of the

wage continuation agreement. Under the BWC's September 9, 2003 order awarding temporary total disability compensation Appellee Mosier was required to continue to pay wage continuation indefinitely as long as the claimant's physician submitted medical reports, off work slips, C-84 forms, Medco 14s, or physician's statements indicating the claimant was still temporarily and totally disabled and had not reached maximum medical improvement. In *State ex rel Jeep Corp. vs. Industrial Commission of Ohio* (1991), 62 Ohio St.3d 64, the Court addressed the issue of a self insured employer and payment of temporary total disability compensation in light of a report from the claimant's physician indicating that the employee's condition had become permanent. This Court noted that O.R.C. §4123.56 required a self insured employer to continue to pay compensation as long as the claimant's physician's reports supported TTD. *Id.* at HN2. The Court noted:

In the case of an employer who has elected to pay compensation direct, payments shall be for a duration based upon the medical reports of the attending physician. If the employer disputes the attending physician's report, payments may be terminated only upon application and hearing of the district hearing officer. Payments shall continue pending the determination of the matter, however payments shall not be made for such period when any employee has returned to work or when the employee's treating physician has made a written statement that the employee is capable of returning to his former position of employment. (Former R.C. 4123.56)

Jeep, supra at HN2.

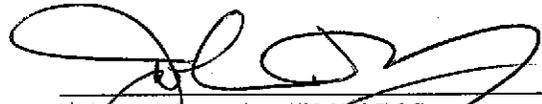
In the case at bar, the claimant established a right to continued payment under the wage continuation agreement by submitting to the employer and the employer's TPA documentation from his treating physician that the claimant continued to be temporary and totally disabled and unable to return to work because of the allowed conditions in the claim. (Second Supp. 1, 2, 3.)

Therefore, Appellant Industrial Commission's argument that the claimant was not entitled to temporary total disability compensation because he had not submitted proof to establish the conditions precedent for payment of temporary total disability is patently incorrect.

CONCLUSION

Based upon the foregoing, Appellee Mosier respectfully requests this Honorable Court to affirm the Tenth District Court of Appeals' decision granting the writ of mandamus to return the case to the Industrial Commission's Staff Hearing Officer and order Appellant Commission to accept jurisdiction to adjudicate Appellee Mosier's motion to determine the extent of respondent worker's disability, find the claimant to have reached maximum medical improvement and to terminate its prior order of temporary total disability compensation.

Respectfully submitted,



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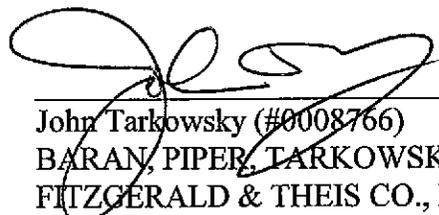
PROOF OF SERVICE

A copy of the foregoing was served by regular U.S. mail this 22nd day of February, 2007 upon the following:

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APPENDIX

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ORC Ann. 2731.01

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* CURRENT THROUGH LEGISLATION PASSED BY THE
126TH OHIO GENERAL ASSEMBLY AND FILED WITH THE
SECRETARY OF STATE THROUGH FEBRUARY 16, 2007 *
* ANNOTATIONS CURRENT THROUGH JANUARY 1, 2007 *
* OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH
JANUARY 23, 2007 *

TITLE 27. COURTS -- GENERAL PROVISIONS -- SPECIAL
REMEDIES
CHAPTER 2731. MANDAMUS

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ORC Ann. 2731.01 (2006)

§ 2731.01. Mandamus defined

Mandamus is a writ, issued in the name of the state to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station.

📖 History:

RS § 6741; S&C 1124; 51 v 57, § 569; GC § 12283; Bureau of Code Revision. Eff 10-1-53.

📖 Related Statutes & Rules:

Cross-Reference to Related Statutes:

Docketing of mandamus proceedings --

Court of appeals, [RC § 2501.09](#).

Supreme court, [RC § 2503.37](#).

Insufficient appropriations for --

Common pleas court, [RC § 307.01](#).

Community based correctional programs, [RC §§ 2301.51, 2301.56](#).

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TITLE XLI [41] LABOR AND INDUSTRY
CHAPTER 4123: WORKERS' COMPENSATION
[JURISDICTION OF COMMISSION]

ORC Ann. **4123.511** (Anderson 2000)

[§ 4123.51.1] § **4123.511** Notice to claimant and employer; information from other persons; investigations; orders; administrative appeals; repayment schedule.

(A) Within seven days after receipt of any claim under this chapter, the bureau of workers' compensation shall notify the claimant and the employer of the claimant of the receipt of the claim and of the facts alleged therein. If the bureau receives from a person other than the claimant written or facsimile information or information communicated verbally over the telephone indicating that an injury or occupational disease has occurred or been contracted which may be compensable under this chapter, the bureau shall notify the employee and the employer of the information. If the information is provided verbally over the telephone, the person providing the information shall provide written verification of the information to the bureau according to division (E) of section 4123.84 of the Revised Code. The receipt of the information in writing or facsimile, or if initially by telephone, the subsequent written verification, and the notice by the bureau shall be considered an application for compensation under section 4123.84 or 4123.85 of the Revised Code, provided that the conditions of division (E) of section 4123.84 of the Revised Code apply to information provided verbally over the telephone. Upon receipt of a claim, the bureau shall advise the claimant of the claim number assigned and the claimant's right to representation in the processing of a claim or to elect no representation. If the bureau determines that a claim is determined to be a compensable lost-time claim, the bureau shall notify the claimant and the employer of the availability of rehabilitation services. No bureau or industrial commission employee shall directly or indirectly convey any information in derogation of this right. This section shall in no way abrogate the bureau's responsibility to aid and assist a claimant in the filing of a claim and to advise the claimant of the claimant's rights under the law.

The administrator of workers' compensation shall assign all claims and investigations to the bureau service office from which investigation and determination may be made most expeditiously.

The bureau shall investigate the facts concerning an injury or occupational disease and ascertain such facts in whatever manner is most appropriate and may obtain statements of the employee, employer, attending physician, and witnesses in whatever manner is most appropriate.

(B)(1) Except as provided in division (B)(2) of this section, in claims other than those in which the employer is a self-insuring employer, if the administrator determines under division (A) of this section that a claimant is or is not entitled to an award of compensation or benefits, the administrator shall issue an order no later than twenty-eight days after the sending of the notice under division (A) of this section, granting or denying the payment of the compensation or benefits, or both as is appropriate to the claimant. Notwithstanding the time limitation specified in this division for the issuance of an order, if a medical examination of the claimant is required by statute, the administrator promptly shall schedule the claimant for that examination and shall issue an order no later than twenty-eight days after receipt of the report of the examination. The administrator shall notify the claimant and the employer of the claimant and their respective representatives in writing of the nature of the order and the amounts of compensation and benefit payments involved. The employer or claimant may appeal the order pursuant to division (C) of this section within fourteen days after the date of the receipt of the order. The employer and claimant may waive, in writing, their rights to an appeal under this division.

(2) Notwithstanding the time limitation specified in division (B)(1) of this section for the issuance of an order, if the employer certifies a claim for payment of compensation or benefits, or both, to a claimant, and the administrator has completed the investigation of the claim, the payment of benefits or compensation, or both, as is appropriate, shall commence upon the later of the date of the certification or completion of the investigation and issuance of the order by the administrator, provided that the administrator shall issue the order no later than the time limitation specified in division (B)(1) of this section.

(3) If an appeal is made under division (B)(1) or (2) of this section, the administrator shall forward the claim file to the appropriate district hearing officer within seven days of the appeal. In contested claims other than state fund claims, the administrator shall forward the claim within seven days of the administrator's receipt of the claim to the commission, which shall refer the claim to an appropriate district hearing officer for a hearing in accordance with division (C) of this section.

(C) If an employer or claimant timely appeals the order of the administrator issued under division (B) of this section or in the case of other contested claims other than state fund claims, the commission shall refer the claim to an appropriate district hearing officer according to rules the commission adopts under section 4121.36 of the Revised Code. The district hearing officer shall notify the parties and their respective representatives of the time and place of the hearing.

The district hearing officer shall hold a hearing on a disputed issue or claim within forty-five days after the filing of the appeal under this division and issue a decision within seven days after holding the hearing. The district hearing officer shall notify the parties and their respective representatives in writing of the order. Any party may appeal an order issued under this division pursuant to division (D) of this section within fourteen days after receipt of the order under this division.

(D) Upon the timely filing of an appeal of the order of the district hearing officer issued under division (C) of this section, the commission shall refer the claim file to an appropriate staff hearing officer according to its rules adopted under section 4121.36 of the Revised Code. The staff hearing officer shall hold a hearing within forty-five days after the filing of an appeal under this division and issue a decision within seven days after holding the hearing under this division. The staff hearing officer shall notify the parties and their respective representatives in writing of the staff hearing officer's order. Any party may appeal an order issued under this division pursuant to division (E) of this section within fourteen days after receipt of the order under this division.

(E) Upon the filing of a timely appeal of the order of the staff hearing officer issued under

division (D) of this section, the commission or a designated staff hearing officer, on behalf of the commission, shall determine whether the commission will hear the appeal. If the commission or the designated staff hearing officer decides to hear the appeal, the commission or the designated staff hearing officer shall notify the parties and their respective representatives in writing of the time and place of the hearing. The commission shall hold the hearing within forty-five days after the filing of the notice of appeal and, within seven days after the conclusion of the hearing, the commission shall issue its order affirming, modifying, or reversing the order issued under division (D) of this section. The commission shall notify the parties and their respective representatives in writing of the order. If the commission or the designated staff hearing officer determines not to hear the appeal, within fourteen days after the filing of the notice of appeal, the commission or the designated staff hearing officer shall issue an order to that effect and notify the parties and their respective representatives in writing of that order.

Except as otherwise provided in this chapter and Chapters 4121., 4127., and 4131. of the Revised Code, any party may appeal an order issued under this division to the court pursuant to section 4123.512 [4123.51.2] of the Revised Code within sixty days after receipt of the order, subject to the limitations contained in that section.

(F) Every notice of an appeal from an order issued under divisions (B), (C), (D), and (E) of this section shall state the names of the claimant and employer, the number of the claim, the date of the decision appealed from, and the fact that the appellant appeals therefrom.

(G) All of the following apply to the proceedings under divisions (C), (D), and (E) of this section:

(1) The parties shall proceed promptly and without continuances except for good cause;

(2) The parties, in good faith, shall engage in the free exchange of information relevant to the claim prior to the conduct of a hearing according to the rules the commission adopts under section 4121.36 of the Revised Code;

(3) The administrator is a party and may appear and participate at all administrative proceedings on behalf of the state insurance fund. However, in cases in which the employer is represented, the administrator shall neither present arguments nor introduce testimony that is cumulative to that presented or introduced by the employer or the employer's representative. The administrator may file an appeal under this section on behalf of the state insurance fund; however, except in cases arising under section 4123.343 [4123.34.3] of the Revised Code, the administrator only may appeal questions of law or issues of fraud when the employer appears in person or by representative.

(H) Except as provided in section 4121.63 of the Revised Code and division (J) of this section, payments of compensation to a claimant or on behalf of a claimant as a result of any order issued under this chapter shall commence upon the earlier of the following:

(1) Fourteen days after the date the administrator issues an order under division (B) of this section, unless that order is appealed;

(2) The date when the employer has waived the right to appeal a decision issued under division (B) of this section;

(3) If no appeal of an order has been filed under this section or to a court under section 4123.512 [4123.51.2] of the Revised Code, the expiration of the time limitations for the filing of an appeal of an order;

(4) The date of receipt by the employer of an order of a district hearing officer, a staff

hearing officer, or the industrial commission issued under division (C), (D), or (E) of this section.

(I) No medical benefits payable under this chapter or Chapter 4121., 4127., or 4131. of the Revised Code are payable until the earlier of the following:

(1) The date of the issuance of the staff hearing officer's order under division (D) of this section;

(2) The date of the final administrative or judicial determination.

(J) Upon the final administrative or judicial determination under this section or section 4123.512 [4123.51.2] of the Revised Code of an appeal of an order to pay compensation, if a claimant is found to have received compensation pursuant to a prior order which is reversed upon subsequent appeal, the claimant's employer, if a self-insuring employer, or the bureau, shall withhold from any amount to which the claimant becomes entitled pursuant to any claim, past, present, or future, under Chapter 4121., 4123., 4127., or 4131. of the Revised Code, the amount of previously paid compensation to the claimant which, due to reversal upon appeal, the claimant is not entitled, pursuant to the following criteria:

(1) No withholding for the first twelve weeks of temporary total disability compensation pursuant to section 4123.56 of the Revised Code shall be made;

(2) Forty per cent of all awards of compensation paid pursuant to sections 4123.56 and 4123.57 of the Revised Code, until the amount overpaid is refunded;

(3) Twenty-five per cent of any compensation paid pursuant to section 4123.58 of the Revised Code until the amount overpaid is refunded;

(4) If, pursuant to an appeal under section 4123.512 [4123.51.2] of the Revised Code, the court of appeals or the supreme court reverses the allowance of the claim, then no amount of any compensation will be withheld.

The administrator and self-insuring employers, as appropriate, are subject to the repayment schedule of this division only with respect to an order to pay compensation that was properly paid under a previous order, but which is subsequently reversed upon an administrative or judicial appeal. The administrator and self-insuring employers are not subject to, but may utilize, the repayment schedule of this division, or any other lawful means, to collect payment of compensation made to a person who was not entitled to the compensation due to fraud as determined by the administrator or the industrial commission.

(K) If a staff hearing officer or the commission fails to issue a decision or the commission fails to refuse to hear an appeal within the time periods required by this section, payments to a claimant shall cease until the staff hearing officer or commission issues a decision or hears the appeal, unless the failure was due to the fault or neglect of the employer or the employer agrees that the payments should continue for a longer period of time.

(L) Except as otherwise provided in this section or section 4123.522 [4123.52.2] of the Revised Code, no appeal is timely filed under this section unless the appeal is filed with [n1] the time limits set forth in this section.

(M) No person who is not an employee of the bureau or commission or who is not by law given access to the contents of a claims file shall have a file in the person's possession.

(N) Upon application of a party who resides in an area in which an emergency or disaster is declared, the industrial commission and hearing officers of the commission may waive the

time frame within which claims and appeals of claims set forth in this section must be filed upon a finding that the applicant was unable to comply with a filing deadline due to an emergency or a disaster.

As used in this division:

(1) "Emergency" means any occasion or instance for which the governor of Ohio or the president of the United States publicly declares an emergency and orders state or federal assistance to save lives and protect property, the public health and safety, or to lessen or avert the threat of a catastrophe.

(2) "Disaster" means any natural catastrophe or fire, flood, or explosion, regardless of the cause, that causes damage of sufficient magnitude that the governor of Ohio or the president of the United States, through a public declaration, orders state or federal assistance to alleviate damage, loss, hardship, or suffering that results from the occurrence.

HISTORY: HISTORY

: RC § 4123.51.2, 126 v 1015 (Eff 10-5-55); 135 v H 417 (Eff 11-16-73); 136 v S 545 (Eff 1-17-77); 141 v S 307 (Eff 8-22-86); 143 v H 222 (Eff 11-3-89); RC § 4123.51.1, 145 v H 107 (Eff 10-20-93); 146 v H 278 (Eff 9-29-95); 146 v H 413 (Eff 10-1-96); 147 v H 362 (Eff 6-30-97); 147 v S 45**; 147 v H 363 (Eff 9-29-97); 148 v H 180 (Eff 8-6-99); 148 v H 611. Eff 6-14-2000.

Not analogous to former RC § 4123.51.1 (126 v 1015; 136 v S 545), renumbered RC § 4123.51 in 145 v H 107. Eff 10-20-93.

NOTES:

n1* So in enrolled bill, division (L).

n2** The amendments made by SB 45 (147 v --) were rejected by the 11-4-97 referendum vote on Issue 2.

CROSS-REFERENCES TO RELATED SECTIONS

Administrator of workers' compensation; powers and duties, RC § 4121.39.
 Appeals of rehabilitation decisions, RC § 4121.64.
 Appeal to court of common pleas; cost; fees, RC § 4123.51.2.
 Application for approval of final settlement, RC § 4123.65.
 Basis for computation of benefits, RC § 4123.61.
 Benefits in case of death; appealable order, RC § 4123.59.
 Chairperson; executive director; powers and duties generally, RC § 4121.03.
 Commutation to lump sum; appealable order, RC § 4123.64.
 Compensation for occupational diseases, RC § 4123.68.
 Compensation in case of injury, occupational disease or death; exceptions; agreement where work performed in another state, RC § 4123.54.
 District hearing officers; jurisdiction, RC § 4121.34.
 Duties of administrator re data processing system, RC § 4121.12.1.
 Health care partnership program, RC § 4121.44.1.
 Health care quality advisory council, RC § 4121.44.2.
 Incentives for employing handicapped employees; administrative orders, RC § 4123.34.3.
 Investigation and determination of claims; appeals; representation fees prohibited, RC § 4123.41.7.
 Partial disability compensation; appeal of order, RC § 4123.57.
 Persons eligible for death benefits; limitations; appealable order, RC § 4123.60.
 Power of administrator to hear and determine claims; appeals, RC § 4127.02.
 Remedy of employee against noncomplying employer, RC § 4123.75.

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TITLE XLI [41] LABOR AND INDUSTRY
CHAPTER 4123: WORKERS' COMPENSATION
[JURISDICTION OF COMMISSION]

ORC Ann. 4123.512 (Anderson 2000)

[§ 4123.51.2] § 4123.512 Appeal to court of common pleas; cost; fees.

(A) The claimant or the employer may appeal an order of the industrial commission made under division (E) of section **4123.511** [4123.51.1] of the Revised Code in any injury or occupational disease case, other than a decision as to the extent of disability to the court of common pleas of the county in which the injury was inflicted or in which the contract of employment was made if the injury occurred outside the state, or in which the contract of employment was made if the exposure occurred outside the state. If no common pleas court has jurisdiction for the purposes of an appeal by the use of the jurisdictional requirements described in this division, the appellant may use the venue provisions in the Rules of Civil Procedure to vest jurisdiction in a court. If the claim is for an occupational disease the appeal shall be to the court of common pleas of the county in which the exposure which caused the disease occurred. Like appeal may be taken from an order of a staff hearing officer made under division (D) of section **4123.511** [4123.51.1] of the Revised Code from which the commission has refused to hear an appeal. The appellant shall file the notice of appeal with a court of common pleas within sixty days after the date of the receipt of the order appealed from or the date of receipt of the order of the commission refusing to hear an appeal of a staff hearing officer's decision under division (D) of section **4123.511** [4123.51.1] of the Revised Code. The filing of the notice of the appeal with the court is the only act required to perfect the appeal.

If an action has been commenced in a court of a county other than a court of a county having jurisdiction over the action, the court, upon notice by any party or upon its own motion, shall transfer the action to a court of a county having jurisdiction.

Notwithstanding anything to the contrary in this section, if the commission determines under section 4123.522 [4123.52.2] of the Revised Code that an employee, employer, or their respective representatives have not received written notice of an order or decision which is appealable to a court under this section and which grants relief pursuant to section 4123.522 [4123.52.2] of the Revised Code, the party granted the relief has sixty days from receipt of the order under section 4123.522 [4123.52.2] of the Revised Code to file a notice of appeal under this section.

(B) The notice of appeal shall state the names of the claimant and the employer, the number

Appx. 7

of the claim, the date of the order appealed from, and the fact that the appellant appeals therefrom.

The administrator, the claimant, and the employer shall be parties to the appeal and the court, upon the application of the commission, shall make the commission a party. The party filing the appeal shall serve a copy of the notice of appeal on the administrator of workers' compensation at the central office of the bureau of workers' compensation in Columbus. The administrator shall notify the employer that if the employer fails to become an active party to the appeal, then the administrator may act on behalf of the employer and the results of the appeal could have an adverse effect upon the employer's premium rates.

(C) The attorney general or one or more of the attorney general's assistants or special counsel designated by the attorney general shall represent the administrator and the commission. In the event the attorney general or the attorney general's designated assistants or special counsel are absent, the administrator or the commission shall select one or more of the attorneys in the employ of the administrator or the commission as the administrator's attorney or the commission's attorney in the appeal. Any attorney so employed shall continue the representation during the entire period of the appeal and in all hearings thereof except where the continued representation becomes impractical.

(D) Upon receipt of notice of appeal the clerk of courts shall provide notice to all parties who are appellees and to the commission.

The claimant shall, within thirty days after the filing of the notice of appeal, file a petition containing a statement of facts in ordinary and concise language showing a cause of action to participate or to continue to participate in the fund and setting forth the basis for the jurisdiction of the court over the action. Further pleadings shall be had in accordance with the Rules of Civil Procedure; provided that service of summons on such petition shall not be required. The clerk of the court shall, upon receipt thereof, transmit by certified mail a copy thereof to each party named in the notice of appeal other than the claimant. Any party may file with the clerk prior to the trial of the action a deposition of any physician taken in accordance with the provisions of the Revised Code, which deposition may be read in the trial of the action even though the physician is a resident of or subject to service in the county in which the trial is had. The bureau of workers' compensation shall pay the cost of the stenographic deposition filed in court and of copies of the stenographic deposition for each party from the surplus fund and charge the costs thereof against the unsuccessful party if the claimant's right to participate or continue to participate is finally sustained or established in the appeal. In the event the deposition is taken and filed, the physician whose deposition is taken is not required to respond to any subpoena issued in the trial of the action. The court, or the jury under the instructions of the court, if a jury is demanded, shall determine the right of the claimant to participate or to continue to participate in the fund upon the evidence adduced at the hearing of the action.

(E) The court shall certify its decision to the commission and the certificate shall be entered in the records of the court. Appeals from the judgment are governed by the law applicable to the appeal of civil actions.

(F) The cost of any legal proceedings authorized by this section, including an attorney's fee to the claimant's attorney to be fixed by the trial judge, based upon the effort expended, in the event the claimant's right to participate or to continue to participate in the fund is established upon the final determination of an appeal, shall be taxed against the employer or the commission if the commission or the administrator rather than the employer contested the right of the claimant to participate in the fund. The attorney's fee shall not exceed twenty-five hundred dollars.

(G) If the finding of the court or the verdict of the jury is in favor of the claimant's right to

participate in the fund, the commission and the administrator shall thereafter proceed in the matter of the claim as if the judgment were the decision of the commission, subject to the power of modification provided by section 4123.52 of the Revised Code.

(H) An appeal from an order issued under division (E) of section **4123.511** [4123.51.1] of the Revised Code or any action filed in court in a case in which an award of compensation has been made shall not stay the payment of compensation under the award or payment of compensation for subsequent periods of total disability during the pendency of the appeal. If, in a final administrative or judicial action, it is determined that payments of compensation or benefits, or both, made to or on behalf of a claimant should not have been made, the amount thereof shall be charged to the surplus fund under division (B) of section 4123.34 of the Revised Code. In the event the employer is a state risk, the amount shall not be charged to the employer's experience. In the event the employer is a self-insuring employer, the self-insuring employer shall deduct the amount from the paid compensation the self-insuring employer reports to the administrator under division (L) of section 4123.35 of the Revised Code. All actions and proceedings under this section which are the subject of an appeal to the court of common pleas or the court of appeals shall be preferred over all other civil actions except election causes, irrespective of position on the calendar.

This section applies to all decisions of the commission or the administrator on November 2, 1959, and all claims filed thereafter are governed by sections **4123.511** [4123.51.1] and 4123.512 [4123.51.2] of the Revised Code.

Any action pending in common pleas court or any other court on January 1, 1986, under this section is governed by former sections 4123.514 [4123.51.4], 4123.515 [4123.51.5], 4123.516 [4123.51.6], and 4123.519 [4123.51.9] and section 4123.522 [4123.52.2] of the Revised Code.

HISTORY: HISTORY

: RC § 4123.51.9, 126 v 1015(1026) (Eff 10-5-55); 127 v 898 (Eff 9-7-57); 128 v 743 (Eff 11-2-59); 130 v 923 (Eff 1-23-63); 132 v H 268 (Eff 12-11-67); 136 v S 545 (Eff 1-17-77); 137 v H 1282 (Eff 1-1-79); 141 v S 307 (Eff 8-22-86); 143 v H 222 (Eff 11-3-89); RC § 4123.51.2, 145 v H 107 (Eff 10-20-93); 147 v S 45*; 147 v H 363 (Eff 9-29-97); 147 v H 361 (Eff 12-16-97); 148 v H 180. Eff 8-6-99.

Not analogous to former RC § 4123.51.2 (126 v 1015; 135 v H 417; 136 v S 545; 141 v S 307; 143 v H 222), renumbered RC § 4123.51.1 in 145 v H 107, eff 10-20-93.

NOTES:

n1* The amendments made by SB 45 (147 v --) were rejected by the 11-4-97 referendum vote on Issue 2.

CROSS-REFERENCES TO RELATED SECTIONS

Agencies to pay interest on late payments for goods and services; faster timetables to prevail, RC § 126.30.

Appeals of rehabilitation decisions, RC § 4121.64.

Application for approval of final settlement, RC § 4123.65.

Application of workers' compensation law, exceptions, RC § 4127.13.

Basis for computation of benefits, RC § 4123.61.

Benefits in case of death; appealable order, RC § 4123.59.

Commutation to lump sum; appealable order, RC § 4123.64.

Compensation for occupational diseases, RC § 4123.68.

Duties of administrator re data processing system, RC § 4121.12.1.

Incentives for employing handicapped employees; administrative orders, RC § 4123.34.3.

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TITLE XLI [41] LABOR AND INDUSTRY
CHAPTER 4123: WORKERS' COMPENSATION
[JURISDICTION OF COMMISSION]

ORC Ann. **4123.52** (Anderson 2000)

§ **4123.52** Continuing jurisdiction of commission.

The jurisdiction of the industrial commission and the authority of the administrator of workers' compensation over each case is continuing, and the commission may make such modification or change with respect to former findings or orders with respect thereto, as, in its opinion is justified. No modification or change nor any finding or award in respect of any claim shall be made with respect to disability, compensation, dependency, or benefits, after six years from the date of injury in the absence of the payment of medical benefits under this chapter, in which event the modification, change, finding, or award shall be made within six years after the payment of medical benefits, or in the absence of payment of compensation under section 4123.57, 4123.58, or division (A) or (B) of section 4123.56 of the Revised Code or wages in lieu of compensation in a manner so as to satisfy the requirements of section 4123.84 of the Revised Code, in which event the modification, change, finding, or award shall be made within ten years from the date of the last payment of compensation or from the date of death, nor unless written notice of claim for the specific part or parts of the body injured or disabled has been given as provided in section 4123.84 or 4123.85 of the Revised Code, and the commission shall not make any modification, change, finding, or award which shall award compensation for a back period in excess of two years prior to the date of filing application therefor. This section does not affect the right of a claimant to compensation accruing subsequent to the filing of any such application, provided the application is filed within the time limit provided in this section.

This section does not deprive the commission of its continuing jurisdiction to determine the questions raised by any application for modification of award which has been filed with the commission after June 1, 1932, and prior to the expiration of the applicable period but in respect to which no award has been granted or denied during the applicable period.

The commission may, by general rules, provide for the destruction of files of cases in which no further action may be taken.

The commission and administrator of workers' compensation each may, by general rules, provide for the retention and destruction of all other records in their possession or under their control pursuant to section 121.211 [121.21.1] and sections 149.34 to 149.36 of the Revised Code. The bureau of workers' compensation may purchase or rent required

equipment for the document retention media, as determined necessary to preserve the records. Photographs, microphotographs, microfilm, films, or other direct document retention media, when properly identified, have the same effect as the original record and may be offered in like manner and may be received as evidence in proceedings before the industrial commission, staff hearing officers, and district hearing officers, and in any court where the original record could have been introduced.

HISTORY: HISTORY

: GC § 1465-86; 103 v 72(88), § 39; 114 v 26; 115 v 423; 118 v 410; 122 v 268; Bureau of Code Revision, 10-1-53; 132 v H 268 (Eff 12-11-67); 137 v H 876 (Eff 7-26-78); 137 v H 1282 (Eff 1-1-79); 141 v H 238 (Eff 7-1-85); 143 v H 222 (Eff 11-3-89); 145 v H 107 (Eff 10-20-93); 147 v S 45*; 148 v H 611. Eff 6-14-2000.

NOTES:

n1* The amendments made by SB 45 (147 v --) were rejected by the 11-4-97 referendum vote on Issue 2.

The effective date is set by section 21 of HB 107.

CROSS-REFERENCES TO RELATED SECTIONS

Appeal to court of common pleas; judgment of court treated as if it were a commission decision, RC § 4123.51.2.

Claims barred after two years; exceptions, RC § 4123.84.

Granting of self-insuring employer status, RC § 4123.35.

OHIO ADMINISTRATIVE CODE

Jurisdictional principles applicable to payment of bills for medical services rendered by health care providers --

Bureau of workers' compensation. OWCH: OAC 4123-7-01.

Industrial commission. OWCH: OAC 4121-17-01.

TEXT DISCUSSION

Claims for injury or death. Ohio Workers' Comp. § 5.2

Claims for occupational diseases. Ohio Workers' Comp. § 5.3

Continuing jurisdiction. Ohio Workers' Comp. § 5.5

Invoking continuing jurisdiction of the commission. Ohio Workers' Comp. § 5.6

Jurisdiction to award compensation. Ohio Workers' Comp. § 5.9

Mode of judicial review. 6 Ohio Civ. Prac. § 312.01

Modification of orders. Ohio Workers' Comp. § 5.7

Residual disabilities. Ohio Workers' Comp. § 5.8

RESEARCH AIDS

Industrial commission's continuing jurisdiction:

O-Jur3d: Workers' Comp §§ 54, 220, 242, 245, 251, 256, 271, 348, 351

Am-Jur2d: Workers' C § 379 et seq

C.J.S.: Work C § 289 et seq

Use of photostats, microfilm, and other recording and copying techniques:

O-Jur3d: Records § 3

ALR

Liability of successive employers for disease or condition allegedly attributable to successive employments. 34 ALR4th 958.

Time and jurisdiction for review, reopening, modification, or reinstatement of award or agreement. 165 ALR 9.

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ORC Ann. 4123.56

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*** ARCHIVE MATERIAL ***

*** THIS DOCUMENT REFLECTS CHANGES RECEIVED THROUGH NOVEMBER 1, 2000 ***

TITLE XLI [41] LABOR AND INDUSTRY
CHAPTER 4123: WORKERS' COMPENSATION
[COMPENSATION; BENEFITS]

ORC Ann. **4123.56** (Anderson 2000)

§ **4123.56** Temporary disability compensation.

(A) Except as provided in division (D) of this section, in the case of temporary disability, an employee shall receive sixty-six and two-thirds per cent of the employee's average weekly wage so long as such disability is total, not to exceed a maximum amount of weekly compensation which is equal to the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code, and not less than a minimum amount of compensation which is equal to thirty-three and one-third per cent of the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code unless the employee's wage is less than thirty-three and one-third per cent of the minimum statewide average weekly wage, in which event the employee shall receive compensation equal to the employee's full wages; provided that for the first twelve weeks of total disability the employee shall receive seventy-two per cent of the employee's full weekly wage, but not to exceed a maximum amount of weekly compensation which is equal to the lesser of the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code or one hundred per cent of the employee's net take-home weekly wage. In the case of a self-insuring employer, payments shall be for a duration based upon the medical reports of the attending physician. If the employer disputes the attending physician's report, payments may be terminated only upon application and hearing by a district hearing officer pursuant to division (C) of section 4123.511 [4123.51.1] of the Revised Code. Payments shall continue pending the determination of the matter, however payment shall not be made for the period when any employee has returned to work, when an employee's treating physician has made a written statement that the employee is capable of returning to the employee's former position of employment, when work within the physical capabilities of the employee is made available by the employer or another employer, or when the employee has reached the maximum medical improvement. Where the employee is capable of work activity, but the employee's employer is unable to offer the employee any employment, the employee shall register with the director of job and family services, who shall assist the employee in finding suitable employment. The termination of temporary total disability, whether by order or otherwise, does not preclude the commencement of temporary total disability at another point in time if the employee again becomes temporarily totally disabled.

After two hundred weeks of temporary total disability benefits, the medical section of the bureau of workers' compensation shall schedule the claimant for an examination for an

evaluation to determine whether or not the temporary disability has become permanent. A self-insuring employer shall notify the bureau immediately after payment of two hundred weeks of temporary total disability and request that the bureau schedule the claimant for such an examination.

When the employee is awarded compensation for temporary total disability for a period for which the employee has received benefits under Chapter 4141. of the Revised Code, the bureau shall pay an amount equal to the amount received from the award to the director of job and family services and the director shall credit the amount to the accounts of the employers to whose accounts the payment of benefits was charged or is chargeable to the extent it was charged or is chargeable.

If any compensation under this section has been paid for the same period or periods for which temporary nonoccupational accident and sickness insurance is or has been paid pursuant to an insurance policy or program to which the employer has made the entire contribution or payment for providing insurance or under a nonoccupational accident and sickness program fully funded by the employer, compensation paid under this section for the period or periods shall be paid only to the extent by which the payment or payments exceeds the amount of the nonoccupational insurance or program paid or payable. Offset of the compensation shall be made only upon the prior order of the bureau or industrial commission or agreement of the claimant.

As used in this division, "net take-home weekly wage" means the amount obtained by dividing an employee's total remuneration, as defined in section 4141.01 of the Revised Code, paid to or earned by the employee during the first four of the last five completed calendar quarters which immediately precede the first day of the employee's entitlement to benefits under this division, by the number of weeks during which the employee was paid or earned remuneration during those four quarters, less the amount of local, state, and federal income taxes deducted for each such week.

(B) Where an employee in a claim allowed under this chapter suffers a wage loss as a result of returning to employment other than the employee's former position of employment or as a result of being unable to find employment consistent with the claimant's physical capabilities, the employee shall receive compensation at sixty-six and two-thirds per cent of the employee's weekly wage loss not to exceed the statewide average weekly wage for a period not to exceed two hundred weeks.

(C) In the event an employee of a professional sports franchise domiciled in this state is disabled as the result of an injury or occupational disease, the total amount of payments made under a contract of hire or collective bargaining agreement to the employee during a period of disability is deemed an advanced payment of compensation payable under sections **4123.56** to 4123.58 of the Revised Code. The employer shall be reimbursed the total amount of the advanced payments out of any award of compensation made pursuant to sections **4123.56** to 4123.58 of the Revised Code.

(D) If an employee receives temporary total disability benefits pursuant to division (A) of this section and social security retirement benefits pursuant to the "Social Security Act," the weekly benefit amount under division (A) of this section shall not exceed sixty-six and two-thirds per cent of the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code.

HISTORY: HISTORY

: GC § 1465-79; 103 v 72(85), § 32; 108 v PtI, 313; 110 v 224; 117 v 252; 119 v 565; 121 v 660; 122 v 268(280); 123 v 250; 124 v 806; Bureau of Code Revision, 10-1-53; 126 v 1015(1028) (Eff 10-5-55); 128 v 743(757) (Eff 11-2-59); 130 v 926 (Eff 10-1-63); 132 v H

268 (Eff 12-11-67); 133 v H 1 (Eff 3-18-69); 134 v H 280 (Eff 9-20-71); 135 v H 417 (Eff 11-16-73); 136 v H 714 (Eff 1-1-76); 136 v S 545 (Eff 1-17-77); 137 v H 1282 (Eff 1-1-79); 138 v S 30 (Eff 5-14-79); 138 v H 184 (Eff 6-27-79); 141 v S 307 (Eff 8-22-86); 141 v S 390 (Eff 7-17-86); 141 v S 411, § 3 (Eff 7-17-86); 141 v S 411, § 5 (Eff 8-22-86); 143 v H 222 (Eff 11-3-89); 145 v H 107 (Eff 10-20-93); 147 v S 45;* 148 v H 471. Eff 7-1-2000.

NOTES:

n1* The amendments made by SB 45 (147 v --) were rejected by the 11-4-97 referendum vote on Issue 2.

The effective date is set by section 12(A) of HB 471.

CROSS-REFERENCES TO RELATED SECTIONS

Administrative appeals; repayment of previously paid compensation which must be refunded, RC § 4123.51.1.

Claims barred after two years; exceptions, RC § 4123.84.

Concealment of preexisting disease; compensation for disease and injury, RC § 4123.70.

Discrimination against alien dependents and punitive actions against employee unlawful, RC § 4123.90.

Expected wage increases; annual adjustment of benefits, RC § 4123.62.

Filing time for partial disability compensation; coordination of benefits; determination of percentage of disability, RC § 4123.57.

Industrial commission has continuing jurisdiction, RC § 4123.52.

Medical examinations, RC § 4123.53.

Occupational diseases, compensation, RC § 4123.68.

Paid compensation defined, RC § 4123.35.

Payments for employing rehabilitated workers; wage loss compensation, RC § 4121.67.

Reduction of benefits, RC § 4141.31.

State highway patrol officer occupational injury leave pay, RC § 5503.08.

OHIO ADMINISTRATIVE CODE

Industrial commission/workers' compensation --

Wage loss compensation. OAC ch. 4125-1.

Payment of compensation when advancements are made by employer during period of disability. OWCH: OAC 4123-5-20.

Temporary disability. OWCH: OAC 4121-3-32.

TEXT DISCUSSION

Abandonment of former position of employment. Ohio Workers' Comp. § 9.6

Definition of temporary total disability. Ohio Workers' Comp. § 9.5

The Eaton policy. Ohio Workers' Comp. § 9.8

Temporary total disability. Ohio Workers' Comp. § 9.4

Termination of temporary total disability benefits. Ohio Workers' Comp. § 9.7

Wage loss compensation. Ohio Workers' Comp. § 9.9

RESEARCH AIDS

Amount and period of compensation:

O-Jur3d: Workers' Comp §§ 153, 157, 161, 187, 188, 191-194, 207, 351

C.J.S.: Work C §§ 169, 304

ALR

Basis for computation of compensation in case of intermittent employment. 112 ALR 1094.

Construction and application of term "business" as used in provisions of Workmen's Compensation Act as to computing earnings of employee. 106 ALR 1502.

"Total disability" or the like as referring to inability to work in usual occupation or in other