

In the  
**Supreme Court of Ohio**

State of Ohio ex rel.	:	Case No. 07-747
Pilkington North America, Inc.,	:	
	:	
Appellee,	:	On Appeal from the
	:	Franklin County Court of Appeals,
vs.	:	Tenth Appellate District,
	:	Case No. 06AP-232
Industrial Commission of Ohio, et al.,	:	
	:	
Appellant.	:	

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**MERIT BRIEF OF APPELLANT, INDUSTRIAL COMMISSION OF OHIO**

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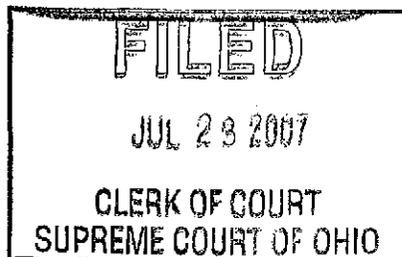
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## INTRODUCTION

This case involves the “last-injurious-exposure rule,” a long-standing concept that is applicable to certain workers’ compensation claims that involve an occupational disease. Unlike a claim for an injury that arises from a specific, single event, occupational disease claims are contracted over an extended period of time, and can potentially involve exposures encountered while working at several different jobs. See R.C. 4123.68. The last-injurious-exposure rule provides a mechanism by which the liability for the occupational disease can be assigned to a particular employer. That is, the employer at which the worker suffered the last injurious exposure generally is charged with the exposure for the claim.

The case at bar involves an occupational disease claim for mesothelioma that has been determined by the appellant Industrial Commission of Ohio (“commission”) to be compensable. The late Donald F. Stein (“Stein”) worked for a single employer, the appellee Pilkington North America, Inc. (“Pilkington”), formerly known as Libbey-Owens-Ford, for over 40 years. During that span, Pilkington’s status under the Ohio workers’ compensation system changed from being a contributor to the State Insurance Fund to being a self-insurer.

The controversy which arose when this claim was allowed involves where the financial responsibility for the claim, for payment of medical expenses and disability compensation, should be assessed, i.e., the State Insurance Fund or directly upon Pilkington as a self-insuring employer. Under the facts presented, and the applicability of the last-injurious-exposure rule, the commission determined that Pilkington, as a self-insured employer, should bear the claim’s financial responsibility. The court of appeals, however, found the commission’s ruling to be contrary to law, and ordered the commission to “apportion” the exposure for the claim between both the State Insurance Fund and the self-insured entity. While such result may initially appear

to be a reasonable approach considering Stein's many years of employment with Pilkington, it conflicts with decades of precedent and its operation is impractical and burdensome. This Court is asked to reverse the lower court's ruling and let stand the commission's judgment.

### STATEMENT OF THE CASE

Pilkington initiated this action in the Tenth District Court of Appeals, seeking a writ of mandamus to vacate that portion of the commission's order that assessed the liability for Stein's workers' compensation claim to Pilkington's self-insured risk. *State ex rel. Pilkington North America, Inc. v. Indus. Comm.* Franklin App. 06AP-232, 2007-Ohio-1011, at ¶1 (“*Pilkington at \_\_\_*”). Pilkington asserted that application of the last-injurious-exposure rule was unnecessary because Stein's exposure date can be calculated by subtracting the average latency period of mesothelioma from the initial on-set date to find that liability for Stein's mesothelioma claim should reside *solely* under its State Fund risk. The matter was assigned to a magistrate who recommended a limited writ ordering the commission to distribute liability between Pilkington's state fund and self-insured risk accounts. *Id.* at ¶9, *et seq.*

The commission objected to the magistrate's decision, contending that the commission properly applied the last-injurious-exposure rule to allocate risk liability to Pilkington as a self-insured employer. The appellate court, however, adopted the magistrate's decision and issued a writ of mandamus, ordering the commission to devise a mechanism to distribute liability between Pilkington's self-insured and state fund risks for both the medical and indemnity costs for Stein's mesothelioma claim. *Id.* at ¶8. The commission respectfully requests that this Court reinstate the commission's order and reverse the appellate court's creation of a new procedure for the assessment of exposure in an occupational disease claim.

## STATEMENT OF FACTS

Stein worked as a general laborer at Pilkington from February 12, 1947 to January 31, 1988. In his workers' compensation claim application, Stein alleged he was exposed to asbestos during his entire tenure while working on furnaces and in areas with no ventilation and no protection. Supplement, page 1-3 (hereinafter, "Supp. #"). At the beginning of Stein's tenure, Pilkington was a State Fund employer, paying premium to the State Insurance Fund for coverage for work-related claims of its employees. On December 7, 1970, Pilkington was granted the privilege of being self-insured. Supp. 14. In lieu of paying premiums into the State Fund, a self-insuring employer is directly responsible to pay the expenses associated with its employees' claims. R.C. 4123.35(B). Pilkington received a new risk number when it changed its status. See reference claims, Supp. 14.

In 1987, a mass in Stein's right lower half of his lung was identified; by 1990 the mass had doubled in size but showed no evidence of atypical or malignant cells. Stein also had an associated condition of mild chronic obstructive pulmonary disease. The tumor was removed and pathology diagnosed it as solitary fibrous mesothelioma. Supp. 8. In 1999, a CT scan showed that Stein had another right-side lung mass not present one year earlier. Following surgery, Stein was post-operatively diagnosis with a pleural mediastinal tumor, right, etiology unknown; status post resection of giant right benign pleural mesothelioma. Supp. 4. In 2003, a third CT scan revealed a larger soft tissue mass at the right lung base. After another surgery, the initial frozen section study of mass tissue showed an initial impression of small cell neoplasm with the final pathological diagnosis of a localized fibrous tumor. Supp. 10. The Mayo Clinic diagnosed Stein's mass as a benign fibrous mesothelioma with sarcomatous malignant changes. Supp. 12. Evidence before the commission included medical journal articles that the *average* latency

period between first exposure and the clinical diagnosis of malignant mesothelioma is 35 to 40 years. Supp. 18 and 21.

The commission, in 2005, allowed Stein's claim for mesothelioma and assigned liability for the claim to Pilkington's self-insured risk. The commission's staff hearing officer ("SHO") noted Stein's long work history with Pilkington and found that Stein was exposed to asbestos from the start of his employment into the late 1970's or early 1980's. Supp. 14, Appendix 24. The SHO noted that, in occupational disease claims, last injurious exposure governed the assignment of liability between employers or risks. The commission found that Stein's last injurious exposure occurred *after* Pilkington became self-insured and assessed liability to Pilkington's self-insured risk. *Id.*

The appellate court has found that the last-injurious-exposure rule should only be applied for the claimant to prove his claim and is not used to assess liability between an employer's state fund or self-insured risks. The appellate court ordered the commission to vacate the portion of its order that assessed liability and, on rehearing, allocate liability, devising some formula to proportion liability for Stein's claim, between Pilkington's self-insured and state fund risks.

## ARGUMENT

The last-injurious-exposure rule is used to assess the initial allowance of some occupational diseases claims to the appropriate employer or risk. Since the right to participate under the workers' compensation laws is not the issue herein, mandamus is the appropriate forum to challenge or determine the legal propriety of the commission's decision, rather than an action under R.C. 4123.512<sup>1</sup>. Contrary to the appellate court's decision, an allocation of liability

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<sup>1</sup> With the often uncertainty of the appealability of certain decisions of the commission under R.C. 4123.512, both Pilkington and Stein filed causes of action in the Wood County Common

for a single occupational disease claim to more than one employer is impractical. More than 50 years ago, in *State ex rel. The Hall China Co. v. Indus. Comm.* (1962), 120 Ohio App. 374, the idea of a “last injurious exposure” was introduced. The accuracy for determining the exact time or location of injurious exposure was not scientifically possible or practical. That concept applies not only to aid the employee in establishing the compensability of his or her claim, but also to assign the financial responsibility for the claim where there are multiple employers or, as here, different employer statuses.

**Appellant Industrial Commission’s Proposition of Law:**

*The last-injurious-exposure rule is applicable not only to determine a claimant’s right to participate, but also to establish the appropriate employer risk account to which liability for the claim should attach.*

The appellate court erred in finding that the last-injurious-exposure rule is limited to determine only a claimant’s right to participate and does not apply to questions of assigning liability to an employer. When an occupational disease arises from many years of exposure, such as to asbestos, liability for the claim rests with the entity where the employee’s last injurious exposure occurred. *State ex rel. Schafer v. Indus. Comm.* (1998), 84 Ohio St.3d 248; *State ex rel. Burnett v. Indus. Comm.* (1983), 6 Ohio St.3d 266.

This Court recently discussed the doctrine in *State ex rel. Erieview Metal Treating Co. v. Indus. Comm.*, 109 Ohio St.3d 147, 148, 2006-Ohio-2036, ¶10 , where the claimant had suffered from occupational asthma from industrial exposure to chemicals and fumes at Erieview. *Id.* at ¶1. Ten years after leaving Erieview, the claimant, while employed as a baker with a new employer for less than one year, again experienced asthma symptoms and filed a second claim which was

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Pleas Court. These cases were stayed pending the decision of Pilkington’s mandamus action and then voluntarily dismissed, subject to refiling.

also allowed. *Id.* at ¶2. When unable to return to baking, the claimant was entitled to temporary total disability compensation, which was awarded under the Erieview claim. *Id.* at ¶3. The commission later granted PTD and charged liability for the PTD solely to the Erieview claim. *Id.* at ¶5.

Erieview challenged the commission’s liability assessment, arguing that the last injurious exposure rule applied, i.e., the claim should be the responsibility of the employer in the subsequent claim, regardless of the circumstances surrounding each of the separate claims. *Id.* at ¶6. This Court declined to use the last-injurious-exposure rule when, under the facts presented, it was “possible to determine with some degree of accuracy which exposure was responsible for [the claimant’s] disability.” *Id.* at ¶11. The Court explained:

The difficulties inherent in this inquiry are obvious. A long-latency occupational disease can take decades to emerge. Once it has, it is often impossible to go back over the years to quantify the amount of exposure at each job or to pinpoint which exposure planted the seeds of eventual disease. *These obstacles inspired the last-injurious-exposure concept, which subordinates the practically unattainable scientific accuracy to the next best thing—consistency. As the name indicates, the employer providing the last injurious exposure will be the one against which the workers’ compensation claim is allowed.*

(Emphasis added) *Id.* at ¶¶9-10. The last-injurious-exposure rule allows an injured worker to overcome the “finger-pointing” defense, recover from one employer, *Burnett*, *supra*, and “provides a reasonably equitable approach to compensation problems in the multi-employer context which is simple, easy to administer, and avoids the difficulties associated with apportionment.” 82 AmJur2d Workers’ Compensation §200, citing *Fairbanks North Star Borough v. Rogers and Babler* (1987), 747 P.2d 528 (Alaska), . Thus, contrary to the appellate court’s holding, the last-injurious-exposure rule applies not only to the initial allowance of a claim, but also when uncertainty and the lack of scientific accuracy demand a more equitable and

practical approach to decisions such as the assignment of liability.

The last-injurious-exposure doctrine is not unique to Ohio. The Supreme Court of Nevada wrote in *State Indus. Ins. Sys. v. Jesch* (1985), 101 Nev. 690, 696, 709 P.2d 172, 176-177:

Simply stated, the last injurious exposure rule in occupational disease, successive-employer cases “places full liability upon the carrier covering the risk at the time of the most recent injury that bears a causal relation to the disability.” 4 A. Larson, *The Law of Workmen’s Compensation* § 95.20 (1984). A majority of jurisdictions have adopted the rule in successive-employer occupational disease cases either by statutory or judicial action. *Id.*

That court recognized the “tremendous initial task to discover all the employers responsible for the occupational disease” and then “attempt to apportion the amount of exposure which occurred with each employer.” *Id.*

While the underlying basis for the rule may have been to aid the worker by avoiding delays and other associated burdens in the consideration of the *merits* of a claim where there is not a specific date of injury, the rationale of using the last-injurious-exposure concept for placing the financial responsibilities upon a single employer is equally viable. Each claim number is associated with a *single* claimant and a *single* employer. In the case at bar, if the costs for the claim were, for example, to be charged equally between Pilkington’s state fund risk account and its self-insuring risk, one-half of every doctor’s bill would be submitted to the Bureau of Workers’ Compensation for payment from the State Insurance Fund, and one-half billed to and directly paid by the self-insured employer. A pharmacy bill, too, would be equally split between the two sources, creating more the double the work for the provider. While a claimant may not be directly impacted by such a payment process, for he or she may not care who pays the bill, there would undoubtedly be adversities that arise for the employee. Claimants would be

burdened with submission of prior authorizations to multiple claim management authorities, one for the State Insurance Fund and another for the self-insured employer. See R.C. 4121.44. Further, there is no appeal standard for disagreements between claim management authorities. Additional hearings, along with additional personnel to handle the increased numbers, would further delay treatment for injured workers and burden the system resulting in delayed response to all claims. While this claim involves only one change in status, the apportionment principles asserted by the appellate court could involve many employers, in the case where a plant was sold to several successive owners; an even more complex situation arises when a plant facility is divided and sold to different successive owners. This Court resolved the complexity and uncertainty presented by long latency occupational diseases decades ago by adopting the last-injurious-exposure principle rather than allocation of liability. Assignment of the claim to the employer or risk associated with the last injurious exposure is the practical solution.

The appellate court herein has misconstrued *Erievue* in holding that the last-injurious-exposure rule applies *only* to assist the claimant in proving the initial allowance. As this Court explained in *Erievue*, the public policy of the last injurious exposure rule “subordinates the practically unattainable scientific accuracy to the next best thing--*consistency*.” Id. at ¶10, *Emphasis added*. The need for consistency is equally applicable to others who may be associated with the workers’ compensation claim.

In this case, Stein was exposed to asbestos both before and after Pilkington became a self-insured employer. Over 32 years lapsed between the date that Pilkington became self-insured and the date that Stein was first diagnosed with malignant mesothelioma. The rule that governs the selection of a liable employer is also used to determine whether the liability is assigned to the State Insurance Fund or a self-insured risk of the same employer when the

employer has changed insurance status during the tenure. In *State ex rel. Marion Power Shovel Co. v. Indus. Comm.* (1950), 153 Ohio St. 451, this Court addressed the liability for a claim when the employer had been self-insured and subsequently became a contributor to the State Insurance Fund. This Court held in its syllabus:

Where a claim for total disability from silicosis is properly allowed, the employer, who was a self-insurer *throughout the entire time when the periods of injurious exposure of the employee to silica dust occurred*, must pay compensation for such disability, even if such employer ceased to be a self-insurer and became a state insurance risk employer after the date of the last such injurious exposure and before the employee became totally disabled.

This Court adopted the last-injurious-exposure principle and held that the employer's status at the time of the worker's exposure controlled assessment of liability. While liability for the claim in *Marion Power Shovel* was assessed to the employer's earlier, rather than later, risk, the last-injurious-exposure principle *was* applied to find that the last injurious exposure occurred while Marion Power Shovel was self-insured. Marion Power Shovel's earlier risk account was assigned liability since there was no uncertainty of exposures spanning *both* the company's state fund insurance *and* self-insured periods. *State ex rel. Occidental Chem. Corp. v. BWC* (2001), 91 Ohio St.3d 249, 251. *Marion Power Shovel* applied the last-injurious-exposure rule, not only to the allowance of the claim, but also to the assignment of liability to the appropriate employer risk account.

As the last-injurious-exposure principle is applied to the instant claim, it was for the commission to determine when the last injurious exposure occurred. The appellate court's magistrate recognized that the evidence offered herein displayed a controversy as to latency periods and the intensity of the exposures that occurred. *Pilkington*, *supra* at ¶¶ 46-51. However, there is no dispute that Stein was exposed to asbestos both before and after Pilkington

became self-insured. Id. at ¶ 14-15. Thus, the determination was for the commission to make and, based upon the evidence, the commission did not abuse its discretion in assigning the liability for this claim to Pilkington's self-insured status. The commission's decision should not be disturbed.

### CONCLUSION

The commission was under no clear legal duty to find that Stein's last injurious exposure occurred before Pilkington became self-insured. Stein testified that he was exposed to asbestos at Pilkington through at least the early 1980's. The medical evidence, too, supported a finding that the last injurious exposure occurred after Pilkington had become self-insured. Pilkington has completely failed to meet the criteria necessary to establish a right to the relief it seeks. *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141.

Accordingly, the commission respectfully requests that this Court reverse the decision of the court of appeals and deny Pilkington's request for issuance of a writ of mandamus.

Respectfully submitted,

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# APPENDIX

In the  
Supreme Court of Ohio

07-0747

State of Ohio ex rel.  
Pilkington North America, Inc.,

Appellee,

vs.

Industrial Commission of Ohio  
and Donald F. Stein,

Appellants.

CASE NO.

On Appeal from the  
Franklin County Court of Appeals, Tenth  
Appellate District

Court of Appeals  
Case No. 06AP 232

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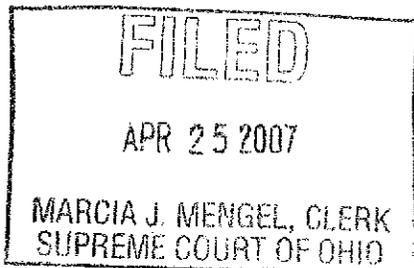
**NOTICE OF APPEAL OF APPELLANT  
INDUSTRIAL COMMISSION OF OHIO**

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**NOTICE OF APPEAL OF APPELLANT  
INDUSTRIAL COMMISSION OF OHIO**

Appellant Industrial Commission of Ohio hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Franklin County Court of Appeals, Tenth Appellate District, entered in Court of Appeals Case No. 06AP 232 on March 12, 2007. This case originated in the Franklin County Court of Appeals via complaint in mandamus, and this appeal is from the court's decision in said case. Therefore, this is an appeal as of right. A copy of the judgment is attached hereto.

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IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

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State of Ohio ex rel.  
Pilkington North America, Inc.,

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v.

Industrial Commission of Ohio  
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Respondents.

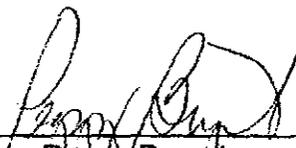
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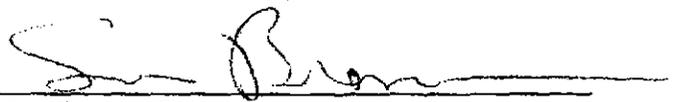
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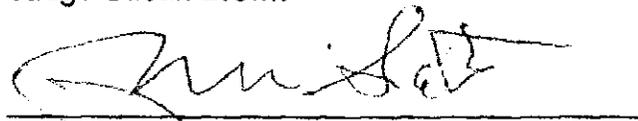
JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on March 8, 2007, the objections to the decision of the magistrate are overruled, the decision of the magistrate is approved and adopted by the court as its own, and it is the judgment and order of this court that a writ of mandamus issue against respondent Industrial Commission of Ohio to vacate that portion of its staff hearing officer's order of June 6, 2005, that allocates 100 percent of the risk liability to relator's self-insured status based upon the last-injurious-exposure rule, and to enter an amended order consistent with the magistrate's decision that appropriately determines allocation of risk liability. Costs assessed to Industrial Commission of Ohio.

Within three (3) days from the filing hereof, the clerk of this court is hereby ordered to serve upon all parties not in default for failure to appear notice of this judgment and its date of entry upon the journal.

  
\_\_\_\_\_  
Judge Peggy Bryant

  
\_\_\_\_\_  
Judge Susan Brown

  
\_\_\_\_\_  
Judge Patrick M. McGrath

FILED  
COURT OF APPEALS  
FRANKLIN COUNTY, OHIO

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT  
MAR -8 PM 12:01  
CLERK OF COURTS

State of Ohio ex rel. :  
Pilkington North America, Inc., :  
Relator, :  
v. :  
Industrial Commission of Ohio :  
and Donald F. Stein, :  
Respondents. :

No. 06AP-232

(REGULAR CALENDAR)

**RECEIVED**

MAR 12 2007

**D E C I S I O N**

Rendered on March 8, 2007

**OFFICE OF ATTORNEY GENERAL  
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*Marc Dann, Attorney General, and Sandra E. Pinkerton, for respondent Industrial Commission of Ohio.*

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**IN MANDAMUS  
ON OBJECTIONS TO MAGISTRATE'S DECISION**

**BRYANT, J.**

{¶1} Relator, Pilkington North America, Inc., commenced this original action requesting a writ of mandamus that orders respondent Industrial Commission of Ohio to vacate that portion of its allowance order imposing liability for the claim upon relator as a

self-insured employer, and to enter an order imposing claim liability solely upon the state insurance fund.

{12} Pursuant to Civ.R. 53 and Section (M), Loc.R. 12 of the Tenth Appellate District, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law. (Attached as Appendix A.) In his decision, the magistrate determined the commission abused its discretion in applying the last-injurious-exposure rule to determine risk liability where the rule was not needed nor used to determine the claimant's right to participate. Accordingly, the magistrate determined a writ should be granted.

{13} The commission filed three objections to the magistrate's decision:

**OBJECTION NO. 1**

The magistrate erred in holding that last injurious exposure rule was limited to questions of whether the claimant had a right to participate.

**OBJECTION NO. 2**

The magistrate erred by recommending a limited writ of mandamus on the basis that the last injurious exposure rule was not applicable in an assessment of liability between the employer's self-insured risk and the employer's state fund risk.

**OBJECTION NO. 3**

The magistrate erred in finding that the last injurious exposure rule was unwarranted in this case and ordering the commission to allocate liability between the self-insured and state fund risks of the employer.

The commission's objections largely reargue those matters adequately addressed in the magistrate's decision, and for the reasons set forth in the decision, the objections are

unpersuasive. Because the objections are interrelated, we address them jointly. Together they assert the commission properly applied the last-injurious-exposure rule to allocate risk liability to relator as a self-insured, not state-fund, employer.

{¶4} In *State ex rel. Erieview Metal Treating Co. v. Indus. Comm.*, 109 Ohio St.3d 147, 2006-Ohio-2036, the Supreme Court of Ohio refused to apply the last-injurious-exposure rule, explaining that "[t]hus far, this theory has appeared before Ohio courts in just one context: before allowance of a claim, in a situation involving several potentially liable employers. \* \* \* It always involves a worker who has been exposed to the injurious substance while working for each of several employers. When that worker filed a workers' compensation claim, a question arises: When multiple employers have subjected the worker to the hazard, against which employer should the workers' compensation claim be allowed?" *Id.* at ¶9.

{¶5} Here, the claimant's claim has been allowed, he has received workers' compensation benefits and the case involves a single employer, albeit an employer that was state-fund at one point in time and self-insured at another. Because the facts do not involve claim allowance with multiple employers, the single context in which the Supreme Court has applied the last-injurious-exposure rule, the magistrate appropriately concluded the commission wrongly employed the rule to allocate risk liability to the employer at a time it was self-insured rather than a state-fund employer. As the magistrate explained, "[t]he last-injurious-exposure rule was not used, nor was it needed, to assist the claimant in establishing the liable employer to support the allowance of his industrial claim." (Magistrate's Decision, ¶42.) Given the Supreme Court's statement in *Erieview* that the rule has been applied in a single context, and absent some indication from the Supreme

Court that it intends to apply the rule beyond those situations where allowance of a claim is at issue, we decline the commission's invitation to employ and extend the last-injurious-exposure rule to allocate risk liability.

{¶6} The magistrate thus returned the matter to the commission to allocate risk liability. In that regard, relator also filed an objection:

THE MAGISTRATE ERRED IN REFERRING THIS CLAIM  
BACK TO THE COMMISSION FOR AN AMENDED ORDER  
RATHER THAN ORDERING THE COMMISSION TO  
ASSIGN THE CLAIM ENTIRELY TO THE STATE FUND.

Relator contends the risk liability should have been allocated to the state fund. Relying on Dr. Gad's reports, relator contends the only evidence indicates the exposure occurred prior to December 7, 1970, when relator was not self-insured.

{¶7} The evidence of record, however, contains the First Report of Injury Form. In it, the applicant was asked to describe the events that caused the disease. In responding, claimant stated, "I was employed by Libby-Owens-Ford in Rossford for 41 years from 1947 to 1988. During those years, I worked as a laborer, furnace tender, and crew leader. *I was exposed to asbestos in many forms in different environments throughout the plant over my 41 years of employment.*" (Emphasis added.) (Magistrate's Decision, ¶18.) Accordingly, even if Dr. Gad's report supports relator's position, claimant's statement suggests exposure beyond December 7, 1970. Given that the latency period, according to Dr. Gad, may be as short as 20 years, the magistrate appropriately determined the matter should be returned to the commission to consider allocation of risk liability. For the foregoing reasons, the commission's three objections and relator's single objection are overruled.

{¶8} Following independent review pursuant to Civ.R. 53, we find the magistrate has properly determined the pertinent facts and applied the salient law to them. Accordingly, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained in it. In accordance with the magistrate's decision, we grant a writ of mandamus that orders the commission to vacate that portion of its staff hearing officer's order of June 6, 2005, that allocates 100 percent of the risk liability to relator's self-insured status based upon the last-injurious-exposure rule, and to enter an amended order consistent with the magistrate's decision that appropriately determines allocation of risk liability.

*Objections overruled;  
writ granted.*

BROWN and McGRATH, JJ., concur.

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# APPENDIX A

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel.  
Pilkington North America, Inc.,

Relator,

v.

Industrial Commission of Ohio  
and Donald F. Stein,

Respondents.

No. 06AP-232

(REGULAR CALENDAR)

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## MAGISTRATE'S DECISION

Rendered on November 9, 2006

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*Marshall & Melhorn, LLC, Michael S. Scalzo and John A. Borell, Jr., for relator.*

*Jim Petro, Attorney General, and Sandra E. Pinkerton, for respondent Industrial Commission of Ohio.*

*Gallon, Takacs, Boissoneault & Schaffer Co., L.P.A., and Theodore A. Bowman, for respondent Donald F. Stein.*

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### IN MANDAMUS

{19} In this original action, relator, Pilkington North America, Inc., requests a writ of mandamus ordering respondent Industrial Commission of Ohio ("commission") to vacate that portion of its allowance order imposing liability for the claim upon relator as a

self-insured employer, and to enter an order imposing claim liability solely upon the state insurance fund.

Findings of Fact:

{¶10} 1. Relator, who is a self-insured employer under Ohio's workers' compensation law, is the successor company of Libbey-Owens-Ford Company ("LOF"). Effective December 7, 1970, LOF became self-insured. Relator succeeds to the liability of LOF self-insured claims. Prior to December 7, 1970, LOF was a state-fund employer.

{¶11} 2. On August 4, 2003, respondent Donald F. Stein ("claimant") underwent surgery performed by Joseph Roshe, M.D. In his operative report of that date, Dr. Roshe described the operation as "[r]ight transthoracic resection of large pleural tumor, possibly mesothelioma."

{¶12} 3. On August 8, 2003, Paul L. Schaefer, M.D., dictated a consultation report regarding the August 4, 2003 surgery. Dr. Schaefer wrote:

He was taken to surgery and at the time of surgery was found to have a multiloculated, well demarcated mass located primarily at the costovertebral angle. This was dissected. \* \* \*  
The pathology of this mass reports to be a fibrous, right-sided fibrous pleural mesothelioma, and Medical Oncology consult is obtained for further evaluation and therapy.

{¶13} 4. On November 3, 2003, claimant completed a work history question-naire for the Ohio Bureau of Workers' Compensation ("bureau"). In response to the questionnaire, claimant attached a typewritten sheet stating that he had worked as a general laborer for LOF from February 12, 1947 to 1973 at the "Thermopane Plant 9 Rossford Ohio." The attachment further states that claimant worked for LOF from 1973 to January 31, 1988 at the "Rossford Plant 6." The job at the Rossford Plant 6 is described

in typed print as follows: "Load & Unload Furnace – Work on Top of furnace – Group leader Silk Screen."

{¶14} Beside the above-noted typed print, is the following handwriting: "asbestos is in air from furnaces + glass[.] Make adjustments on top of furnaces + no ventilation or protection."

{¶15} Below the above handwriting, the attachment states in typed print: "Frin [sic] 1973 until 1988 is when I was exposed to asbestos in furnaces."

{¶16} 5. On January 3, 2005, pathologist Douglas A. Pohl, M.D., Ph.D., wrote:

Mr. Stein is an unfortunate man who presented to medical attention in 1990 with radiographic evidence of a large pleural-based mass arising in the right chest. A right thoracotomy was undertaken revealing a solitary fibrous tumor of the pleura (benign fibrous mesothelioma). Mr. Stein experienced a recurrence of his pleural tumor in 1998 and again in 2003. In my review of the pathology slides of one of these subsequent resections, it is my opinion that Mr. Stein's tumor is a malignant fibrous mesothelioma of the pleura.

The cell of origin of malignant fibrous mesothelioma of the pleura is still debated. An origin from mesothelial cells, like malignant pleural mesothelioma, or submesothelial fibroblasts has been suggested. In Mr. Stein's case, it is likely that a mesothelial cell or submesothelial fibroblast of the right chest wall underwent a malignant change resulting in uncontrolled growth of that cell and the formation of a pleural based mass. Mr. Stein's malignant fibrous mesothelioma has repeatedly recurred indicative of its malignant nature. Mr. Stein's long term prognosis is uncertain.

Malignant pleural mesothelioma is known to arise as a result of past asbestos exposure. Studies of malignant fibrous mesothelioma have been hampered by the extreme rarity of this entity, representing only 5% of all primary pleural neoplasms. Thus, epidemiologic studies have lacked sufficient statistical power to assess the potential causes of malignant fibrous mesothelioma. Nevertheless, published case reports and case series have consistently shown that cases of

malignant fibrous mesothelioma occur in patients with significant past asbestos exposure, indicating a role of asbestos in the etiology of this malignancy.

It is reasonable that asbestos plays a role in the development of malignant fibrous mesothelioma. Transmigration studies by Sebastein et al demonstrated that inhaled asbestos fibers readily migrate to the pleura from the lungs. Other studies by Wagner demonstrated that the instillation of asbestos fibers in the pleura of animals could produce malignant mesothelioma and fibrous tumors of the pleura. These and other studies led to the understanding that asbestos fibers deposited in the pleural space were capable of inducing a mutagenic event in a mesothelial cell. Since asbestos was the only carcinogen capable of gaining access to the pleural space, it was plausible that asbestos is the principal carcinogen in the causation of mesothelioma, as well as malignant fibrous mesothelioma.

Mr. Stein's asbestos exposure occurred while he worked for Heinz from 1940 until 1947 and then for Libby Owens Glass Company from 1947 until 1988. The medical records indicate that Mr. Stein was exposed to substantial amounts of asbestos dust during his work career. In view of the well-documented cause and effect relationship between asbestos exposure and mesothelioma, and the reported cases of malignant fibrous mesothelioma among asbestos exposed workers, it is my opinion, within a reasonable degree of medical certainty, that Mr. Stein's asbestos exposure was a substantial contributing factor to the development of his recurrent malignant fibrous mesothelioma of the pleura.

{¶17} 6. On March 21, 2005, claimant filed a First Report of an Injury, Occupational Disease or Death ("FROI-1") form. On this form, claimant alleged that on August 4, 2003, he was diagnosed with "malignant fibrous mesothelioma due to asbestos exposure." Dr. Roshe was listed as the physician of record. The form asks the applicant to describe the events that caused the disease. In response, claimant stated:

I was employed by Libbey-Owens-Ford in Rossford for 41 years from 1947 to 1988. During those years, I worked as a laborer, furnace tender, and crew leader. I was exposed to

asbestos in many forms in different environments throughout the plant over my 41 years of employment. I am a non-smoker.

{¶18} 7. Relator obtained a report from Michael K. Riethmiller, M.D., J.D., dated April 25, 2005. In that report, Dr. Riethmiller states:

\* \* \* [I]t is my opinion that the appropriate diagnosis for Mr. Stein's tumor was a solitary fibrous tumor of the pleura with progression to a sarcoma which would be a malignant change. I don't believe that Mr. Stein has a diagnosis of malignant fibrous mesothelioma. \* \* \*

\* \* \*

\* \* \* Mr. Stein did not have a malignant fibrous mesothelioma but instead had a solitary or localized fibrous tumor which was initially diagnosed in 1990 and then by 2003 had developed some malignant changes. There isn't any evidence that this tumor is associated with asbestos exposure. Although Dr. Pohl provided an opinion that this tumor is causally connected to asbestos exposure, he didn't provide specific scientific evidence or used evidence associated with a malignant mesothelioma. The fact that asbestos fibers can migrate to the pleura doesn't auto-matically mean that every tumor of the pleura would be caused by asbestos exposure. \* \* \*

{¶19} 8. Following an April 28, 2005 hearing, a district hearing officer ("DHO") issued an order that disallowed the claim. The DHO relied upon Dr. Riethmiller's April 25, 2005 report.

{¶20} 9. Claimant administratively appealed the DHO's order of April 28, 2005.

{¶21} 10. Claimant's appeal was scheduled for hearing before a staff hearing officer ("SHO") on June 6, 2005. Prior to the hearing, relator filed a memorandum in which it claimed that, in the event the claim is allowed, the claim should be charged to the state insurance fund rather than to relator as a self-insured employer.

{¶22} 11. According to an affidavit filed by counsel for relator in this action, at the June 6, 2005 hearing, relator submitted a report from Mohammed Adel Gad, M.D., dated April 21, 2005, which Dr. Gad had authored on behalf of another claimant, William Nyers, Jr., who was employed by LOF.<sup>1</sup> Dr. Gad's April 21, 2005 report on behalf of Mr. Nyers states:

Malignant mesothelioma has a long latency period that may exceed 30 years. Malignant mesothelioma has a latency period that may range anywhere from 20 to 50 years. However, the average latency period is 35 to 40 years. From 1970 to 2002, which is the year in question of the date of injury/disability, there is a 33 year potential latency period. However, from 1955 to 2002, he would have a 47 year latency period. Given that the average latency period is 35 to 40 years, one would think that the exposure that led to this patient's condition most likely occurred before 1970.

In summary, the most injurious exposure most likely occurred prior to 1970. The latency period is defined as the time of exposure to development of the condition in question which in this case is malignant mesothelioma. Certainly, the medical documentation does support the requested alleged condition and that this condition was caused by his employment at Libby Owens Ford.

In conclusion, the patient's condition of malignant mesothelioma is related to the patient's employment at Libby Owens Ford. The most injurious exposure as noted above most likely occurred prior to December of 1970 and the reason for this decision is based on the average latency period of 35 to 40 years for development of malignant mesothelioma.

{¶23} 12. Following the June 6, 2005 hearing, the SHO issued an order vacating the DHO's order of April 28, 2005, and allowing the claim. The SHO's order of June 6, 2005 states:

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<sup>1</sup> In this action, relator moved to supplement the record with Dr. Gad's April 21, 2005 report. Because the

This Staff Hearing Officer finds that the injured worker contracted an occupational disease in the course of and arising out of his employment. The injured worker was significantly exposed to asbestos materials and has developed a recurrent malignant fibrous mesothelioma of the pleura.

The Staff Hearing Officer finds the injured worker had substantial exposure to asbestos during the course of his employment with this employer, which is at a much higher level and risk factor than that of the general public.

In addition, the injured worker testified that he was exposed to high levels of asbestos even into the 70's and early 80's. The injured worker testified that many changes were made in the 70's to help clean up the plant, however, the injured worker was still exposed to asbestos dust of the top of furnaces until the early 80's. The condition which the injured worker has does have an extremely long latency period. However, at 2005, it is still 25 years out from the early 80's for the condition to have developed. Prior tumors were benign. Further, in occupational disease claims the employer who has the liability on the ultimate claim is the employer of last injurious exposure. Since the exposure to asbestos was ongoing into the early 80's, then the Self-Insured Employer, which began in 1970, would be the last injurious exposure employer.

\*\*\*

The Staff Hearing Officer authorizes treatment and orders medical bills paid for the allowed conditions herein pursuant to BWC/IC rules and guidelines.

This order is based upon the report of Dr. Pohl (01/03/2005), the B-reader report, Dr. Mobin (07/18/2003), Dr. Roshe (03/30/1999) and (08/04/2003), the operative note (08/04/2003), and Dr. Daboul (04/09/2002).

{¶24} 13. On June 18, 2005, the SHO mailed an amended order stating that the claim is allowed for "malignant fibrous mesothelioma of the pleura."

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commission did not oppose the motion, the magistrate granted the motion.

{¶25} 14. On June 29, 2005, another SHO mailed an order refusing relator's administrative appeal from the SHO's order of June 6, 2005, as amended.

{¶26} 15. On July 8, 2005, relator moved for reconsideration of the SHO's order refusing its administrative appeal.

{¶27} 16. On July 21, 2005, the commission mailed an order denying the motion for reconsideration.

{¶28} 17. On August 2, 2005, relator filed what it called an amended request for reconsideration. In support, relator submitted a report from Dr. Gad dated July 25, 2005, which addressed the claim of claimant. Dr. Gad's July 25, 2005 report states:

In 2003, the patient developed a malignant mesothelioma. The latency period for development of a malignant mesothelioma is 30 to 45 years per the New England Journal of Medicine, Volume 320, No. 26, Page 1723. As the latency period for development of malignant mesothelioma is 30 to 45 years, most likely this patient's most injurious exposure was before 1970, although in some cases 20 years latency period has been documented. The average latency period would be used in this case and would support the above decision.

{¶29} 18. On August 26, 2005, the commission mailed an order denying relator's August 2, 2005 so-called amended request for reconsideration.

{¶30} 19. On March 10, 2006, relator filed this mandamus action.

Conclusions of Law:

{¶31} The commission, through its SHO, applied the rule of last injurious exposure to, in effect, allocate 100 percent of the risk liability for the allowed industrial claim to relator as a self-insured employer rather than to relator as a former state-fund employer.

{¶32} The primary issue is whether the last-injurious-exposure rule is warranted to determine risk liability where the rule was not needed nor used to determine the claimant's right to participate.

{¶33} Finding that the rule is unwarranted to solely determine risk liability in this situation, it is the magistrate's decision that this court issue a writ of mandamus, as more fully explained below.

{¶34} Historically, the last-injurious-exposure rule was at issue in *State ex rel. The Hall China Co. v. Indus. Comm.* (1962), 120 Ohio App. 374, although the term "last-injurious-exposure rule" does not actually appear in that decision. Later, in *State ex rel. Burnett v. Indus. Comm.* (1983), 6 Ohio St.3d 266, 268, the court had occasion to summarize the holding in *Hall China*:

\* \* \* The court therein held that *an* injurious exposure was a prerequisite to the allowance of an occupational disease claim; and that proof of such exposure with the last employer was a sufficient basis for the award even though other employments may have contributed to the occupational disease.

(Emphasis sic.)

{¶35} Recently, in *State ex rel. Erieview Metal Treating Co. v. Indus. Comm.*, 109 Ohio St.3d 147, 2006-Ohio-2036, at ¶9-10, the court had occasion to further explain the so-called "last-injurious-exposure" theory:

\* \* \* Thus far, this theory has appeared before Ohio courts in just one context: before allowance of a claim, in a situation involving several potentially liable employers. It usually involves a worker who has recently experienced the onset of a long-latency occupational disease such as asbestosis or black lung. It always involves a worker who has been exposed to the injurious substance while working for each of several employers. When that worker files a workers' com-

pensation claim, a question arises: When multiple employers have subjected the worker to the hazard, against which employer should the workers' compensation claim be allowed?

The difficulties inherent in this inquiry are obvious. A long-latency occupational disease can take decades to emerge. Once it has, it is often impossible to go back over the years to quantify the amount of exposure at each job or to pinpoint which exposure planted the seeds of eventual disease. These obstacles inspired the last-injurious-exposure concept, which subordinates the practically unattainable scientific accuracy to the next best thing—consistency. As the name indicates, the employer providing the last injurious exposure will be the one against which the workers' compensation claim is allowed.

{¶36} In *Erievew*, the commission had allocated the entire cost of the permanent total disability ("PTD") award to the claimant's first employer rather than claimant's second employer. The first claim was allowed for occupational asthma and the second claim was allowed for aggravation of pre-existing occupational asthma. All compensation and benefits had been paid in the first claim, with none having been paid in the second claim. The commission allocated the entire cost of the PTD award to the first employer based upon the payment history of the two claims.

{¶37} Finding that the last-injurious-exposure rule was not applicable, the *Erievew* court, at ¶11, explained:

\* \* \* The question, of course, remains as to whether the last-injurious-exposure principle should be extended to this situation nevertheless, and upon consideration, we find that it should not. Here, it is possible to determine with some degree of accuracy which exposure was responsible for Yakopovich's disability. Substantial disability compensation has been paid in the *Erievew* claim, as opposed to none in the *Meijer* claim. There is, therefore, no reason to resort to the last-injurious-exposure theory.

{¶38} Parenthetically, the magistrate notes that Ohio is not the only jurisdiction to have addressed the rule of last injurious exposure. In *State Indus. Ins. Sys. v. Jesch* (1985), 101 Nev. 690, 696, 709 P.2d 172, 176-177, a case cited by the Supreme Court of Ohio in *State ex rel. Liposchak v. Indus. Comm.* (1995), 73 Ohio St.3d 194, 196, the Supreme Court of Nevada states:

Simply stated, the last injurious exposure rule in occupational disease, successive-employer cases "places full liability upon the carrier covering the risk at the time of the most recent injury that bears a causal relation to the disability." 4 A. Larson, *The Law of Workmen's Compensation* § 95.20 (1984). A majority of jurisdictions have adopted the rule in successive-employer occupational disease cases either by statutory or judicial action. *Id.*

In an asbestos-related case it could be a tremendous initial task to discover all the employers responsible for the occupational disease. Then it would be necessary to attempt to apportion the amount of exposure which occurred with each employer. A state's workers compensation agency would be excessively burdened and the claimant would suffer a delay in payment of benefits. Larson, *supra*, at § 95.24. Just such problems prompted the Nebraska Supreme Court to adopt the last injurious exposure rule in asbestos-related cases. The court quoted from an earlier Tennessee case: "[W]e are constrained to so interpret our Workmen's Compensation Law as will best serve the interests of employees who suffer from an occupational disease, rather than attempt an adjustment of their rights in the light of equities that may exist between [successive employers]." *Osteen v. A.C. & S., Inc.*, 209 Neb. 282, 307 N.W.2d 514, 519 (1981) quoting *Wilson v. Van Buren County*, 198 Tenn. 179, 278 S.W.2d 685, 688 (1955).

(Emphasis sic.)

{¶39} As the *Erievue* court indicates, the primary purpose of the last-injurious-exposure rule is to assist the injured worker in establishing his industrial claim when

multiple employers have exposed him to a hazardous substance known to cause disability.

{¶40} Given the purpose of the last-injurious-exposure rule, its application here is unwarranted.

{¶41} Here, the commission has used the last-injurious-exposure rule solely to support a 100 percent allocation of risk liability to the self-insured employer who had previously been a state-fund employer. The last-injurious-exposure rule was not used, nor was it needed, to assist the claimant in establishing the liable employer to support the allowance of his industrial claim.

{¶42} Applying the last-injurious-exposure rule to select the liable risk in this case creates an artificial "all or nothing" result in the allocation of risk liability in an industrial claim in which the claimant has already been granted the right to participate.

{¶43} Based upon the foregoing analysis, the magistrate concludes that the last-injurious-exposure rule is inapplicable to the allocation issue that confronted the commission.

{¶44} Based upon Dr. Gad's April 21, 2005 report, relator theorizes that the injurious exposure causing mesothelioma more likely than not occurred during the period that LOF was a state-fund employer, i.e., from 1947 to December 7, 1970. Relator's theory is necessarily premised upon Dr. Gad's April 21, 2005 statement that the average latency period is 35 to 40 years for malignant mesothelioma. Dr. Gad's April 21, 2005 statement was presumably before the SHO at the June 6, 2005 hearing.

{¶45} Parenthetically, the magistrate notes that in Dr. Gad's July 25, 2005 report submitted by relator in support of its so-called amended request for reconsideration, Dr.

Gad states that the average latency period is 30 to 45 years for the development of mesothelioma. Thus, we have an inconsistency with respect to Dr. Gad's reports as to the average latency period for mesothelioma.

{¶46} Approximately 32 and one-half years elapsed between the date that relator became self-insured (December 7, 1970) and the date that claimant was first diagnosed with malignant mesothelioma (August 2003).

{¶47} As can be clearly seen, accepting Dr. Gad's April 21, 2005 statement that average latency is 35 to 40 years, relator can theorize that claimant's exposure to asbestos during the period that relator was self-insured does not fall within the average latency period and thus it is more likely that claimant's mesothelioma was caused by an injurious exposure occurring prior to December 7, 1970.

{¶48} However, accepting Dr. Gad's July 25, 2005 statement that average latency is 30 to 45 years, relator's above-noted theory is undermined because claimant's earliest exposure to asbestos while relator was self-insured occurred approximately 32 and one-half years prior to his mesothelioma diagnosis.

{¶49} Accepting Dr. Gad's July 25, 2005 statement that average latency is 30 to 45 years, claimant's injurious exposure causing mesothelioma could have occurred during the period that relator was a state-fund employer as well as during the period that relator was self-insured.

{¶50} Moreover, if we accept Dr. Gad's statement that the latency period range for mesothelioma is 20 to 50 years, relator's theory is further undermined because most of claimant's 18 years of employment under relator's self-insured status occurred 20 years or more prior to the diagnosis.

{¶51} The point of testing relator's theory here is to show that, in fact, it is indeed just a theory as to how one might determine when the injurious exposure causing mesothelioma most likely occurred. Of course, the commission was not required to accept relator's theory based upon Dr. Gad's April 21, 2005 report.

{¶52} It is the duty of the commission to determine an appropriate basis for allocating risk liability. In the magistrate's view, this court should not perform the allocation for the commission.

{¶53} Accordingly, it is the magistrate's decision that this court issue a writ of mandamus ordering the commission to vacate that portion of its SHO's order of June 6, 2005, that allocates 100 percent of the risk liability to relator's self-insured status based upon the last-injurious-exposure rule, and to enter an amended order consistent with this magistrate's decision that appropriately determines allocation of risk liability.

/s/ Kenneth W. Macke  
KENNETH W. MACKE  
MAGISTRATE

RECORD OF PROCEEDINGS

Claim Number: 03-889250  
LT-00-SI-COV  
PCN: 2050951 Donald Stein

Claims Heard: 03-889250  
03-889251  
03-865206 - Ref

DONALD STEIN  
4153 W CENTRAL AVE  
TOLEDO OH 43606-2206

Date of Diagnosis: 8/04/2003 Risk Number: 20003013-1

This claim has been previously DISALLOWED.

This matter was heard on 06/06/2005 before Staff Hearing Officer Laura Schank pursuant to the provisions of Ohio Revised Code Section 4121.35(B) and 4123.511(D) on the following:

APPEAL of DHO order from the hearing dated 04/28/2005, filed by Injured Worker on 05/11/2005.

Issue: 1) Injury Or Occupational Disease Allowance

Notices were mailed to the injured worker, the employer, their respective representatives and the Administrator of the Bureau of Workers' Compensation not less than 14 days prior to this date, and the following were present for the hearing:

APPEARANCE FOR THE INJURED WORKER: Injured Worker; Ms. Wilson, atty.;  
Mrs. Stein  
APPEARANCE FOR THE EMPLOYER: Mr. Scalzo, atty.;  
Mr. Baumgartner, WC Administrator  
APPEARANCE FOR THE ADMINISTRATOR: Ms. Spidel, atty,

The order of the District Hearing Officer, from the hearing dated 04/28/2005, is VACATED. Therefore, the FROI-1, filed on 03/21/2005, is GRANTED to the extent of this order.

This Staff Hearing Officer finds that the injured worker contracted an occupational disease in the course of and arising out of his employment. The injured worker was significantly exposed to asbestos materials and has developed a recurrent malignant fibrous mesothelioma of the pleura.

The Staff Hearing Officer finds the injured worker had substantial exposure to asbestos during the course of his employment with this employer, which is at a much higher level and risk factor than that of the general public.

In addition, the injured worker testified that he was exposed to high levels of asbestos even into the 70's and early 80's. The injured worker testified that many changes were made in the 70's to help clean up the plant, however, the injured worker was still exposed to asbestos dust of the top of furnaces until the early 80's. The condition which the injured worker has does have an extremely long latency period. However, at 2005, it is still 25 years out from the early 80's for the condition to have developed. Prior tumors were benign. Further, in occupational disease claims the employer who has the liability on the ultimate claim is the employer of last injurious exposure. Since the exposure to asbestos was ongoing into the early 80's, then the Self-Insured Employer, which began in 1970, would be the last injurious exposure employer.

The Staff Hearing Officer finds no requested Lost Time on file at this time.

FINDINGS MAILED  
JUN 11 2005 mlg/mlg  
I. C. TOLEDO

2005-06-17 14:09:13

The Industrial Commission of Ohio  
**RECORD OF PROCEEDINGS**

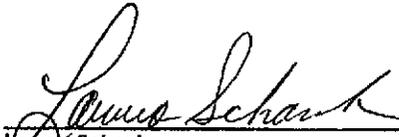
Claim Number: 03-889250

The Staff Hearing Officer authorizes treatment and orders medical bills paid for the allowed conditions herein pursuant to BWC/IC rules and guidelines.

This order is based upon the report of Dr. Pohl (01/03/2005), the B-reader report, Dr. Mobin (07/18/2003), Dr. Roshe (03/30/1999 and 08/04/2003), the operative note (08/04/2003), and Dr. Daboul (04/09/2002).

An Appeal from this order may be filed within 14 days of the receipt of the order. The Appeal may be filed online at [www.ohioic.com](http://www.ohioic.com) or the Appeal (IC-12) may be sent to the Industrial Commission of Ohio, Toledo District Office, One Government Center, Suite 1500, Toledo OH 43604.

Typed By: mlg  
Date Typed: 06/08/2005

  
\_\_\_\_\_  
Laura Schank  
Staff Hearing Officer

Findings Mailed:

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The parties and representatives listed below have been sent this record of proceedings. If you are not an authorized representative of either the injured worker or employer, please notify the Industrial Commission.

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03-889250  
Donald Stein  
4153 W Central Ave  
Toledo OH 43606-2206

ID No: 20511-91  
Gallon & Takacs  
3516 Granite Circle  
Toledo OH 43617-1172

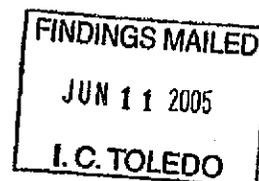
Risk No: 20003013-1  
Libbey Owens Ford Co.  
Baumgartner Charles  
140 Dixie Hwy  
Rossford OH 43460-1215

ID No: 850-80  
Specialty Risk Services Inc  
Cleveland Regional Office  
PO Box 31180  
Independence OH 44131-0180

ID No: 14335-90  
Michael S. Scalzo  
Four Sea Gate-8th Fl  
Toledo OH 43604

BWC, LAW DIRECTOR

(SH01 - SHO Appeal - Rev. 4/10/02)





The Industrial Commission of Ohio  
**RECORD OF PROCEEDINGS**

Claim Number: 03-889250

ICL 06/28/2005

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The parties and representatives listed below have been sent this record of proceedings. If you are not an authorized representative of either the injured worker or employer, please notify the Industrial Commission.

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03-889250  
Donald Stein  
4153 W Central Ave  
Toledo OH 43606-2206

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Risk No: 20003013-1  
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Baumgartner Charles  
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Rossford OH 43460-1215

ID No: 850-80  
Specialty Risk Services Inc  
Cleveland Regional Office  
PO Box 31180  
Independence OH 44131-0180

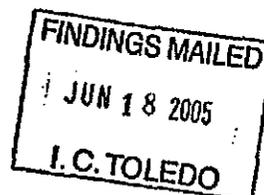
ID No: 14335-90  
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Four Sea Gate-8th Fl  
Toledo OH 43604

BWC, LAW DIRECTOR

(SHO1 - SHO Appeal - Rev. 4/10/02)

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Appendix

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An Equal Opportunity Employer  
and Service Provider



m1g/m1g

**§ 4123.35 Payment of premiums; certificate of payment; granting of self-insuring employer status; self-insured construction projects.**

(A) Except as provided in this section, every employer mentioned in division (B)(2) of section 4123.01 of the Revised Code, and every publicly owned utility shall pay semiannually in the months of January and July into the state insurance fund the amount of annual premium the administrator of workers' compensation fixes for the employment or occupation of the employer, the amount of which premium to be paid by each employer to be determined by the classifications, rules, and rates made and published by the administrator. The employer shall pay semiannually a further sum of money into the state insurance fund as may be ascertained to be due from the employer by applying the rules of the administrator, and a receipt or certificate certifying that payment has been made, along with a written notice as is required in section 4123.54 of the Revised Code, shall be mailed immediately to the employer by the bureau of workers' compensation. The receipt or certificate is prima-facie evidence of the payment of the premium, and the proper posting of the notice constitutes the employer's compliance with the notice requirement mandated in section 4123.54 of the Revised Code.

The bureau of workers' compensation shall verify with the secretary of state the existence of all corporations and organizations making application for workers' compensation coverage and shall require every such application to include the employer's federal identification number.

An employer as defined in division (B)(2) of section 4123.01 of the Revised Code who has contracted with a subcontractor is liable for the unpaid premium due from any subcontractor with respect to that part of the payroll of the subcontractor that is for work performed pursuant to the contract with the employer.

Division (A) of this section providing for the payment of premiums semiannually does not apply to any employer who was a subscriber to the state insurance fund prior to January 1, 1914, or who may first become a subscriber to the fund in any month other than January or July. Instead, the semiannual premiums shall be paid by those employers from time to time upon the expiration of the respective periods for which payments into the fund have been made by them.

The administrator shall adopt rules to permit employers to make periodic payments of the semiannual premium due under this division. The rules shall include provisions for the assessment of interest charges, where appropriate, and for the assessment of penalties when an employer fails to make timely premium payments. An employer who timely pays the amounts due under this division is entitled to all of the benefits and protections of this chapter. Upon receipt of payment, the bureau immediately shall mail a receipt or certificate to the employer certifying that payment has been made, which receipt is prima-facie evidence of payment. Workers' compensation coverage under this chapter continues uninterrupted upon timely receipt of payment under this division.

Every public employer, except public employers that are self-insuring employers under this section, shall comply with sections 4123.38 to 4123.41, and 4123.48 of the Revised Code in regard to the contribution of moneys to the public insurance fund.

(B) Employers who will abide by the rules of the administrator and who may be of sufficient financial ability to render certain the payment of compensation to injured employees or the dependents of killed employees, and the furnishing of medical, surgical, nursing, and hospital attention and services and medicines, and funeral expenses, equal to or greater than is provided for in sections 4123.52, 4123.55 to 4123.62, and 4123.64 to 4123.67 of the Revised Code, and who do not desire to insure the payment thereof or indemnify themselves against loss sustained by the direct payment thereof, upon a finding of such facts by the administrator, may be granted the privilege to pay individually compensation, and furnish medical, surgical, nursing, and hospital services and attention and funeral expenses directly to injured employees or the dependents of killed employees, thereby being granted status as a self-insuring employer. The administrator may charge employers who apply for the status as a self-insuring employer a reasonable application fee to cover the bureau's costs in connection with processing and making a determination with respect to an application.

All employers granted status as self-insuring employers shall demonstrate sufficient financial and administrative ability to assure that all obligations under this section are promptly met. The administrator shall deny the privilege where the employer is unable to demonstrate the employer's ability to promptly meet all the obligations imposed on the employer by this section.

(1) The administrator shall consider, but is not limited to, the following factors, where applicable, in determining the employer's ability to meet all of the obligations imposed on the employer by this section:

(a) The employer employs a minimum of five hundred employees in this state;

(b) The employer has operated in this state for a minimum of two years, provided that an employer who has purchased, acquired, or otherwise succeeded to the operation of a business, or any part thereof, situated in this state that has operated for at least two years in this state, also shall qualify;

(c) Where the employer previously contributed to the state insurance fund or is a successor employer as defined by bureau rules, the amount of the buyout, as defined by bureau rules;

(d) The sufficiency of the employer's assets located in this state to insure the employer's solvency in paying compensation directly;

(e) The financial records, documents, and data, certified by a certified public accountant, necessary to provide the employer's full financial disclosure. The records, documents, and data include, but are not limited to, balance sheets and profit and loss history for the current year and previous four years.

(f) The employer's organizational plan for the administration of the workers' compensation law;

(g) The employer's proposed plan to inform employees of the change from a state fund insurer to a self-insuring employer, the procedures the employer will follow as a self-insuring employer, and the employees' rights to compensation and benefits; and

(h) The employer has either an account in a financial institution in this state, or if the employer maintains an account with a financial institution outside this state, ensures that workers' compensation checks are drawn from the same account as payroll checks or the employer clearly indicates that payment will be honored by a financial institution in this state.

The administrator may waive the requirements of divisions (B)(1)(a) and (b) of this section and the requirement of division (B)(1)(e) of this section that the financial records, documents, and data be certified by a certified public accountant. The administrator shall adopt rules establishing the criteria that an employer shall meet in order for the administrator to waive the requirement of division (B)(1)(e) of this section. Such rules may require additional security of that employer pursuant to division (E) of section 4123.351 [4123.35.1] of the Revised Code.

The administrator shall not grant the status of self-insuring employer to the state, except that the administrator may grant the status of self-insuring employer to a state institution of higher education, excluding its hospitals, that meets the requirements of division (B)(2) of this section.

(2) When considering the application of a public employer, except for a board of county commissioners described in division (C) of section 4123.01 of the Revised Code, a board of a county hospital, or a publicly owned utility, the administrator shall verify that the public employer satisfies all of the following requirements as the requirements apply to that public employer:

(a) For the two-year period preceding application under this section, the public employer has maintained an unvoted debt capacity equal to at least two times the amount of the current annual premium established by the administrator under this chapter for that public employer for the year immediately preceding the year in which the public employer makes application under this section.

(b) For each of the two fiscal years preceding application under this section, the unreserved and undesignated year-end fund balance in the public employer's general fund is equal to at least five per cent of the public employer's general fund revenues for the fiscal year computed in accordance with generally accepted accounting principles.

(c) For the five-year period preceding application under this section, the public employer, to the extent applicable, has complied fully with the continuing disclosure requirements established in rules adopted by the United States securities and exchange commission under 17 C.F.R. 240.15c 2-12.

(d) For the five-year period preceding application under this section, the public employer has not had its local government fund distribution withheld on ac-

count of the public employer being indebted or otherwise obligated to the state.

(e) For the five-year period preceding application under this section, the public employer has not been under a fiscal watch or fiscal emergency pursuant to section 118.023 [118.02.3], 118.04, or 3316.03 of the Revised Code.

(f) For the public employer's fiscal year preceding application under this section, the public employer has obtained an annual financial audit as required under section 117.10 of the Revised Code, which has been released by the auditor of state within seven months after the end of the public employer's fiscal year.

(g) On the date of application, the public employer holds a debt rating of Aa3 or higher according to Moody's investors service, inc., or a comparable rating by an independent rating agency similar to Moody's investors service, inc.

(h) The public employer agrees to generate an annual accumulating book reserve in its financial statements reflecting an actuarially generated reserve adequate to pay projected claims under this chapter for the applicable period of time, as determined by the administrator.

(i) For a public employer that is a hospital, the public employer shall submit audited financial statements showing the hospital's overall liquidity characteristics; and the administrator shall determine, on an individual basis, whether the public employer satisfies liquidity standards equivalent to the liquidity standards of other public employers.

(j) Any additional criteria that the administrator adopts by rule pursuant to division (E) of this section.

The administrator shall not approve the application of a public employer, except for a board of county commissioners described in division (C) of section 4123.01 of the Revised Code, a board of a county hospital, or publicly owned utility, who does not satisfy all of the requirements listed in division (B)(2) of this section.

(C) A board of county commissioners described in division (C) of section 4123.01 of the Revised Code, an employer, that will abide by the rules of the administrator and that may be of sufficient financial ability to render certain the payment of compensation to injured employees or the dependents of killed employees, and the furnishing of medical, surgical, nursing, and hospital attention and services and medicines, and funeral expenses, equal to or greater than provided for in sections 4123.52, 4123.55 to 4123.59, and 4123.64 to 4123.67 of the Revised Code, and that does not desire to insure the payment thereof, may indemnify itself against loss sustained by the direct payment thereof, upon a finding of such facts by the administrator, may be granted the privilege to provide individually compensation, and furnish medical, surgical, nursing, and hospital services and attention and funeral expenses directly to injured employees or the dependents of killed employees, thereby being granted status as a self-insuring employer. The administrator may charge a board of county commissioners described in division (C) of section 4123.01 of the Revised Code

shall pay from the safety and hygiene fund the salary of the superintendent of the division of safety and hygiene, the compensation of the other employees of the division of safety and hygiene, the expenses necessary or incidental to investigations and researches for the prevention of industrial accidents and diseases, and the cost of printing and distributing such information.

The superintendent, under the direction of the administrator, shall prepare an annual report, addressed to the governor, on the amount of the expenditures and the purposes for which they have been made, and the results of the investigations and researches. The administrator shall include the administrative costs, salaries, and other expenses of the division of safety and hygiene as a part of the budget of the bureau of workers' compensation that is submitted to the director of budget and management and shall identify those expenditures separately from other bureau expenditures.

The superintendent shall be a competent person with at least five years' experience in industrial accident or disease prevention work. The superintendent and up to six positions in the division of safety and hygiene as the administrator, with the advice and consent of the oversight commission, designates are in the unclassified civil service of the state as long as the administrator, with the advice and consent of the oversight commission, determines the positions subordinate to the superintendent are primarily and distinctively administrative, managerial, or professional in character. All other full-time employees of the division of safety and hygiene are in the classified civil service of the state.

**HISTORY:** GC § 1465-89a; 111 v 226; Bureau of Code Revision, RC § 4123.17, 10-1-53; RC § 4121.37, 136 v S 545 (Eff 1-17-77); 138 v H 1217 (Eff 3-23-81); 142 v H 171 (Eff 7-1-87); 143 v H 111 (Eff 7-1-89); 143 v H 222 (Eff 11-3-89); 144 v H 308 (Eff 4-20-93); 145 v H 107 (Eff 10-20-93); 146 v H 7 (Eff 9-1-95); 146 v S 162 (Eff 10-29-95); 146 v S 293 (Eff 9-26-96); 146 v S 82 (Eff 3-7-97); 148 v H 180 (Eff 8-6-99); 149 v H 75. Eff 7-11-2001; 151 v H 67, § 1, eff. 6-21-05.

#### Effect of amendments

151 v H 67, effective June 21, 2005, in the second paragraph, added "and for operating the long-term care loan fund program established under section 4121.48 of the Revised Code" to the end of the first sentence and made related changes.

### § 4121.39 General duties of administrator of workers' compensation.

#### CASE NOTES AND OAG

##### Res judicata

Ohio Rev. Code Ann. §§ 4121.39(A) and 4123.511 made it clear that the duties of the Administrator of the Bureau of Workers' Compensation were wholly ministerial, rather than judicial, so, when a claim regarding an employee's injury was denied by the Administrator and not appealed, it did not cause the doctrine of res judicata to bar a second claim arising from the same injury, which was filed by the employee, to be barred. *Broyles v. Conrad*, — Ohio App. 3d —, — N.E. 2d —, 2005 Ohio App. LEXIS 2146, 2005 Ohio 2233, (May 6, 2005).

### § 4121.40 Service directors; investigators and field auditors.

#### CASE NOTES AND OAG

##### Searches

Although Ohio Rev. Code Ann. §§ 4121.13(F) and 4121.13(G) implied that Bureau of Workers' Compensation (BWC) investigators had broad-reaching discretion regarding how to investigate, Ohio Rev. Code Ann. § 4121.40 mandated that investigators follow all the rules established and published in the BWC's Operations Manual, one of which required a warrant when searching a home. *Czerniak v. Owens*, — Ohio App. 3d —, — N.E. 2d —, 2006 Ohio App. LEXIS 4360, 2006 Ohio 4436, (Aug. 25, 2006).

### § 4121.44 Implementation of qualified health plan system and health partnership program; health care data program established.

(A) The administrator of workers' compensation shall oversee the implementation of the Ohio workers' compensation qualified health plan system as established under section 4121.442 [4121.44.2] of the Revised Code.

(B) The administrator shall direct the implementation of the health partnership program administered by the bureau as set forth in section 4121.441 [4121.44.1] of the Revised Code. To implement the health partnership program, the bureau:

(1) Shall certify one or more external vendors, which shall be known as "managed care organizations," to provide medical management and cost containment services in the health partnership program for a period of two years beginning on the date of certification, consistent with the standards established under this section;

(2) May recertify external vendors for additional periods of two years; and

(3) May integrate the certified vendors with bureau staff and existing bureau services for purposes of operation and training to allow the bureau to assume operation of the health partnership program at the conclusion of the certification periods set forth in division (B)(1) or (2) of this section.

(C) Any vendor selected shall demonstrate all of the following:

(1) Arrangements and reimbursement agreements with a substantial number of the medical, professional and pharmacy providers currently being utilized by claimants.

(2) Ability to accept a common format of medical bill data in an electronic fashion from any provider who wishes to submit medical bill data in that form.

(3) A computer system able to handle the volume of medical bills and willingness to customize that system to the bureau's needs and to be operated by the vendor's staff, bureau staff, or some combination of both staffs.

(4) A prescription drug system where pharmacies on a statewide basis have access to the eligibility and pricing, at a discounted rate, of all prescription drugs.

(5) A tracking system to record all telephone calls from claimants and providers regarding the status of

submitted medical bills so as to be able to track each inquiry.

(6) Data processing capacity to absorb all of the bureau's medical bill processing or at least that part of the processing which the bureau arranges to delegate.

(7) Capacity to store, retrieve, array, simulate, and model in a relational mode all of the detailed medical bill data so that analysis can be performed in a variety of ways and so that the bureau and its governing authority can make informed decisions.

(8) Wide variety of software programs which translate medical terminology into standard codes, and which reveal if a provider is manipulating the procedure codes, commonly called "unbundling."

(9) Necessary professional staff to conduct, at a minimum, authorizations for treatment, medical necessity, utilization review, concurrent review, post-utilization review, and have the attendant computer system which supports such activity and measures the outcomes and the savings.

(10) Management experience and flexibility to be able to react quickly to the needs of the bureau in the case of required change in federal or state requirements.

(D)(1) Information contained in a vendor's application for certification in the health partnership program, and other information furnished to the bureau by a vendor for purposes of obtaining certification or to comply with performance and financial auditing requirements established by the administrator, is for the exclusive use and information of the bureau in the discharge of its official duties, and shall not be open to the public or be used in any court in any proceeding pending therein, unless the bureau is a party to the action or proceeding, but the information may be tabulated and published by the bureau in statistical form for the use and information of other state departments and the public. No employee of the bureau, except as otherwise authorized by the administrator, shall divulge any information secured by the employee while in the employ of the bureau in respect to a vendor's application for certification or in respect to the business or other trade processes of any vendor to any person other than the administrator or to the employee's superior.

(2) Notwithstanding the restrictions imposed by division (D)(1) of this section, the governor, members of select or standing committees of the senate or house of representatives, the auditor of state, the attorney general, or their designees, pursuant to the authority granted in this chapter and Chapter 4123. of the Revised Code, may examine any vendor application or other information furnished to the bureau by the vendor. None of those individuals shall divulge any information secured in the exercise of that authority in respect to a vendor's application for certification or in respect to the business or other trade processes of any vendor to any person.

(E) On and after January 1, 2001, a vendor shall not be any insurance company holding a certificate of authority issued pursuant to Title XXXIX of the Revised Code or any health insuring corporation holding

a certificate of authority under Chapter 1751. of the Revised Code.

(F) The administrator may limit freedom of choice of health care provider or supplier by requiring, beginning with the period set forth in division (B)(1) or (2) of this section, that claimants shall pay an appropriate out-of-plan copayment for selecting a medical provider not within the health partnership program as provided for in this section.

(G) The administrator, six months prior to the expiration of the bureau's certification or recertification of the vendor or vendors as set forth in division (B)(1) or (2) of this section, may certify and provide evidence to the governor, the speaker of the house of representatives, and the president of the senate that the existing bureau staff is able to match or exceed the performance and outcomes of the external vendor or vendors and that the bureau should be permitted to internally administer the health partnership program upon the expiration of the certification or recertification as set forth in division (B)(1) or (2) of this section.

(H) The administrator shall establish and operate a bureau of workers' compensation health care data program. The administrator shall develop reporting requirements from all employees, employers and medical providers, medical vendors, and plans that participate in the workers' compensation system. The administrator shall do all of the following:

(1) Utilize the collected data to measure and perform comparison analyses of costs, quality, appropriateness of medical care, and effectiveness of medical care delivered by all components of the workers' compensation system.

(2) Compile data to support activities of the selected vendor or vendors and to measure the outcomes and savings of the health partnership program.

(3) Publish and report compiled data to the governor, the speaker of the house of representatives, and the president of the senate on the first day of each January and July, the measures of outcomes and savings of the health partnership program. The administrator shall protect the confidentiality of all proprietary pricing data.

(I) Any rehabilitation facility the bureau operates is eligible for inclusion in the Ohio workers' compensation qualified health plan system or the health partnership program under the same terms as other providers within health care plans or the program.

(J) In areas outside the state or within the state where no qualified health plan or an inadequate number of providers within the health partnership program exist, the administrator shall permit employees to use a nonplan or nonprogram health care provider and shall pay the provider for the services or supplies provided to or on behalf of an employee for an injury or occupational disease that is compensable under this chapter or Chapter 4123., 4127., or 4131. of the Revised Code on a fee schedule the administrator adopts.

(K) No health care provider, whether certified or not, shall charge, assess, or otherwise attempt to collect from an employee, employer, a managed care organization, or the bureau any amount for covered services

or supplies that is in excess of the allowed amount paid by a managed care organization, the bureau, or a qualified health plan.

(I.) The administrator shall permit any employer or group of employers who agree to abide by the rules adopted under this section and sections 4121.441 and 4121.442 [4121.44.1 and 4121.44.2] of the Revised Code to provide services or supplies to or on behalf of an employee for an injury or occupational disease that is compensable under this chapter or Chapter 4123., 4127., or 4131. of the Revised Code through qualified health plans of the Ohio workers' compensation qualified health plan system pursuant to section 4121.442 [4121.44.2] of the Revised Code or through the health partnership program pursuant to section 4121.441 [4121.44.1] of the Revised Code. No amount paid under the qualified health plan system pursuant to section 4121.442 [4121.44.2] of the Revised Code by an employer who is a state fund employer shall be charged to the employer's experience or otherwise be used in merit-rating or determining the risk of that employer for the purpose of the payment of premiums under this chapter, and if the employer is a self-insuring employer, the employer shall not include that amount in the paid compensation the employer reports under section 4123.35 of the Revised Code.

**HISTORY:** 145 v H 107 (Eff 10-20-93); 146 v H 7 (Eff 9-1-95); 146 v H 245 (Eff 9-17-96); 147 v S 45; 148 v H 180 (Eff 8-6-99); 149 v H 94. Eff 9-5-2001; 150 v H 91, § 1, eff. 8-1-03; 151 v S 7, § 1, eff. 6-30-06.

The effective date is set by section 7 of H.B. 91 (150 v —).

#### Effect of amendments

151 v S 7, effective June 30, 2006, in (H)(3), deleted "and the qualified health plan system" from the end of the first sentence.

H.B. 91, Acts 2003, effective August 1, 2003, substituted "by the administrator" for "by the administrator" in (D)(1); and substituted "health care provider, whether certified or not" for "certified health care provider" in (K).

### CASE NOTES AND OAG

#### Drug formulary

R.C. 4121.121, R.C. 4121.44, R.C. 4121.441, and R.C. 4123.66 grant the Bureau of Workers' Compensation sufficient authority to adopt the provisions appearing in 10 Ohio Admin. Code 4123-6-21(L). The language of 10 Ohio Admin. Code 4123-6-21(L) providing that the Bureau of Workers' Compensation or its pharmacy benefits vendor may "be responsible for maintaining a drug formulary" by necessary implication provides authority for the Bureau to first create a drug formulary. Opinion No. 2005-008 (2005).

### [§ 4121.44.1] § 4121.441 Health care partnership program.

(A) The administrator of workers' compensation, with the advice and consent of the workers' compensation oversight commission, shall adopt rules under Chapter 119. of the Revised Code for the health care partnership program administered by the bureau of workers' compensation to provide medical, surgical, nursing, drug, hospital, and rehabilitation services and

supplies to an employee for an injury or occupational disease that is compensable under this chapter or Chapter 4123., 4127., or 4131. of the Revised Code.

The rules shall include, but are not limited to, the following:

(1) Procedures for the resolution of medical disputes between an employer and an employee, an employee and a provider, or an employer and a provider, prior to an appeal under section 4123.511 [4123.51.1] of the Revised Code. Rules the administrator adopts pursuant to division (A)(1) of this section may specify that the resolution procedures shall not be used to resolve disputes concerning medical services rendered that have been approved through standard treatment guidelines, pathways, or presumptive authorization guidelines.

(2) Prohibitions against discrimination against any category of health care providers;

(3) Procedures for reporting injuries to employers and the bureau by providers;

(4) Appropriate financial incentives to reduce service cost and insure proper system utilization without sacrificing the quality of service;

(5) Adequate methods of peer review, utilization review, quality assurance, and dispute resolution to prevent, and provide sanctions for, inappropriate, excessive or not medically necessary treatment;

(6) A timely and accurate method of collection of necessary information regarding medical and health care service and supply costs, quality, and utilization to enable the administrator to determine the effectiveness of the program;

(7) Provisions for necessary emergency medical treatment for an injury or occupational disease provided by a health care provider who is not part of the program;

(8) Discounted pricing for all in-patient and out-patient medical services, all professional services, and all pharmaceutical services;

(9) Provisions for provider referrals, pre-admission and post-admission approvals, second surgical opinions, and other cost management techniques;

(10) Antifraud mechanisms;

(11) Standards and criteria for the bureau to utilize in certifying or recertifying a health care provider or a vendor for participation in the health partnership program;

(12) Standards and criteria for the bureau to utilize in penalizing or decertifying a health care provider or a vendor from participation in the health partnership program.

(B) The administrator shall implement the health partnership program according to the rules the administrator adopts under this section for the provision and payment of medical, surgical, nursing, drug, hospital, and rehabilitation services and supplies to an employee for an injury or occupational disease that is compensable under this chapter or Chapter 4123., 4127., or 4131. of the Revised Code.

**HISTORY:** 145 v H 107 (Eff 10-20-93); 146 v H 7 (Eff 9-1-95); 146 v H 245. Eff 9-17-96; 151 v S 7, § 1, eff. 6-30-06.

Order from United States treasury department, 16  
 Employer pays, 13  
 Right to setoff, 5

1. (1995) A trial court's deduction of an attorney's contingent fee from a lump-sum workers' compensation payment does not offend RC §§ 4123.67 or 3113.21: *Rowan v. Rowan*, 78 OHSt 496, 650 NE2d 1360.

2. (1987) Workers' compensation benefits are not exempt from attachment after payment to a claimant: *Ohio Bell Tel. Co. v. Antonelli*, 29 OS3d 9, 29 OBR 178, 504 NE2d 717.

3. (1923) If an injured workman makes application for compensation, and in good faith executes an assignment to his employer in consideration of his employer's advancing him attorneys for immediate and necessary relief, such assignment, to the extent of the actual money advanced, is not prohibited by law: *State ex rel. Hunt & Dorman Mfg. Co. v. Industrial Comm.*, 108 OS 139, 140 NE 621.

4. (1923) When a bona fide assignment of compensation is duly forwarded to and received by the industrial commission four days before allowance of the claim, due notice of such assignment is given and the payment to the injured workman thereafter will not prejudice the assignee: *State ex rel. Hunt & Dorman Mfg. Co. v. Industrial Comm.*, 108 OS 139, 140 NE 621.

5. (1995) The court rejected appellant's argument that RC § 4123.07 prohibited his employer from enforcing its right of setoff against the payment he was entitled to receive under a settlement agreement; since RC § 4123.67 did not apply to amounts paid by the employer in performance of its contractual obligation, it did not bar a setoff from the amount it promised to pay: *Frost v. Mihm*, No. 95-CA-38 (2nd Dist.), 1995 Ohio App. LEXIS 5311.

6. (1994) The waiting-period provision should be given its plain meaning and not extended by judicial decision to include a forty week waiting period from the last payment of living-maintenance wage-loss compensation under RC § 4123.63 or 4123.67(B) prior to filing an application for permanent partial disability compensation: *State ex rel. Burrows v. Industrial Commission*, No. 93APD11-1511 (10th Dist.), 1994 Ohio App. LEXIS 5063.

7. (1994) An attachment for child support obligations is the only valid attachment before payment of a workers' compensation award, and takes priority over an attorney's lien: *Ruttman & Phares*, No. 66079 (8th Dist.), 1994 Ohio App. LEXIS 5362.

8. (1984) Workers' compensation benefits are in the nature of compensation for injury or disease and are distinguishable from personal earnings, which are in the nature of compensation for services rendered. Therefore, workers' compensation benefits may not be withheld pursuant to RC § 3113.21 to pay court-ordered child support: *Indus. Comm. v. Sherry*, 20 App4d 32, 20 OBR 34, 484 NE2d 212.

9. (1982) Under RC § 4123.67, workers' compensation benefits may not be attached for the purpose of paying child support: *Kilgore v. Kilgore*, 5 OApp3d 137, 5 OBR 269, 449 4th 3d 492.

10. (1955) "Dependents" as used in the Ohio Workmen's Compensation Act is limited to the concept of the word as defined by the terms of the act and does not include those who in law might be classified as dependents of a living employee to whom an award has been made by the industrial commission, since dependents of an employee in life may be other than those who would be so classified upon his death, which latter class are the only "dependents" to whom the commission may make payment, either upon an original award or upon the death of the employee to whom an award has been made: *Bruce v. Bruce*, 100 OApp 121, 6 OO 100, 71 OLA 44, 130 9th 3d 433 (App).

11. (1955) Dependents, as such, are not known as claimants and may not be awarded or receive any payments from the workmen's compensation fund, unless and until employee from whom they claim has died: *Bruce v. Bruce*, 100 OApp 121, 6 OO 100, 130 NE2d 433.

12. (1955) The wife of a living employee receiving compensation under the Ohio Workmen's Compensation Act, is not a "dependent" to whom payment may be made under the terms of such act and an order of the court of common pleas, in a divorce action, requiring the industrial commission of Ohio to withhold one-half of such employee's weekly compensation check, said sum to be applied in payment of the wife's temporary alimony, is contrary to law and invalid: *Bruce v. Bruce*, 100 OApp 121, 6 OO 100, 130 NE2d 433.

13. (1955) Payment may be made from the workmen's compensation fund only to the injured employee or his dependents in the event such employee dies as a result of the injury by reason of which compensation benefits are awarded: *Bruce v. Bruce*, 100 OApp 121, 6 OO 100, 130 NE2d 433.

14. (1935) The provisions of GC § 1465-88 (RC § 4123.67), exempting compensation under the Workmen's Compensation Act from claims of creditors and from attachment and execution before payment does not extend to a compensation payment received by an employee and deposited by him in a bank, although such payment remains unmixed with other funds: *Talaba v. Auld*, 3 OO 556, 19 OLA 676, 6 OSupp 313 (CP).

15. (1918) Under GC § 1465-88 (RC § 4123.67), while the lien of an attorney upon a fund produced by his services would not become extinguished by its merger in a judgment, such fund when arising from an allowance by the industrial commission under the workmen's compensation law is specifically made exempt from the common law lien of an attorney upon a fund produced by his services: *Brewer v. Emmett*, 22 NP(NS) 425, 31 OD 384.

16. (1962) Despite the provisions of RC § 4123.67, under Internal Revenue Code, § 6332, the accounts section of the bureau of workmen's compensation and/or the industrial commission must honor levies from the United States treasury department on all types of awards of compensation made to injured workmen under RC § 4123.01 et seq and not yet paid: 1962 OAG No. 2891.

17. (1935) Compensation, after it has been received by an injured workman and placed in a bank by him, is subject to attachment or execution the same as any other funds: 1935 OAG No. 3896.

## § 4123.68 Compensation for occupational diseases.

Every employee who is disabled because of the contraction of an occupational disease or the dependent of an employee whose death is caused by an occupational disease, is entitled to the compensation provided by sections 4123.55 to 4123.59 and 4123.66 of the Revised Code subject to the modifications relating to occupational diseases contained in this chapter. An order of the administrator issued under this section is appealable pursuant to sections 4123.511 [4123.51.1] and 4123.512 [4123.51.2] of the Revised Code.

The following diseases are occupational diseases and compensable as such when contracted by an employee in the course of the employment in which such employee was engaged and due to the nature of any process described in this section. A disease which meets the definition of an occupational disease is compensable

pursuant to this chapter though it is not specifically listed in this section.

#### SCHEDULE

Description of disease or injury and description of process:

- (A) Anthrax: Handling of wool, hair, bristles, hides, and skins.
- (B) Glanders: Care of any equine animal suffering from glanders; handling carcass of such animal.
- (C) Lead poisoning: Any industrial process involving the use of lead or its preparations or compounds.
- (D) Mercury poisoning: Any industrial process involving the use of mercury or its preparations or compounds.
- (E) Phosphorous poisoning: Any industrial process involving the use of phosphorous or its preparations or compounds.
- (F) Arsenic poisoning: Any industrial process involving the use of arsenic or its preparations or compounds.
- (G) Poisoning by benzol or by nitro-derivatives and amido-derivatives of benzol (dinitro-benzol, anilin, and others): Any industrial process involving the use of benzol or nitro-derivatives or amido-derivatives of benzol or its preparations or compounds.
- (H) Poisoning by gasoline, benzine, naphtha, or other volatile petroleum products: Any industrial process involving the use of gasoline, benzine, naphtha, or other volatile petroleum products.
- (I) Poisoning by carbon bisulphide: Any industrial process involving the use of carbon bisulphide or its preparations or compounds.
- (J) Poisoning by wood alcohol: Any industrial process involving the use of wood alcohol or its preparations.
- (K) Infection or inflammation of the skin on contact surfaces due to oils, cutting compounds or lubricants, dust, liquids, fumes, gases, or vapors: Any industrial process involving the handling or use of oils, cutting compounds or lubricants, or involving contact with dust, liquids, fumes, gases, or vapors.
- (L) Epithelion cancer or ulceration of the skin or of the corneal surface of the eye due to carbon, pitch, tar, or tarry compounds: Handling or industrial use of carbon, pitch, or tarry compounds.
- (M) Compressed air illness: Any industrial process carried on in compressed air.
- (N) Carbon dioxide poisoning: Any process involving the evolution or resulting in the escape of carbon dioxide.
- (O) Brass or zinc poisoning: Any process involving the manufacture, founding, or refining of brass or the melting or smelting of zinc.
- (P) Manganese dioxide poisoning: Any process involving the grinding or milling of manganese dioxide or the escape of manganese dioxide dust.
- (Q) Radium poisoning: Any industrial process involving the use of radium and other radioactive substances in luminous paint.
- (R) Tenosynovitis and prepatellar bursitis: Primary tenosynovitis characterized by a passive effusion or crepitus into the tendon sheath of the flexor or extensor muscles of the hand, due to frequently repetitive mo-

tions or vibrations, or prepatellar bursitis due to continued pressure.

(S) Chrome ulceration of the skin or nasal passages: Any industrial process involving the use of or direct contact with chromic acid or bichromates of ammonium, potassium, or sodium or their preparations.

(T) Potassium cyanide poisoning: Any industrial process involving the use of or direct contact with potassium cyanide.

(U) Sulphur dioxide poisoning: Any industrial process in which sulphur dioxide gas is evolved by the expansion of liquid sulphur dioxide.

(V) Berylliosis: Berylliosis means a disease of the lungs caused by breathing beryllium in the form of dust or fumes, producing characteristic changes in the lungs and demonstrated by x-ray examination, by biopsy or by autopsy.

This chapter does not entitle an employee or his dependents to compensation, medical treatment, or payment of funeral expenses for disability or death from berylliosis unless the employee has been subjected to injurious exposure to beryllium dust or fumes in his employment in this state preceding his disablement and only in the event of such disability or death resulting within eight years after the last injurious exposure; provided that such eight-year limitation does not apply to disability or death from exposure occurring after January 1, 1976. In the event of death following continuous total disability commencing within eight years after the last injurious exposure, the requirement of death within eight years after the last injurious exposure does not apply.

Before awarding compensation for partial or total disability or death due to berylliosis, the administrator of workers' compensation shall refer the claim to a qualified medical specialist for examination and recommendation with regard to the diagnosis, the extent of the disability, the nature of the disability, whether permanent or temporary, the cause of death, and other medical questions connected with the claim. An employee shall submit to such examinations, including clinical and x-ray examinations, as the administrator requires. In the event that an employee refuses to submit to examinations, including clinical and x-ray examinations, after notice from the administrator, or in the event that a claimant for compensation for death due to berylliosis fails to produce necessary consents and permits, after notice from the administrator, so that such autopsy examination and tests may be performed, then all rights for compensation are forfeited. The reasonable compensation of such specialist and the expenses of examinations and tests shall be paid, if the claim is allowed, as part of the expenses of the claim; otherwise they shall be paid from the surplus fund.

(W) Cardiovascular, pulmonary, or respiratory diseases incurred by fire fighters or police officers following exposure to heat, smoke, toxic gases, chemical fumes and other toxic substances: Any cardiovascular, pulmonary, or respiratory disease of a fire fighter or police officer caused or induced by the cumulative effect of exposure to heat, the inhalation of smoke, toxic gases, chemical fumes and other toxic substances to the point

mance of his duty constitutes a presumption, which may be refuted by affirmative evidence, that such occurred in the course of and arising out of his employment. For the purpose of this section, "fire fighter" means any regular member of a lawfully constituted fire department of a municipal corporation or township, whether paid or volunteer, and "police officer" means any regular member of a lawfully constituted police department of a municipal corporation, township or county, whether paid or volunteer.

This chapter does not entitle a fire fighter, or police officer, or his dependents to compensation, medical treatment, or payment of funeral expenses for disability or death from a cardiovascular, pulmonary, or respiratory disease, unless the fire fighter or police officer has been subject to injurious exposure to heat, smoke, toxic gases, chemical fumes, and other toxic substances in his employment in this state preceding his disablement, some portion of which has been after January 1, 1967, except as provided in division (E) of section 4123.57 of the Revised Code.

Compensation on account of cardiovascular, pulmonary, or respiratory diseases of fire fighters and police officers is payable only in the event of temporary total disability, permanent total disability, or death, in accordance with section 4123.56, 4123.58, or 4123.59 of the Revised Code. Medical, hospital, and nursing expenses are payable in accordance with this chapter. Compensation, medical, hospital, and nursing expenses are payable only in the event of such disability or death resulting within eight years after the last injurious exposure; provided that such eight-year limitation does not apply to disability or death from exposure occurring after January 1, 1976. In the event of death following continuous total disability commencing within eight years after the last injurious exposure, the requirement of death within eight years after the last injurious exposure does not apply.

This chapter does not entitle a fire fighter or police officer, or his dependents, to compensation, medical, hospital, and nursing expenses, or payment of funeral expenses for disability or death due to a cardiovascular, pulmonary, or respiratory disease in the event of failure or omission on the part of the fire fighter or police officer truthfully to state, when seeking employment, the place, duration, and nature of previous employment in answer to an inquiry made by the employer.

Before awarding compensation for disability or death under this division, the administrator shall refer the claim to a qualified medical specialist for examination and recommendation with regard to the diagnosis, the extent of disability, the cause of death, and other medical questions connected with the claim. A fire fighter or police officer shall submit to such examinations, including clinical and x-ray examinations, as the administrator requires. In the event that a fire fighter or police officer refuses to submit to examinations, including clinical and x-ray examinations, after notice from the administrator, or in the event that a claimant for compensation or death under this division fails to produce necessary results and permits, after notice from the administrator, that such autopsy examination and tests may be

performed, then all rights for compensation are forfeited. The reasonable compensation of such specialists and the expenses of examination and tests shall be paid, if the claim is allowed, as part of the expenses of the claim, otherwise they shall be paid from the surplus fund.

(X) Silicosis: Silicosis means a disease of the lungs caused by breathing silica dust (silicon dioxide) producing fibrous nodules distributed through the lungs and demonstrated by x-ray examination, by biopsy or by autopsy.

(Y) Coal miners' pneumoconiosis: Coal miners' pneumoconiosis, commonly referred to as "black lung disease," resulting from working in the coal mine industry and due to exposure to the breathing of coal dust, and demonstrated by x-ray examination, biopsy, autopsy or other medical or clinical tests.

This chapter does not entitle an employee or his dependents to compensation, medical treatment, or payment of funeral expenses for disability or death from silicosis, asbestosis, or coal miners' pneumoconiosis unless the employee has been subject to injurious exposure to silica dust (silicon dioxide), asbestos, or coal dust in his employment in this state preceding his disablement, some portion of which has been after October 12, 1945, except as provided in division (E) of section 4123.57 of the Revised Code.

Compensation on account of silicosis, asbestosis, or coal miners' pneumoconiosis are payable only in the event of temporary total disability, permanent total disability, or death, in accordance with sections 4123.56, 4123.58, and 4123.59 of the Revised Code. Medical, hospital, and nursing expenses are payable in accordance with this chapter. Compensation, medical, hospital, and nursing expenses are payable only in the event of such disability or death resulting within eight years after the last injurious exposure; provided that such eight-year limitation does not apply to disability or death occurring after January 1, 1976, and further provided that such eight-year limitation does not apply to any asbestosis cases. In the event of death following continuous total disability commencing within eight years after the last injurious exposure, the requirement of death within eight years after the last injurious exposure does not apply.

This chapter does not entitle an employee or his dependents to compensation, medical, hospital and nursing expenses, or payment of funeral expenses for disability or death due to silicosis, asbestosis, or coal miners' pneumoconiosis in the event of the failure or omission on the part of the employee truthfully to state, when seeking employment, the place, duration, and nature of previous employment in answer to an inquiry made by the employer.

Before awarding compensation for disability or death due to silicosis, asbestosis, or coal miners' pneumoconiosis, the administrator shall refer the claim to a qualified medical specialist for examination and recommendation with regard to the diagnosis, the extent of disability, the cause of death, and other medical questions connected with the claim. An employee shall submit to such examinations, including clinical and x-ray examina-

tions, as the administrator requires. In the event that an employee refuses to submit to examinations, including clinical and x-ray examinations, after notice from the administrator, or in the event that a claimant for compensation for death due to silicosis, asbestosis, or coal miners' pneumoconiosis fails to produce necessary consents and permits, after notice from the commission, so that such autopsy examination and tests may be performed, then all rights for compensation are forfeited. The reasonable compensation of such specialist and the expenses of examinations and tests shall be paid, if the claim is allowed, as a part of the expenses of the claim, otherwise they shall be paid from the surplus fund.

(Z) Radiation illness: Any industrial process involving the use of radioactive materials.

Claims for compensation and benefits due to radiation illness are payable only in the event death or disability occurred within eight years after the last injurious exposure provided that such eight-year limitation does not apply to disability or death from exposure occurring after January 1, 1976. In the event of death following continuous disability which commenced within eight years of the last injurious exposure the requirement of death within eight years after the last injurious exposure does not apply.

(AA) Asbestosis: Asbestosis means a disease caused by inhalation or ingestion of asbestos, demonstrated by x-ray examination, biopsy, autopsy, or other objective medical or clinical tests.

All conditions, restrictions, limitations, and other provisions of this section, with reference to the payment of compensation or benefits on account of silicosis or coal miners' pneumoconiosis apply to the payment of compensation or benefits on account of any other occupational disease of the respiratory tract resulting from injurious exposures to dust.

The refusal to produce the necessary consents and permits for autopsy examination and testing shall not result in forfeiture of compensation provided the administrator finds that such refusal was the result of bona fide religious convictions or teachings to which the claimant for compensation adhered prior to the death of the decedent.

**HISTORY:** CC § 1465-68a; 109 v 181; 113 v 257; 114 v 26; 117 v 268; 118 v 422; 120 v 449; 121 v 660; 124 v 806; Bureau of Code Revision, 10-1-53; 125 v 903(1019); 128 v 743(766) (EFF 11-2-59); 132 v H 331 (EFF 10-31-67); 133 v H 680 (EFF 11-25-69); 135 v H 417 (EFF 11-16-73); 136 v H 1 (EFF 6-13-75); 136 v H 714 (EFF 12-2-75); 137 v H 1282 (EFF 1-1-79); 141 v S 307 (EFF 8-22-86); 145 v H 107 (EFF 10-20-93); 147 v S 45.†

† 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

Hearing administrator; duties, RC § 4121.36.  
Partial disability compensation, RC § 4123.57.  
Persons entitled to benefits, RC § 4123.69.  
Time for report of physician, RC § 4123.71.

#### Ohio Administrative Code

Preparation and filing of applications for compensation and/or benefits. **OWCH:** OAC 4123-3-08.

#### Text Discussion

Background of the occupational disease statute. **Ohio Workers' Comp.** § 8.1  
Definition of occupational disease. **Ohio Workers' Comp.** 8.2  
Erosion of the restrictive statutes. **Ohio Workers' Comp.** 8.6  
Injurious exposure. **Ohio Workers' Comp.** § 8.5  
The limitations of the restrictive statutes. **Ohio Workers' Comp.** § 8.4  
Occupational disease procedures. **Ohio Workers' Comp.** 8.8  
Pre-existing weakness, multiple causation, and aggravation pre-existing disease. **Ohio Workers' Comp.** § 8.9  
Special restrictive statutes. **Ohio Workers' Comp.** § 8.3

#### Forms

Occupational disease. 3 OJI 365.07

#### Research Aids

Compensable occupational diseases:

**O-Jur3d:** Workers' Comp §§ 156-178, 416

**Am-Jur2d:** Workers' C §§ 242 et seq, 321 et seq

**C.J.S.:** Work C §§ 315-324

#### ALR

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

Liability under federal employer's liability act (45 USC § 5 et seq) for industrial or occupational disease or poisoning. 122 ALRFed 45.

When statute of limitations begins to run as to cause of action for development of latent industrial or occupational disease. 1 ALR4th 117.

Workers' compensation: Lyme disease. 22 ALR5th 246

#### Law Review

Aggravation under workmen's compensation. Allyn D. Kendis and James D. Kendis. 17 ClevMarLRev (1) 93 (1968)

The asbestosis time bomb. Robert E. Sweeney. 14 Trial 110 17 (1978).

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Gradually developed disabilities: a dilemma for workers' compensation. M. Thomas Arnold. 15 AkronLRev 11 (1981).

The initial filing period in Ohio workers' compensation law. Jeffrey V. Nackley. 7 NoKyLRev 33 (1980)

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Problems of proving causation in cardiac cases arising under the Ohio Workmen's Compensation Act. Comment. 1 ToledoLRev 165 (1969).

Rationale of the law of injury and occupational disease under the Ohio Workmen's Compensation Act. Note. 14 CincLRev 145 (1965).

Responses to occupational disease: the role of markets, regulation, and information. Elinor P. Schroeder and Robert A. Shapiro. 72 GeoLJ 1231 (1984).

Right to know: Cincinnati's more righteous, less knowing experiment. James T. O'Reilly. 52 CincLRev 337 (1984)

Workers' right-to-know about chemical hazards in the workplace: a proposed model uniform right to know act and a critical look at Cincinnati's right to know ordinance. Robert C. Cough. 10 NoKyLRev 427 (1981)