

IN THE SUPREME COURT OF OHIO
CASE NO. 07-0642

STATE OF OHIO ex rel.	:	
SEARS ROEBUCK & COMPANY	:	On Appeal from the Franklin
	:	County Court of Appeals
Appellant-Relator,	:	Court of Appeals
	:	Case No. 05APD10-1135
vs.	:	
	:	
INDUSTRIAL COMMISSION OF OHIO,	:	
et al.,	:	
	:	
Appellee-Respondents.	:	

APPELLEE-RESPONDENT'S, SUE MOENTER, MERIT BRIEF

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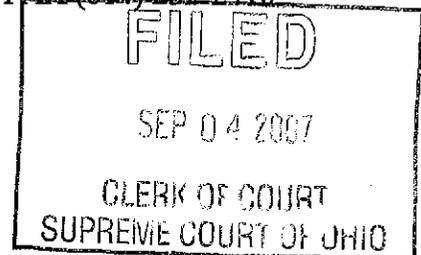


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STATEMENT OF THE CASE AND THE FACTS

Sue Moenter (Ms. Moenter) was injured while working at Sears Roebuck & Co. (Sears) on January 17, 1979. Her workers' compensation claim was ultimately recognized for the medical conditions of sprain of sacrum; protruding dis L4-5, lumbar; post laminectomy syndrome, NOS. Because of these injuries, Ms. Moenter was unable to perform any type of sustained remunerative employment. She thus filed an application for permanent and total disability compensation (PTD application). The application was supported by the report of Dr. Charles May, D.O. Dr. May ultimately concluded that, as a result of these recognized workers' compensation injuries, Ms. Moenter was not capable of engaging in sustained remunerative employment. Dr. May limited his opinion to the allowed conditions of the claim. Supplement, Stipulated Record, page 7 (hereinafter, Supp. p. _____, or Supp. Stip., p. _____).

As a result of the PTD application, the Industrial Commission asked Dr. James Rutherford, M.D., to examine Ms. Moenter and render an opinion as to the ultimate question of whether Ms. Moenter was permanently and totally disabled. Dr. Rutherford concluded that Ms. Moenter is not capable of physical work activities. Supp. Stip., p. 43. Dr. Rutherford also specifically limited his opinion to the allowed conditions in the claim.

The Industrial Commission held a hearing on the PTD application. Ultimately, the Commission found that Ms. Moenter was permanently and totally disabled. Sears filed a Request for Reconsideration, arguing that there was a mistake of law and fact with the Commission decision. The Commission granted the request, and re-heard the matter. The Commission still reached the conclusion that, based on the report of Dr. Rutherford, Ms. Moenter was permanently and totally disabled. The "start date" for this compensation was based on the report of Dr. May.

Unsatisfied with the Commission decision, Sears filed the original action in mandamus with

the Tenth District Court of Appeals. In that action, the lower court's Magistrate recommended the granting of a limited writ for the modification of the "start date" for payment of the permanent and total disability compensation. The Magistrate concluded, however, that the commission did not abuse its discretion in relying on Dr. Rutherford in finding Ms. Moenter permanently and totally disabled. Sears filed objections to the Magistrate's Decision. The Tenth District adopted the Magistrate's decision as its own. Sears instituted this action to this Court.

LAW AND ARGUMENT

1. INTRODUCTION AND STANDARD OF REVIEW:

Sears' arguments are misplaced and unpersuasive. Sears simply asks this Court to reweigh the evidence, a province reserved solely for the Commission. Complaints for writs of mandamus do not invoke a *de novo* review of the commissions decision by the courts. *State ex rel. Pass v. C.S.T. Extraction Co.* (1996), 74 Ohio St.3d 373, 376, 658 N.E.2d 1055. To conduct a *de novo* review of a Commission decision establishes a "super" commission in the courts. This Court has consistently refused to sanction this type of review. Sears' arguments must be rejected and the requested writ refused.

The commission simply found Dr. Rutherford and Dr. May more persuasive in their respective opinions than the opinion of Dr. McDaniel. Despite Sears' complaints to the contrary, it is entirely within the Commission's prerogative to find some reports more persuasive than others. *State ex rel. Burley Coil v. Indus. Comm.* (1987), 31 Ohio St.3d 18, 508 N.E.2d 936; *State ex rel. Hopkins v. Indus. Comm.* (1994), 70 Ohio St.3d 36, 39, 635 N.E.2d 1257. Sears' request to reweigh the evidence is an inappropriate request. A writ of mandamus is appropriate only when there is an abuse of discretion. Weighing the evidence before the Commission is not an abuse of discretion by the Commission. The Commission is simply doing its job.

2. **PROPOSITION OF LAW ONE:**

DESCRIBING ALL OF AN INJURED WORKERS' MEDICAL PROBLEMS DOES NOT DISQUALIFY AN EXAMINING DOCTOR'S REPORT WHEN THE DOCTOR LIMITS THE ULTIMATE CONCLUSION TO THE ALLOWED CONDITIONS IN THE WORKERS' COMPENSATION CLAIM.

A. **Dr. May**

Sears insists that the Commission "correctly disregarded" Dr. May's reports as not valid because Dr. May's reports consider nonallowed conditions. Sears' assertion is meritless. First, the Commission speaks through its orders, and nothing else. *State ex rel. Yellow Freight System, Inc. v. Indus. Comm.* (1994), 71 Ohio St.3d 139, 642 N.E.2d 378; *Indus. Comm. v. Hogle* (1923), 108 Ohio St. 363, 140 N.E. 612. There is nothing in the Commission order indicating a rejection of Dr. May's report. Sears argument that there is such a finding is groundless.

Second, it is clear that Dr. May does not rely on nonallowed conditions in reaching his conclusion that Ms. Moenter is permanently and totally disabled. Dr. May could not have been more clear:

Based upon the allowed conditions on this claim and my recent physical evaluation of Ms. Moenter, and based upon her most up-to-date diagnostic studies, it is my medical opinion that Sue Moenter is permanently and totally disabled from any form of substantial gainful employment as a direct and proximate result of the allowed injuries in this claim.

Supp. Stip., p. 7. Dr. May does note that Ms. Moenter suffered from lumbar radiculopathy. Dr. May also mentions some degenerative issues. However, it is clear that Dr. May was only mentioning these symptoms and conditions. Dr. May was not relying on these symptoms and condition in reaching his conclusion. A description of problems in a report does not disqualify that doctor's report. *State ex rel. Firestone Tire & Rubber Co. v. Indus. Comm.* (1989), 47 Ohio St.3d 78, 80, 547 N.E.2d 1173. Contrary to Sears' assertions, Dr. May's report is not fatally flawed.

Unlike the doctor's report in *State ex rel. Johns Manville Internatl., Inc. v. Indus. Comm.*, Franklin App. No. 02AP-957, 2003-Ohio-5808, a decision heavily relied upon by Sears, Dr. May did not base his opinion on nonallowed conditions. Instead, Dr. May based his opinion on the allowed conditions only and concluded that Ms. Moenter was permanently and totally disabled. Sears' charge that Dr. May relies on lumbar radiculopathy is without merit.

In *Johns Manville*, the Commission relied upon the June 13, 1989 report of Dr. Ward to retroactively award permanent and total disability compensation to the injured worker. The *Johns Manville* Court (through its magistrate) determined that Dr. Ward's report was equivocal and could not be considered "some evidence." The magistrate found the report equivocal for the following reasons:

- (1) at the time the alleged permanent and total disability application was filed in 1989, claimant had not yet reached maximum medical improvement;
- (2) in 1994, the claimant filed an application for permanent partial disability, thereby demonstrating that she was not aware that the alleged 1989 permanent and total disability application;
- (3) in 1994, the commission found that claimant had a 15 percent permanent partial disability and that this 1994 order precludes a subsequent finding in 2001 that claimant was permanently and totally disabled from 1989 through 1994 based upon the same conditions in the same claim;
- (4) regardless of the fact that the alleged permanent and total disability applications were submitted on a C84 form signed by Dr. Ward, it was not a permanent and total disability application as it did not include the information normally included on a permanent and total disability application, nor was it signed by the claimant;

(5) the report of Dr. Ward was fatally equivocal as Dr. Ward based disability on nonallowed conditions; and

(6) to construe the C84 form as a permanent and total disability application was a substantial deprivation of due process to the employer.

However, none of these concerns exist in this case. Reliance on *Johns Manville*, therefore, is misplaced.

In its Statement of Facts, Sears “argues” that the Dr. May’s reports are inconsistent because Dr. May lists nonallowed conditions in the reports he prepared for Ms. Moenter’s PERS disability application. The insinuation is meritless. PERS is a separate disability assessment, with different burdens of proof and rules for determinations and decision making. PERS does not limit itself in its decisions on disability to work related injuries. Thus, every condition can be considered by that adjudicatory body. The fact that additional conditions are considered by Dr. May in that PERS assessment does not render his workers’ compensation assessment invalid, especially since Dr. May consistently states in his report for the workers’ compensation determination that he is only considering the allowed conditions in the workers’ compensation claim.

B. Dr. Rutherford

Sears continues to advance the argument that the Commission cannot rely on the report of Dr. Rutherford. The logic behind the argument is seriously flawed. It is clear that the reasoning behind Sears’ argument goes to the weight and credibility of Dr. Rutherford’s report, and nothing more. As such, Sears’ request for a writ of mandamus must be denied.

The first prong of Sears’ argument is that Dr. Rutherford evaluated nonallowed conditions. Sears asserts that there are “implications” in the doctor’s report which obviously indicate a reliance on nonallowed conditions. However, Sears reads inferences into Dr. Rutherford’s report that do not

exist. Dr. Rutherford only mentions evidence of radiculopathy and a degenerative condition. He reiterates, however, that his opinion is based only on the allowed conditions. Supp. Stip., p. 42. He reaffirms that the disability and restrictions are related solely to the allowed conditions in the industrial claim. Id. He then concludes: “It is my medical opinion that **due to the claim allowances of Claim No. 671200-22** that Ms. Moenter could not sustain a functional position for sitting or standing for sustained remunerative employment.” Id. (emphasis added). Clearly, Dr. Rutherford only considered allowed conditions and his opinion is not inconsistent.

Sears asserts “the real confusion regarding Dr. Rutherford’s report is seen when examining his findings regarding Claimant’s capacity for sustained remunerative employment.” Brief, page 11. The confusion is not in the doctor’s report but in Sears’ argument. It is ridiculous to insist that an injured worker have absolutely no residual functional capacity in order to be found permanently and totally disabled. The dispositive question is whether *this* claimant is unfit for sustained remunerative employment after considering the work restrictions, age, work experience, and education. *State ex rel. Paragon v. Indus. Comm.* (1983), 5 Ohio St.3d 72, 448 N.E.2d 1372; *State ex rel. Stephenson v. Indus. Comm.* (1987), 31 Ohio St.3d 167, 509 N.E.2d 946. For this reason, the Industrial Commission, through its rule-making authority, only requires medical evidence which addresses an injured workers’ physical limitations as support for an application for permanent and total disability. See Ohio Adm. Code 4121-3-34(C)(1). Sears argument that there is an inconsistency in Dr. Rutherford’s report is therefore groundless.

3. **PROPOSITION OF LAW TWO:**

THE INDUSTRIAL COMMISSION OF OHIO DOES NOT ABUSE ITS DISCRETION WHEN IT FOLLOWS THE ADMINISTRATIVE CODE IN REACHING A DECISION, AND DENIES AN EMPLOYER'S REQUEST FOR A DEPOSITION, FINDING THAT THE HEARING OFFICER CAN RESOLVE THE DISPUTE REGARDING ALLEGED INCONSISTENCIES IN A REPORT.

The Industrial Commission does not abuse its discretion when it denies Sears' request for a deposition. The Commission found that the hearing officer could resolve the alleged inconsistencies in Dr. Rutherford's report. Sears argument that the denial of the deposition request is an abuse of discretion must be rejected. The sum of the argument is that the report of Dr. Rutherford is, in the eyes of Sears, internally inconsistent and ambiguous, and thus, Sears is entitled to a deposition.

First, as explained, Dr. Rutherford's report is in no means internally inconsistent or ambiguous.

Second, there is no absolute "right" to depose a witness during the administrative proceedings. No party has a constitutional due process right to depose physicians who make reports in support of, or opposed to, a workers' compensation claimant. *LTV Steel Co. v. Indus. Comm.* (2000), 140 Ohio App.3d 680, 748 N.E.2d 1176.

Sears insists that the disparity between Dr. Rutherford and Dr. McDaniel demand the requested deposition. But as this Court cogently pointed out:

Disability hearings occur precisely because there is a disparity in the medical evidence. Unanimity does not usually generate a hearing. To the contrary, the need for a hearing generally arises when one doctor says that a claimant can work and the other disagrees. They are completely opposite opinions and that is why there is a hearing-to debate a disputed report's strengths and weaknesses. Once the hearing is concluded, the commission can accept the disputed report or reject it as unpersuasive.

State ex rel. Cox v. Greyhound Food Mgt., Inc., 95 Ohio St.3d 353, 2002-Ohio 2335, ¶ 19. The Court went on to hold that there were severe deficiencies in the Administrative Code dealing with

the taking of depositions. Ultimately, the Court held that there are other factors than “disparity in opinion” and the “harassment” potential which should be considered in deciding the appropriateness of a deposition. “In this case, we indeed rely on two other criteria: (1) Does a defect exist that can be cured by deposition? and (2) Is the disability hearing an equally reasonable option for resolution.” *Cox*, 95 Ohio St.3d at 356, ¶ 24.

After *Cox* was decided, the Administrative Code provision relevant to depositions was amended. Ohio Adm. Code 4121-3-09(A)(7)(d) now provides the factors to be considered when determining the reasonableness of the request for a deposition.

(d) Except as may be provided pursuant to rule 4121-3-15(D) of the Administrative Code, when determining the reasonableness of the request for deposition or interrogatories the hearing administrator shall consider whether the alleged defect or potential problem raised by the applicant can be adequately addressed or resolved by the claims examiner, hearing administrator, or hearing officer through the adjudicatory process within the commission or the claims process within the bureau of workers' compensation.

Here, the Commission followed its own rules, reviewed Sears’ request, concluded that the alleged defect or potential problem raised by Sears could be adequately addressed or resolved by the hearing officer at the hearing, and denied the request. There is no abuse of discretion in reaching a decisive decision. Sears complaint is merely a disagreement over the assessment of the evidence and its request—provinces solely within the Commission’s prerogative. What Sears fails to recognize is that the deposition “reasonableness” standard is a prudent means of discouraging depositions intended to harass or delay. *Cox*, 95 Ohio St.3d 353, 2002-Ohio-2335.

This Court has expressly condone the actions of the Commission in denying Sears’ deposition request. In *Cox, supra*, this Court upheld the denial of the deposition request because the claimant had the opportunity at the permanent and total disability hearing to enumerate all of the

flaws in the allegedly offending doctor's report and to highlight the strength of the divergent doctor's opinion. Likewise, Sears had the same opportunity at the hearing. The Commission did not find the hearing argument persuasive. This decision-making is not an abuse of discretion.

This Court has consistently rejected similar arguments raised by others. In *State ex rel. Pate v. Indus. Comm.*, 97 Ohio St.3d 89, 2002-Ohio 5444, the claimant sought to depose the Commission's doctor alleging both internal inconsistency and a substantial disparity in the written opinion. The Court rejected the argument and upheld the denial of the deposition request. Although in *Pate* the doctors disagreed as to the ability to work (as here), this Court still held that the disagreement could be resolved in a hearing before a hearing officer of the Commission where that hearing officer could accept or reject reports as being persuasive or unpersuasive. In so doing, there is no abuse of discretion in denying the requested deposition.

There is no abuse of discretion in denying Sears' request for deposition, because, as the Commission explained, its hearing officer can resolve the alleged conflict or problem.

4. **PROPOSITION OF LAW THREE:**

THE COMMISSION IS NOT BOUND BY THE CONCLUSIONS OF A VOCATIONAL EXPERT AND IS THE EXPERT ON THE NON-MEDICAL DISABILITY FACTORS.

Sears lastly argues that the reports of Dr. McDaniel and the vocational report of Craig Johnson are the appropriate evidence upon which the Commission should have relied and thus, the Industrial Commission should have reached a different conclusion. This argument is the best illustration that Sears is simply asking for a re-weighing of the evidence.

Furthermore, even if Sears' argument as to the reliability of the reports of Drs. May and Rutherford is accepted, the appropriate remedy is for a limited writ to be granted, and the Commission ordered to obtain new medical evidence. The Commission is not bound by the

conclusions of a vocational expert. *State ex rel. Singleton v. Indus. Comm.* (1994), 71 Ohio St.3d 117, 642 N.E.2d 359; *State ex rel. Adkins v. Indus. Comm.* (1986), 24 Ohio St.3d 180, 494 N.E.2d 1105; *State ex rel. Speelman v. Indus. Comm.* (1992), 73 Ohio App.3d 757, 598 N.E.2d 192. It is long-accepted law that the Commission is the expert on the non-medical disability factors. See *State ex rel. Jackson v. Indus. Comm.* (1997), 79 Ohio St.3d 266, 270-271, 680 N.E.2d 1233. Thus, it is not necessary for the Industrial Commission to accept the conclusions of vocational reports and it is free to reach its own conclusions based upon the evidence. See *id.*, quoting *Singleton, supra*, 71 Ohio St.3d at 118, 642 N.E.2d 359. Sears ignores this foundational underpinning of the workers' compensation system.

As long as the Commission's decision is supported by "some evidence" and that decision is adequately explained, the Commission's order will not be disturbed. It is the Commission's prerogative to interpret evidence and draw reasonable inferences from that evidence. *State ex rel. West v. Indus. Comm.* (1996), 74 Ohio St.3d 354, 356, 658 N.E.2d 780; *State ex rel. King v. Trimble* (1996), 77 Ohio St. 3d 58, 63, 671 N.E.2d 19.

The Commission's decision is supported by "some evidence" and its decision is adequately explained. The requested writ must be denied.

CONCLUSION

Sears ignores the fundamental concept, crucial to the workers' compensation arena, that it is the Commission, and not the outside expert evaluators, which remains the ultimate authority to determine these factual issues. Sears is simply dissatisfied with the result of the hearing. This is not sufficient reason to grant the requested relief.

The medical reports in front of the Commission noted that Ms. Moenter has other nonallowed conditions. However, there is nothing in those reports to indicate that either Dr. May or Dr.

Rutherford relied upon anything other than the allowed conditions in determining that Ms. Moenter was permanently and totally disabled. Sears simply wants this court to reweigh the evidence—an inappropriate request. Inasmuch as those medical reports constitute some evidence upon which the Commission could rely, Sears has not demonstrated that the Commission relied upon nonallowed medical conditions in concluding that Ms. Moenter was permanently and totally disabled. Sears' argument must be rejected and the requested writ denied.

Complaints for writs of mandamus do not invoke a *de novo* review by the courts. To conduct a *de novo* review simply establishes a “super” commission in the courts. Sears' arguments simply ask for this *de novo* review and reweighing of the evidence. Dr. May does not consider nonallowed conditions in rendering his opinion and his reports are not internally inconsistent and ambiguous. Likewise, Dr. Rutherford's report is not fatally flawed. Finally, there was no reasonable reason to grant Sears' request for a deposition. The Commission did not abuse its discretion and Sears' arguments must be rejected. The requested writ of mandamus must be denied because the employer has failed to demonstrate that the Commission abused its discretion.

Respectfully Submitted



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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing, Appellees-Respondent's, Sue Moenter, Merit Brief, was mailed by regular U.S. Mail, postage prepaid, on this 4TH day of September, 2007, to William R. Creedon, Assistant Attorney General, Attorney for Appellee-Respondent, Industrial Commission of Ohio, 150 E. Gay St., 22nd Flr., Columbus, OH 43215, and to Ronald A. Fresco and Rebecca R. Schrader, attorneys for Appellant-Relator, REMINGER & REMINGER CO. L.P.A., Capitol Square Office Tower, 65 East State Street, 4th Floor, Columbus, Ohio 43215.



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APPENDIX

4121-3-09

Ohio Administrative Code

4121 Industrial Commission

Chapter 4121-3 Claims Procedures

4121-3-09 Conduct of hearings before the commission and its staff and district hearing officers.

4121-3-09 Conduct of hearings before the commission and its staff and district hearing officers.

(A) Proof and discovery.

(1) In every instance the proof shall be of sufficient quantum and probative value to establish the jurisdiction of the commission to consider the claim and determine the rights of the injured worker to an award. Proof may be presented by affidavit, deposition, oral testimony, written statement, document, or other forms of evidence.

(a) The parties or their representatives shall provide to each other, as soon as available and prior to hearing, a copy of the evidence the parties intend to submit at a commission proceeding.

(b) In the event a party fails to comply with paragraph (A)(1)(a) of this rule, the hearing officer has the discretion to continue the claim to the end of the hearing docket, or to a future date with instructions to the parties or their representatives to comply with the rule.

(2) The free pre-hearing exchange of information relevant to a claim is encouraged to facilitate thorough and adequate preparation for commission proceedings. If a dispute arises between the parties regarding the exchange of information, the hearing administrator, pursuant to paragraph (B) of this rule may conduct a pre-hearing conference to consider the dispute. At the conclusion of the pre-hearing conference, the hearing administrator may issue a compliance letter, which becomes part of the claim file and which shall be adhered to by the parties.

(3) The injured worker must provide, when requested, a current signed medical release as required by division (B) of section 4123.651 of the Revised Code. Should an injured worker refuse to provide a current signed medical release as requested, then the claim shall be referred to the hearing administrator so that an order suspending the claim may be placed pursuant to division (C) of section 4123.651 of the Revised Code. Medical releases are to be executed on forms provided by the bureau of workers' compensation, the commission, or on substantially similar forms.

(4) The commission may, at any point in the processing of an application for benefits, require the injured worker to submit to a physical examination or may refer a claim for investigation.

(5) The employer may require a medical examination of the injured worker as provided in section 4123.651 of the Revised Code under the following circumstances:

(a) In no event will the injured worker be examined more than one time at the request of the employer on any issue that is asserted by the injured worker or which is to be considered by the commission, during the time that the specific matter asserted or that is in controversy remains pending final adjudication before the bureau or commission.

The exercise of this right of an examination shall not be allowed to delay the timely payment of benefits or scheduled hearings. The cost of any examination initiated by employer shall be paid by the

APPENDIX I

employer including any fee required by the physician, and the payment of all of the injured worker's traveling and meal expenses, in a manner and at the rates as established by the administrator from time to time. If employed, the injured worker will also be compensated for any loss of wages arising from the scheduling of an examination. All reasonable expenses shall be paid by the employer immediately upon receipt of the billing, and the employer shall provide the injured worker with a proper form to be completed by the injured worker for reimbursement of such expenses. The employer shall reimburse the injured worker for lost wages within thirty days of the submission of proof of lost wages.

The employer shall promptly inform the commission, as well as the injured worker's representative, as to the time and place of the examination, and the questions and information provided to the doctor. A copy of the examination report shall be submitted to the commission and to the injured worker's representative upon the employer's receipt of the report from the doctor.

The procedure set forth in paragraph (A)(5)(a) of this rule shall be applicable to claims where the date of injury or the date of disability in occupational disease claims occur on or after August 22, 1986.

Emergency treatment does not constitute examination for the purpose of this rule. Treatment by a company doctor does not constitute an examination for this rule. However, if following an examination the company doctor renders an opinion as to causation, extent of disability, or other medical opinion on a workers' compensation matter that is asserted by the injured worker, or which is to be considered by the commission, then that examination does constitute an examination for purposes of this rule.

(b) If after a medical examination of the injured worker under paragraph (A)(5)(a) of this rule on an issue that remains in controversy and has not been finally adjudicated, an employer asserts that an additional medical examination by a doctor of the employer's choice is essential in the defense of the claim by the employer, written request for such an examination shall be submitted to the hearing administrator only in cases where there is a dispute as to the request for additional examination. Written request for such an examination in a claim which has been set for a hearing with notice must be filed immediately upon the receipt of the notice or within such time as will be adequate for notification of the parties of the continuance of the hearing. The request shall state the date of the last examination of the injured worker by a doctor of employer's choice on the question pending and the reasoning for such additional examination.

All reasonable expenses of such examination, including any travel expense shall be paid by the employer within thirty days of upon the receipt of the billing. Payment for traveling expenses shall not require an order of the bureau or commission, unless there is a dispute. The employer shall provide the injured worker with a proper form to be completed by the claimant for reimbursement for traveling expenses. The employer shall reimburse the injured worker for lost wages within thirty days of the submission of proof of lost wages.

(6)

(a) If an injured worker without good cause refuses to attend a medical examination scheduled under paragraph (A)(5) of this rule, or refuses to provide or execute a current signed medical release as required by Section 4123.651 of the Revised Code, the right to have the injured worker's claim for compensation or benefits considered, if the claim is pending before the commission, the administrator or district or staff hearing officer or to receive any payment of compensation or benefits previously granted is suspended during the period of refusal.

(b) The employer or the administrator asserting the suspension in paragraph (A)(6)(a) of this rule

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shall, within three business days of the assertion, provide the hearing administrator and the injured worker or in claims where the injured worker is represented the injured worker's representative notice of the assertion. The notice shall include the reason for the assertion that there was not good cause shown for the refusal to attend a medical examination scheduled under paragraph (A)(5) of this rule or the refusal to provide or execute a current signed medical release as required by Section 4123.651 of the Revised Code. Upon receipt of such notification, the hearing administrator shall contact the parties to the claim and determine whether there is a dispute concerning the asserted suspension. Promptly thereafter, a compliance letter shall be issued as set forth in paragraphs (A)(6)(c) and (A)(6)(d) of this rule.

(c) If it is found that there was good cause for the refusal to attend a medical examination scheduled under paragraph (A)(5) of this rule and/or for the refusal to provide or execute a current signed medical release as requested under Section 4123.651 of the Revised Code, a compliance letter shall issue finding that the claim is not suspended. If the compliance letter finds that payment of compensation or benefits was terminated by the administrator or by self-insuring employer without having good cause for the suspension, payments of compensation and/or benefits shall be made within fourteen days of the compliance letter.

(d) If it is found that there was not good cause for the refusal to attend a medical examination scheduled under paragraph (A)(5) of this rule, and/or for the refusal to provide or execute a current signed medical release as required by Section 4123.651 of the Revised Code, a compliance letter shall issue finding that the injured worker's right to have the claim for compensation or benefits considered if the claim is pending before the administrator, commission, or district or staff hearing officer, or to receive any payment of compensation or benefits previously granted is suspended during the period of refusal.

(e) A party that is dissatisfied with a compliance letter issued under paragraph (A)(6)(c) or (A)(6)(d) of this rule may file an objection within fourteen days of the receipt of the compliance letter issued under paragraph (A)(6)(c) or (A)(6)(d) of this rule. If a party files a timely written objection to the compliance letter that is issued under paragraph (A)(6)(c) or (A)(6)(d) of this rule an expedited hearing will be held by a staff hearing officer within three business days of the commission's receipt of the objection.

(7) Procedure for obtaining the oral deposition of, or submitting interrogatories to, an industrial commission or bureau physician.

(a) A request to take the oral deposition of or submit interrogatories to an industrial commission or bureau physician who has examined an injured or disabled worker or reviewed the claim file and issued an opinion shall be submitted in writing to the hearing administrator within ten days from the receipt of the examining or reviewing physician's report and the applicant shall simultaneously mail a copy of the request to all parties, or if represented, to the representatives of the parties.

(b) The request must set out the reasons for the request and affirm that the applicant will pay all costs of the deposition or interrogatories including the payment of a reasonable fee, as defined below, to the physician and will furnish a copy of the deposition or the interrogatory to the opposing party and to the file.

(c) If the hearing administrator finds that the request is a reasonable one, the hearing administrator shall issue a compliance letter that will set forth the responsibilities of the party that makes the request. The following items shall be set forth in the compliance letter:

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(i) A statement of the responsibility of the party that requests the taking of deposition or answering of interrogatories concerning payment to the physician of a reasonable fee as established from time to time by commission resolution. Additionally, should a party cancel a deposition within two days of the scheduled time, a minimum cancellation fee will be charged as set by the industrial commission.

(ii) A statement of the responsibility of the party that makes the request to provide written notice of the date and time of the deposition to be provided by the requesting party to all opposing parties and their representatives, the bureau of workers' compensation and the industrial commission.

(iii) A statement setting forth a date by which the transcript of the deposition or the answers to the interrogatories is to be submitted to the industrial commission for inclusion within the claim file folder and to be served upon opposing parties.

(d) Except as may be provided pursuant to rule 4121-3-15(D) of the Administrative Code, when determining the reasonableness of the request for deposition or interrogatories the hearing administrator shall consider whether the alleged defect or potential problem raised by the applicant can be adequately addressed or resolved by the claims examiner, hearing administrator, or hearing officer through the adjudicatory process within the commission or the claims process within the bureau of workers' compensation.

(e) The party seeking the deposition may request that the hearing administrator issue a subpoena to secure the attendance of the physician.

If a witness who has been issued a subpoena fails to appear, the hearing administrator shall certify this fact to the office of the attorney general who shall take appropriate action to compel the witness to obey the subpoena.

(f) The applicant shall furnish the opposing party and the industrial commission with a copy of the deposition or the completed interrogatories. The applicant shall also furnish the industrial commission with proof of payment of the court reporter and the physician.

(B) Prehearing conferences.

(1) At any time prior to the hearing the hearing administrator may, for good cause, hold a prehearing conference to consider matters that would tend to expedite the proceeding.

(2) At the conclusion of a prehearing conference, the hearing administrator shall prepare a compliance letter listing the subjects considered and the agreements reached at the prehearing conference. The compliance letter shall be made part of the claim file to be reviewed by the adjudicator and also be provided to the parties in attendance at the pre-hearing conference. The parties must adhere to the provisions of the compliance letter.

(3) A prehearing conference may be held by telephone conference call or in person, as determined by the hearing administrator.

(C) Hearings before the industrial commission, its staff hearing officers, and the district hearing officers, and the rendering of their decision.

(1) Contested claims matters, disputed issues or claims, and appeals under section **APPENDIX 4e** Revised Code shall be set for hearing before the district hearing officers, staff hearing officers or the

industrial commission. Contested claim matters shall be assigned to hearing officers through a system which ensures that each hearing officer hears a representative sample of the issues under contest, dispute, or appeal. Hearing officers shall review all claim files prior to hearing.

(2) Notice of the date, time and place of such hearings shall be given to the injured worker and the employer, and their respective representatives of record by mail, and to the administrator by inter-office mail, in advance of the hearing date. The mailing of the notice, unless it is an emergency hearing, shall precede the hearing date by a period of time which will reasonably afford the parties opportunity to be present and participate in the hearing. This shall not be less than fourteen days following the date of the mailing of the notice.

(3) Representation of injured workers and employers before the bureau and the commission is a matter of individual free choice. This includes hearings before the designated hearing officers. The commission does not require representation nor does it prohibit it. No employee of the commission shall in any way make statements tending to limit such free choice. No one, other than an attorney at law, authorized to practice in the state of Ohio, shall be permitted to represent injured workers for a fee before the commission.

(4) If no appearance is made at a hearing, with notice, the claim will be heard and disposed of upon the proof on file, if such proof is sufficient for that purpose. If such proof is insufficient, the hearing may be continued to a specific date for the attendance of the parties or for the purpose of obtaining additional proof or for any other justifiable reason.

(5) At hearings with notice, consideration shall be confined to the issues presented in the adjudication of the claim and the parties shall be prepared to fully present their respective positions in regard to such issues.

(6) In claims where a hearing with notice is required, parties may waive notice of hearing in writing, or by appearance and oral motion at the hearing, if such waiver is presented in advance of the hearing.

(7) Hearing officers of the commission and the commission itself, insofar as is practicable, shall announce the decision on the issues presented in the hearing at its conclusion. Upon announcement of the decision or upon the hearing officer taking the issues under advisement, where that is required, the hearing shall be concluded.

(8) Hearings with notice before the district hearing officers on contested claims matters, disputed issues or claims, and appeals from a decision of the administrator shall be conducted in the industrial commission service office that is closest to the injured worker's residence, which shall be presumed to be the office that houses the claim file unless otherwise determined by agreement of the parties. Hearings for out-of-state injured workers who live more than one hundred-fifty miles from an industrial commission service office will be in Columbus, unless otherwise determined by agreement of the parties. If within one hundred-fifty miles, then the hearing will be at the nearest industrial commission service office. Other hearings before the Commission or its deputies, shall be at the places designated by the commission in the notices of hearing.

(9) Continuances.

(a)

(i) Requests for continuances shall be addressed to the hearing administrator. The party that requests

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a continuance must state the reason for the request. The requesting party must also state that other parties' representatives or, if there is no representative, the opposing parties, have been informed prior to filing the request with the commission that the request is being made and the reason therefore. Requests for continuances shall be in writing except in extraordinary circumstances where time does not permit a written request, and should be submitted on the "request for continuance" form available from the commission.

(ii) In the absence of a hearing administrator, due to extended illness or vacancy, the regional manager or the regional manager's designee shall be assigned the responsibility placed on the hearing administrator for granting or denying requests for continuances.

(b)

(i) If a representative of a party requests a continuance, the representative shall certify that the representative has informed representative's client of the time frames set forth within section 4123.511 of the Revised Code and that representative's client has agreed to waive the time frames for hearing and issuance of an order set forth in section 4123.511 of the Revised Code.

(ii) Requests for continuance filed more than five calendar days prior to the date of hearing shall be processed by the hearing administrator, resulting in the issuance of a compliance letter either granting or denying the requested continuance based on the standard of good cause. Where a request for continuance is received within five calendar days of the scheduled hearing, the hearing administrator shall address the requested continuance based on the presence of extraordinary circumstances that could not have been foreseen by the requesting party. Where a request for continuance is granted and the parties had mutually agreed to the continuance and the parties and/or their representatives have certified that the parties have agreed to waive the time frames set forth within section 4123.511 of the Revised Code, the case will not be identified as a claim that has not met the time limits set forth within section 4123.511 of the Revised Code in the reports required to be prepared pursuant to division (H)(2)(a) of section 4121.36 of the Revised Code.

(iii) Guidelines may be provided by the commission for hearing administrators and hearing officers in determining whether the standard of good cause, or the standard of extraordinary circumstances that could not have been foreseen, is established.

(iv) If a request for continuance is received on the day of the scheduled hearing, the adjudicator assigned to hold the hearing shall publish an order either granting or denying the request for continuance based on the presence of extraordinary circumstances that could not have been foreseen by the requesting party. If the adjudicator determines to grant the continuance, the order shall list the party that requested the continuance and set forth the unforeseen extraordinary circumstances that justify the continuance. If a request for continuance was made through the hearing administrator, and it was found that the party making the request had not met the requisite standard to grant the request for continuance, similar reasons asserted at the hearing to justify the request will not be found to be sufficient by the adjudicator. If the adjudicator grants a request for continuance, the order shall be interlocutory in nature and is not subject to appeal. Such claims shall remain subject to the reporting provisions under division (H)(2)(a) of section 4121.36 of the Revised Code, as well as the requirement of the timely hearing and issuance of an order under section 4123.511 of the Revised Code.

(v) If the adjudicator denies the requested continuance, the hearing shall proceed on the merits and the adjudicator shall reference in the order on the merits that the continuance was denied along with the reasons therefore.

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(c) No hearing will be continued for purposes of discovery unless the requisite standard for granting the continuance has been met and the requesting party demonstrates that it has exercised due diligence in attempting to complete discovery prior to hearing.

(d) In cases where the hearing is to be scheduled before the members of the industrial commission, requests for continuances will be considered and determined by a majority of the members of the industrial commission.

(10) All final decisions of the district hearing officers, staff hearing officers or commission upon hearing with notice shall be reduced to writing and copies mailed to the parties and to all authorized representatives of record of each party, and to the administrator.

Written decisions, shall be signed by the adjudicator(s) who conducted the hearing. When schedules or traveling do not permit a hearing officer to sign his orders, another hearing officer will be designated to sign the order. The designated signer should ensure that the order conforms to the hearing worksheet of the hearing officer that made the decision. If a designated signer has a question regarding the contents of the order, the order must be returned to the hearing officer that made the decision prior to its publication.

(11) All hearings before a district hearing officer, staff hearing officer and the industrial commission shall be public.

(12) The hearing administrator, hearing officer, or industrial commission may compel the attendance or testimony of witnesses on their own motion or at the request of any party.

(13) The assignment of a staff hearing officer or district hearing officer to a hearing shall be made by the regional manager.

(D) Final decisions of the district hearing officer, staff hearing officer or the industrial commission shall be in writing and shall include:

(1) Description of the part of the body and the nature of the disability recognized in the claim.

(2) A concise statement of the order or award.

(3) A notation as to the notice furnished and as to the appearances of the parties.

(4) Signatures of each commissioner participating in the hearing, shall be affixed to the original order verifying each commissioner's vote.

(5) Signatures of each hearing officer participating in the hearing shall be affixed to the original order verifying the hearing officer's vote, which will be made part of the claim file.

(E) All matters which at the request of one of the parties or on the initiative of the administrator and any commissioner are to be expedited, shall require at least forty-eight hours notice of a public hearing and a statement of such order of the circumstances that justified such expeditious hearing.

(F) All original memoranda, orders and decisions of the commission shall be compiled in a journal to be made available to the public with sufficient indexing to allow orderly review of documents. The journal shall indicate the vote of each commissioner.

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(G) All orders, rules, memoranda and decisions of the commission shall contain the signature of two of the three commissioners and shall state whether adopted at a meeting of the commission or by circulation to individual commissioners. Any facsimile or secretarial signature, initials of commissioners and delegated hearing officers and any printed record of "yes" and "no" vote of a district or staff hearing officer, or commission member is invalid.

(H) Claim inquiries.

(1) The industrial commission shall maintain a public information section, which will be charged with the responsibility of handling claim inquiries by or on behalf of injured workers, employers and their respective representatives.

(2) Requests, whether in writing, in person, or by telephone, concerning the status of a claim and/or any action necessary to maintain the claim shall be directed to the public information section.

(3) The public information section shall promptly answer such request(s) or may refer the matter for response to the office or section before which the matter is currently pending. If the matter is so referred, the public information section shall follow-up the inquiry to ensure that it has been expeditiously answered.

(4) Should the filing of a supplemental application, affidavit or other form(s) be necessary, it shall be forwarded by the office answering the inquiry.

(5) The public information section shall maintain a record of all inquiries received in order that statistics be developed to indicate problem areas and to serve as a basis for appropriate measures.

(I) Processing claims in an orderly, uniform and timely fashion.

(1) Each section of the industrial commission shall perform the tasks necessary to discharge its responsibilities for the processing of claims in accordance with the procedures adopted by such section and approved by the industrial commission.

(2) The discharge of these responsibilities, whether involving claims pertaining to state fund, self-insured or other employers shall be accomplished within the reasonable time parameters as set forth by the procedures of each section.

(3) It shall be the responsibility of the regional manager and hearing administrator to monitor the performance of tasks being carried on within their jurisdiction and to ensure that such assigned tasks are being performed in an orderly, uniform and timely manner, as established by the procedures of that section.

(4) Should it be determined that the assigned tasks were not being performed according to the adopted procedures, it shall be the responsibility of the regional manager and hearing administrator to adopt such corrective measures as may be indicated under the circumstances.

(J) In the absence of the hearing administrator, due to extended illness or vacancy, the regional manager or the regional manager's designee shall assume the responsibilities placed on the hearing administrator by this rule.

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HISTORY: Eff 1-1-65; 10-9-76; 1-10-78; 12-11-78; 11-26-79; 8-22-86 (Emer.); 11-17-86 (Emer.);

2-16-87; 7-3-95; 9-23-96 (Emer.); 1-17-97; 4-1-04

Rule promulgated under: RC 119.03

Rule authorized by: RC 4121.30, 4121.36, 4121.31

Rule amplifies: RC 4123.651, 4121.36

RC 119.032 review dates: 7/28/03, 2/1/07

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APPENDIX 9

4121-3-34

Ohio Administrative Code

4121 Industrial Commission

Chapter 4121-3 Claims Procedures

4121-3-34 Permanent total disability.

4121-3-34 Permanent total disability.

(A) Purpose

The purpose of this rule is to ensure that applications for compensation for permanent total disability are processed and adjudicated in a fair and timely manner. This rule applies to the adjudication of all applications for compensation for permanent and total disability filed on or after the effective date of this rule.

(B) Definitions

The following definitions shall apply to the adjudication of all applications for permanent and total disability:

(1) "Permanent total disability" means the inability to perform sustained remunerative employment due to the allowed conditions in the claim.

The purpose of permanent and total disability benefits is to compensate an injured worker for impairment of earning capacity.

The term "permanent" as applied to disability under the workers' compensation law does not mean that such disability must necessarily continue for the life of the injured worker but that it will, within reasonable probability, continue for an indefinite period of time without any present indication of recovery therefrom.

(2) Classification of physical demands of work:

(a) "Sedentary work" means exerting up to ten pounds of force occasionally (occasionally: activity or condition exists up to one-third of the time) and/or a negligible amount of force frequently (frequently: activity or condition exists from one-third to two-thirds of the time) to lift, carry, push, pull, or otherwise move objects. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met.

(b) "Light work" means exerting up to twenty pounds of force occasionally, and/or up to ten pounds of force frequently, and/or a negligible amount of force constantly (constantly: activity or condition exists two-thirds or more of the time) to move objects. Physical demand may be only a negligible amount, a job should be rated light work: (1) when it requires walking or standing to a significant degree; or (2) when it requires sitting most of the time but entails pushing and/or pulling or arm or leg controls; and/or (3) when the job requires working at a production rate pace entailing the constant pushing and/or pulling of materials even though the weight of those materials is negligible.

(c) "Medium work" means exerting twenty to fifty pounds of force occasionally, and/or ten to

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twenty-five pounds of force frequently, and/or greater than negligible up to ten pounds of force constantly to move objects. Physical demand requirements are in excess of those for light work.

(d) "Heavy work" means exerting fifty to one hundred pounds of force occasionally, and/or twenty to fifty pounds of force frequently and/or ten to twenty pounds of force constantly to move objects. Physical demand requirements are in excess of those for medium work.

(e) "Very heavy work" means exerting in excess of one hundred pounds of force occasionally, and/or in excess of fifty pounds of force frequently, and/or in excess of twenty pounds of force constantly to move objects. Physical demand requirements are in excess of those for heavy work.

(3) Vocational factors:

(a) "Age" shall be determined at time of the adjudication of the application for permanent and total disability. In general, age refers to one's chronological age and the extent to which one's age affects the ability to adapt to a new work situation and to do work in competition with others.

(b) "Education" is primarily used to mean formal schooling or other training which contributes to the ability to meet vocational requirements. The numerical grade level may not represent one's actual educational abilities. If there is no other evidence to contradict it, the numerical grade level will be used to determine educational abilities.

(i) "Illiteracy" is the inability to read or write. An injured worker is considered illiterate if the injured worker can not read or write a simple message, such as instructions or an inventory list, even though the person can sign his or her name.

(ii) "Marginal education" means sixth grade level or less. An injured worker will have ability in reasoning, arithmetic, and language skills which are needed to do simple unskilled types of work. Generally, formal schooling at sixth grade level or less is marginal education.

(iii) "Limited education" means seventh grade level through eleventh grade level. Limited education means ability in reasoning, arithmetic and language skills but not enough to allow an injured worker with these educational qualifications to do most of the more complex job duties needed in semi-skilled or skilled jobs. Generally, seventh grade through eleventh grade formal education is limited education.

(iv) "High school education or above" means twelfth grade level or above. The G.E.D. is equivalent to high school education. High school education or above means ability in reasoning, arithmetic, and language skills acquired through formal schooling at twelfth grade education or above. Generally an individual with these educational abilities can perform semi-skilled through skilled work.

(c) "Work experience":

(i) "Unskilled work" is work which needs little or no judgment to do simple duties that can be learned on the job in a short period of time. The job may or may not require considerable strength. Jobs are unskilled if the primary work duties are handling, feeding, and off bearing (placing or removing materials from machines which are automatic or operated by others), or machine tending and a person can usually learn to do the job in thirty days and little specific vocational preparation and judgment are needed.

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(ii) "Semi-skilled work" is work which needs some skills but does not require doing the more

complex work duties. Semi-skilled jobs may require close attention to watching machine processes or inspecting, testing, or otherwise looking for irregularities or tending or guarding equipment, property, material, or persons against loss, damage, or injury and other types of activities which are similarly less complex than skilled work but more complex than unskilled work. A job may be classified as semi-skilled where coordination and dexterity are necessary, as when hands or feet must be moved quickly in a repetitive task.

(iii) "Skilled work" is work which requires qualifications in which a person uses judgment or involves dealing with people, factors or figures or substantial ideas at a high level of complexity. Skilled work may require qualifications in which a person uses judgment to determine the machine and manual operations to be performed in order to obtain the proper form, quality, or quantity to be produced. Skilled work may require laying out work, estimating quality, determine the suitability and needed quantities of materials, making precise measurements, reading blue prints or other specifications, or making necessary computations or mechanical adjustments or control or regulate the work.

(iv) "Transferability of skills" are skills which can be used in other work activities. Transferability will depend upon the similarity of occupational work activities that have been performed by the injured worker. Skills which an individual has obtained through working at past relevant work may qualify individuals for some other type of employment.

(v) "Previous work experience" is to include the injured worker's usual occupation, other past occupations, and the skills and abilities acquired through past employment which demonstrate the type of work the injured worker may be able to perform. Evidence may show that an injured worker has the training or past work experience which enables the injured worker to engage in sustained remunerative employment in another occupation. The relevance and transferability of previous work skills are to be addressed by the adjudicator.

(4) "Residual functional capacity" means the maximum degree to which the injured worker has the capacity for sustained performance of the physical-mental requirements of jobs as these relate to the allowed conditions in the claim(s).

(5) "Maximum medical improvement" is a treatment plateau (static or well-stabilized) at which no fundamental functional or physiological change can be expected within reasonable medical probability in spite of continuing medical or rehabilitative procedures. An injured worker may need supportive treatment to maintain this level of function.

(C) Processing of applications for permanent total disability

The following procedures shall apply to applications for permanent total disability that are filed on or after the effective date of this rule.

(1) Each application for permanent total disability shall be accompanied by medical evidence from a physician, or a psychologist or a psychiatric specialist in a claim that has been allowed for a psychiatric or psychological condition, that supports an application for permanent and total disability compensation. The medical examination upon which the report is based must be performed within twenty-four months prior to the date of filing of the application for permanent and total disability compensation. The medical evidence used to support an application for permanent total disability compensation is to provide an opinion that addresses the injured worker's physical and/or mental limitations resulting from the allowed conditions in the claim(s). Medical evidence which provides an opinion addressing such limitations but which also contains a conclusion as to whether an injured worker is permanently and totally disabled,

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may be considered by a hearing officer. A vocational expert's opinion, by itself, is insufficient to support an application for permanent total disability compensation. If the application for permanent total disability is filed without the required medical evidence, it shall be dismissed without hearing.

(2) At the time the application for permanent total disability compensation is filed with the industrial commission, the industrial commission shall serve a copy of the application together with copies of supporting documents to the employer's representative (if the employer is represented), or to the employer (if the employer is not represented) along with a letter acknowledging the receipt of the permanent total disability application.

(3) A claims examiner shall initially review the application for permanent and total disability.

(a) If it is determined there is a written agreement to award permanent total disability compensation entered into between the injured worker, the employer, and the administrator in claims involving state fund employers, the application shall be adjudicated, and an order issued, without a hearing.

(b) If it is determined that the injured worker is requesting a finding of permanent total disability compensation under division (C) of section 4123.58 of the Revised Code (statutory permanent and total disability), the application shall be adjudicated in accordance with paragraph (E) of this rule.

(c) If a motion requesting recognition of additional conditions is filed on or prior to the date of filing for permanent total disability compensation, such motion(s) shall be processed prior to the processing of the application for permanent total disability compensation. However, if a motion for recognition of an additional condition is filed subsequent to the date of filing of the application of permanent total disability, the motions shall be processed subsequent to the determination of the application for permanent total disability compensation.

(4)

(a) The injured worker shall ensure that copies of medical records, information, and reports that the injured worker intends to introduce and rely on that are relevant to the adjudication of the application for permanent total disability compensation from physicians who treated or consulted the injured worker within five years from date of filing of the application for permanent total disability compensation, that may or may not have been previously filed in the workers' compensation claim files, are contained within the file at the time of filing an application for permanent total disability.

(b) The employer shall be provided fourteen days after the date of the industrial commission acknowledgment letter provided for in paragraph (C)(2) of this rule to notify the commission if the employer intends to submit medical evidence relating to the issue of permanent total disability compensation to the commission. Should the employer make such written notification the employer shall submit such medical evidence to the commission within sixty days after the date of the commission acknowledgment letter unless relief is provided to the employer under paragraph (C)(4)(d) of this rule. Should the employer fail to make such written notification within fourteen days after the date of the commission acknowledgment letter, the employer shall be provided sixty days after the date of the commission acknowledgement letter to submit medical evidence relating to the issue of permanent total disability compensation to the commission, but the scheduling of the injured worker for appropriate medical examinations by physicians selected by the commission under paragraph (C)(5)(a)(iii) of this rule will proceed without delay.

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(c) If the injured worker or the employer has made a good faith effort to obtain medical evidence

described in paragraph (C)(4)(a) or (C)(4)(b) of this rule and has been unable to obtain such evidence, the injured worker or the employer may request that the hearing administrator issue a subpoena to obtain such evidence. Prior to the issuance of a subpoena, the hearing administrator shall review the evidence submitted by the injured worker or the employer that demonstrates the good faith effort to obtain medical evidence. Should a subpoena be issued, it shall be served by the party requesting the issuance of a subpoena.

(d) Upon the request of either the injured worker or the employer and upon good cause shown, the hearing administrator may provide an extension of time, to obtain the medical evidence described in paragraphs (C)(4)(a) and (C)(4)(b) of this rule. Thereafter, no further medical evidence will be admissible other than additional medical evidence approved by a hearing administrator that is found to be newly discovered medical evidence that is relevant to the issue of permanent total disability and which, by due diligence, could not have been obtained under paragraph (C)(4)(a) or (C)(4)(b) of this rule.

(5)

(a) Following the date of filing of the permanent and total disability application, the claims examiner shall perform the following activities:

(i) Obtain all the claim files identified by the [injured worker] on the permanent total disability application and any additional claim files involving the same body part(s) as those claims identified on the permanent total disability application.

(ii) Copy all documents including medical and hospital reports pertinent to the issue of permanent total disability including relevant evidence provided under division (C)(4) of this rule and submit the same to an examining physician to be selected by the claims examiner.

(iii) Schedule appropriate medical examination(s) by physician(s) to be selected by the commission provided that the scheduling of said exams shall not be delayed where the employer fails to notify the commission within fourteen days after the date of the commission acknowledgment letter that it intends to submit medical evidence to the commission relating to the issue of permanent total disability compensation.

(iv) Prepare a statement of facts. A copy of the statement of facts shall be mailed to the parties and their representatives by the commission.

(6)

(a) After the reports of the commission medical examinations have been received, the hearing administrator may refer the claim to an adjudicator to consider the issuance of a tentative order, without a hearing.

(i) Within fourteen days of the receipt of the tentative order adjudicating the merits of an application for compensation for permanent and total disability, a party may file a written objection to the order. Unless the party notifies the commission in writing of the objection to the tentative order within fourteen days after the date of receipt of notice of the findings of the tentative order, the tentative order shall become final.

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(ii) In the event a party makes written notification to the industrial commission of an objection

within fourteen days of the date of the receipt of the notice of findings of the tentative order, the application for compensation for permanent and total disability shall be set for hearing and adjudicated on its merits.

(b) If the hearing administrator determines that the case should not be referred for consideration of issuance of a tentative order by an adjudicator, the hearing administrator shall notify the parties to the claim that a party has fourteen days from the date that copies of reports of the commission medical examinations are submitted to the parties within which to make written notification to the commission of a party's intent to submit additional vocational information to the commission that is relevant to the adjudication of the application for permanent total disability compensation.

(i) Unless a party notifies the commission within the aforementioned fourteen-day period of the party's intent to submit additional vocational information to the commission, a party will be deemed to have waived its ability to submit additional vocational information to the commission that is relevant to the adjudication of the application for permanent total disability.

(ii) Should a party provide timely notification to the commission of its intent to submit additional vocational information, the additional vocational information shall be submitted to the commission within forty-five days from the date the copies of the reports of commission medical examinations are submitted to the parties. Upon expiration of the forty-five day period no further vocational information will be accepted without prior approval from the hearing administrator.

(7) If the employer or the injured worker request, for good cause shown, that a pre-hearing conference be scheduled, a pre-hearing conference shall be set. The request for a pre-hearing conference shall include the identification of the issues that the requesting party desires to be considered at the pre-hearing conference. The hearing administrator may also schedule a pre-hearing conference when deemed necessary on any matter concerning the processing of an application for permanent and total disability, including but not limited to, motions that are filed subsequent to the filing of the application for permanent and total disability.

Notice of a pre-hearing conference is to be provided to the parties and their representatives no less than fourteen days prior to the pre-hearing conference. The pre-hearing conference may be by telephone conference call, or in-person at the discretion of the hearing administrator and is to be conducted by a hearing administrator.

(8) Should a pre-hearing conference be held, the hearing administrator is not limited to the consideration of the issues set forth in paragraphs (C)(8)(a) through (C)(8)(i) of this rule, but may also address any other matter concerning the processing of an application for permanent total disability. At a pre-hearing conference the parties should be prepared to discuss the following issues:

(a) Evidence of retirement issues.

(b) Evidence of refusal to work or evidence of refusal or failure to respond to written job offers of sustained remunerative employment.

(c) Evidence of job description.

(d) Evidence of rehabilitation efforts.

(e) Exchange of accurate medical history, including surgical history.

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(f) Agreement as to allowed condition(s) in the claim.

(g) Scheduling of additional medical examinations, if necessary.

(h) Ensure that deposition requests that have been granted pursuant to industrial commission rules are completed and transcripts submitted.

(i) Settlement status.

(9) At the conclusion of the pre-hearing conference, a date for hearing before a staff hearing officer shall be scheduled no earlier than fourteen days subsequent to the date of a pre-hearing conference. After the pre-hearing conference, unless authorized by the hearing administrator, no additional evidence on the issue of permanent and total disability shall be submitted to the claim file. If the parties attempt to submit additional evidence on the issue of permanent and total disability, the evidence will not be admissible on the adjudication of permanent total disability compensation.

(10) The time frames established herein in paragraph (C) of this rule can be waived by mutual agreement of the parties by motion to a hearing administrator, except where otherwise specified.

(11) The applicant may dismiss the application for permanent and total disability any time up to the determination of the hearing on the merits of the application. Should a party dismiss an application prior to its adjudication, the commission's medical evidence obtained will be valid twenty-four months from the date of dismissal.

(D) Guidelines for adjudication of applications for permanent total disability

The following guidelines shall be followed by the adjudicator in the sequential evaluation of applications for permanent total disability compensation:

(1)

(a) If the adjudicator finds that the injured worker meets the definition of statutory permanent and total disability pursuant to division (C) of section 4123.58 of the Revised Code, due to the loss or loss of use of both hands or both arms, or both feet or both legs, or both eyes, or any two thereof, the injured worker shall be found permanently and totally disabled, and a tentative order shall be issued.

Should an objection be filed from a tentative order, a hearing shall be scheduled. (Reference paragraph (E) of this rule).

(b) If, after hearing, the adjudicator finds that the injured worker is engaged in sustained remunerative employment, the injured worker's application for permanent and total disability shall be denied, unless an injured worker qualifies for an award under division (C) of section 4123.58 of the Revised Code.

(c) If, after hearing, the adjudicator finds that the injured worker is medically able to return to the former position of employment, the injured worker shall be found not to be permanently and totally disabled.

(d) If, after hearing, the adjudicator finds that the injured worker voluntarily removed himself from the work force, the injured worker shall be found not to be permanently and totally disabled. If evidence

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of voluntary removal or retirement is brought into issue, the adjudicator shall consider evidence that is submitted of the injured worker's medical condition at or near the time of removal/retirement.

(e) If, after hearing, the adjudicator finds that the injured worker is offered and refuses and/or fails to accept a bona fide offer of sustained remunerative employment that is made prior to the pre-hearing conference described in paragraph (C)(9) of this rule where there is a written job offer detailing the specific physical/mental requirements and duties of the job that are within the physical/mental capabilities of the injured worker, the injured worker shall be found not to be permanently and totally disabled.

(f) If, after hearing, the adjudicator finds that the injured worker's allowed medical condition(s) is temporary and has not reached maximum medical improvement, the injured worker shall be found not to be permanently and totally disabled because the condition remains temporary. In claims involving state fund employers, the claim shall be referred to the administrator to consider the issuance of an order on the question of entitlement to temporary total disability compensation. In claims involving self-insured employers, the self-insured employer shall be notified to consider the question of the injured worker's entitlement to temporary total disability compensation.

(g) If, after hearing, the adjudicator determines that there is appropriate evidence which indicates the injured worker's age is the sole cause or primary obstacle which serves as a significant impediment to reemployment, permanent total disability compensation shall be denied. However, a decision based upon age must always involve a case-by-case analysis. The injured worker's age should also be considered in conjunction with other relevant and appropriate aspects of the injured worker's nonmedical profile.

(h) If, after hearing, the adjudicator finds that the allowed condition(s) is the proximate cause of the injured worker's inability to perform sustained remunerative employment, the adjudicator is to proceed in the sequential evaluation of the application for permanent and total disability compensation in accordance with the provisions of paragraph (D) of this rule. However, should the adjudicator find that non-allowed conditions are the proximate cause of the injured worker's inability to perform sustained remunerative employment, the injured worker shall be found not to be permanently and totally disabled.

(i) If, after hearing, the adjudicator finds that injured worker's inability to perform sustained remunerative employment is the result of a pre-existing condition(s) allowed by aggravation, the adjudicator is to continue in the sequential evaluation of the application for permanent total disability compensation in accordance with the provisions of paragraph (D) of this rule. However, should the adjudicator find that the non-allowed pre-existing condition(s) are the proximate cause of the injured worker's inability to perform sustained remunerative employment, the injured worker shall be found not to be permanently and totally disabled.

(2)

(a) If, after hearing, the adjudicator finds that the medical impairment resulting from the allowed condition(s) in the claim(s) prohibits the injured worker's return to the former position of employment as well as prohibits the injured worker from performing any sustained remunerative employment, the injured worker shall be found to be permanently and totally disabled, without reference to the vocational factors listed in paragraph (B)(3) of this rule.

(b) If, after hearing, the adjudicator finds that the injured worker, based on the medical impairment resulting from the allowed conditions is unable to return to the former position of employment but may

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be able to engage in sustained remunerative employment, the non-medical factors shall be considered by the adjudicator.

The non-medical factors that are to be reviewed are the injured worker's age, education, work record, and all other factors, such as physical, psychological, and sociological, that are contained within the record that might be important to the determination as to whether the injured worker may return to the job market by using past employment skills or those skills which may be reasonably developed. (Vocational factors are defined in paragraph (B) of this rule).

(c) If, after hearing and review of relevant vocational evidence and non-medical disability factors, as described in paragraph (D)(2)(b) of this rule the adjudicator finds that the injured worker can return to sustained remunerative employment by using past employment skills or those skills which may be reasonably developed through retraining or through rehabilitation, the injured worker shall be found not to be permanently and totally disabled.

(3) Factors considered in the adjudication of all applications for permanent and total disability:

(a) The burden of proof shall be on the injured worker to establish a case of permanent and total disability. The burden of proof is by preponderance of the evidence. The injured worker must establish that the disability is permanent and that the inability to work is causally related to the allowed conditions.

(b) In adjudicating an application for permanent and total disability, the adjudicator must determine that the disability is permanent, the inability to work is due to the allowed conditions in the claim, and the injured worker is not capable of sustained remunerative employment.

(c) The industrial commission has the exclusive authority to determine disputed facts, the weight of the evidence, and credibility.

(d) All medical evidence of impairment shall be based on objective findings reasonably demonstrable and medical reports that are submitted shall be in conformity with the industrial commission medical examination manual.

(e) If the adjudicator concludes from evidence that there is no proximate causal relationship between the industrial injury and the inability to work, the order shall clearly explain the reasoning and basis for the decision.

(f) The adjudicator shall not consider the injured worker's percentage of permanent partial impairment as the sole basis for adjudicating an application for permanent and total disability.

(g) The adjudicator is to review all relevant factors in the record that may affect the injured worker's ability to work.

(h) The adjudicator shall prepare orders on a case by case basis which are fact specific and which contain the reasons explaining the decision. The orders must specifically state what evidence has been relied upon in reaching the conclusion and explain the basis for the decision. In orders that are issued under paragraphs (D)(2)(b) and (D)(2)(c) of this rule the adjudicator is to specifically list the non-medical disability factors within the order and state how such factors interact with the medical impairment resulting from the allowed injuries in the claim in reaching the decision.

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(i) In claims in which a psychiatric condition has been allowed and the injured worker retains the physical ability to engage in some sustained remunerative employment, the adjudicator shall consider whether the allowed psychiatric condition in combination with the allowed physical condition prevents the injured worker from engaging in sustained remunerative employment.

(E) Statutory permanent total disability

Division (C) of section 4123.58 of the Revised Code provides that the loss or loss of use of both hands or both arms, or both feet or both legs, or both eyes, or any two thereof, constitutes total and permanent disability.

(1) In all claims where the evidence on file clearly demonstrates actual physical loss, or the permanent and total loss of use occurring at the time of injury secondary to a traumatic spinal cord injury or head injury, of both hands or both arms, or both feet or both legs, or both eyes, or any two thereof, the claim shall be referred to be reviewed by a staff hearing officer of the commission. Subsequent to review, the staff hearing officer shall, without hearing, enter a tentative order finding the injured worker to be entitled to compensation for permanent and total disability under division (C) of section 4123.58 of the Revised Code. If an objection is made, the claim shall be scheduled for hearing.

(a) Within thirty days of the receipt of the tentative order adjudicating the merits of an application for compensation for permanent and total disability, a party may file a written objection to the order. Unless the party notifies the industrial commission in writing of the objection to the tentative order within thirty days after the date of receipt of notice of the findings of the tentative order, the tentative order shall become final.

(b) In the event a party makes written notification to the industrial commission of an objection within thirty days of the date of the receipt of the notice of findings of the tentative order, the application for compensation for permanent and total disability shall be set for hearing and adjudicated on its merits.

(2) In all other cases filed under division (C) of section 4123.58 of the Revised Code, if the staff hearing officer finds that the injured worker meets the definition of statutory permanent and total disability pursuant to division (C) of section 4123.58 of the Revised Code, due to the loss of use of both hands or both arms, or both feet or both legs, or both eyes, or any two thereof, the staff hearing officer, without a hearing, is to issue a tentative order finding the injured worker to be permanently and totally disabled under division (C) of section 4123.58 of the Revised Code. An objection to the tentative order may be made pursuant to paragraphs (E)(1)(a) and (E)(1)(b) of this rule.

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Rule amplifies: RC 4121.35, 4123.36

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APPENDIX 19

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