

IN THE SUPREME COURT OF OHIO

APPEAL FROM
TENTH DISTRICT COURT OF APPEALS
FRANKLIN COUNTY, OHIO

State, ex rel. DaimlerChrysler Corp.,	:	
	:	
Appellant	:	Case No. 2007-2020
	:	
v.	:	[Appeal of Right from
	:	Franklin App. No.
	:	06AP-968]
Industrial Commission and Kathleen Moran,	:	
	:	
Appellees.	:	

BRIEF OF AMICUS OHIO AFL-CIO
IN SUPPORT OF APPELLEE KATHLEEN MORAN

Thomas J. Gibney #0029992
A. Brooke Phelps #0075605
EASTMAN & SMITH LTD.
One SeaGate 24th Floor
P.O. Box 10032
Toledo, OH 43699
Telephone: 419/241-6000
Facsimile: 419/247-1777

Attorneys for Appellant
DaimlerChrysler Corp.

Stewart R. Jaffy #0011377
Marc J. Jaffy #0046722
STEWART JAFFY & ASSOCIATES CO., LPA
306 East Gay Street
Columbus, Ohio 43215
Telephone: 614/228-6148
Facsimile: 614/228-6140

Attorneys for Amicus Ohio AFL-CIO

John R. Polofka #0011822
Trevor P. Van Berkomp #0070344
POLOFKA & VAN BERKOM
500 Madison Ave. Suite 605
Toledo, OH 43604
Telephone: 419/241-7900
Facsimile: 419/241-1530

Attorneys for Appellee Moran

FILED
APR 14 2008
CLERK OF COURT
SUPREME COURT OF OHIO

Andrew Alatis #0042401
ASSISTANT ATTORNEY GENERAL
150 E. Gay St., 22nd Floor
Columbus, Ohio 43215
Telephone: 614/466-6696
Facsimile: 614/752-2538

Attorney for Appellee Commission

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I. STATEMENT OF THE CASE AND FACTS

On May, 26, 2005, Kathleen Moran underwent a cervical fusion at the C6-7 level, because of her industrial injury.

[Magistrate's opinion at para. 14.] On January 11, 2006, Dr. Purewal examined Ms. Moran for the Employer (DaimlerChrysler), and indicated that Ms. Moran

has not yet reached maximum medical improvement and it will take up to one year of healing and consolidation period for the fusion to be considered as having reached maximum medical improvement.

[Report of Dr. Purewal, cited in Magistrate's op. at para. 15, emphasis added.]

The treating doctor, Dr. Andreshak, also indicated in March, 2006, that Ms. Moran had not reached maximum medical improvement (hereinafter "MMI"). [Report of Dr. Andreshak, Supp. 93.]

Even though there was no evidence that Ms. Moran's condition had reached MMI, on March 20, 2006 the Employer filed a motion to terminate temporary total compensation. [Motion, Supp. 90.] The Employer claimed temporary total should be terminated because Dr. Andreshak had indicated that Ms. Moran would be unable to return to her former position of employment because of the effects of her allowed conditions. [Motion, Supp. 90.]

The Industrial Commission denied the Employer's motion to terminate temporary total. The Commission found that none of the requirements of O.A.C. 4121-3-32 for terminating temporary total

had been met. [Order, quoted in Magistrate's opinion at para. 21.] The Commission rejected the Employer's argument that temporary total should be terminated based on "permanency" because

The Staff Hearing Officer does not find the statement from Dr. Andreshak that [Ms. Moran] will not return to her former position to equate to a finding of permanency. Dr. Andreshak does not state that the Injured Worker's temporary disability has become permanent.

[Order, quoted in Magistrate's opinion at para. 21, bracketed material and emphasis added.]

The Employer filed a mandamus complaint in the Court of Appeals to challenge the Commission's decision. That Court refused to grant the requested writ, because:

the issue before us was directly addressed in [Vulcan Materials Co. v. Indus. Comm. (1986), 25 Ohio St.3d 31] wherein the court expressly held that "[t]he commission's designation of a disability as permanent relates solely to the perceived longevity of the condition at issue. It has absolutely no bearing upon the claimant's ability to perform the tasks involved in his former position of employment." Vulcan at 33.

[Court of Appeals op., para. 4, bracketed material added.]

II. ARGUMENT

INTRODUCTION

The Employer seeks to deprive injured workers such as Ms. Moran, workers who have been so severely injured as a result of their employment that they will be unable to return to their former positions of employment, from temporary total compensation while they heal from their injury.

The Employer's argument that severely injured workers should be denied the right to temporary total compensation while they recover from their injuries is unconscionable. It is contrary to the purpose of the workers' compensation system created by Oh. Const. Art. II, Sec. 35, which is to provide compensation when a worker is injured in their employment. The Employer's attempt to bar severely injured workers from receipt of temporary total while they heal from their injury is also contrary to the purpose of temporary total, which is to provide compensation during the healing period while an injured worker recovers from their injury.

Ms. Moran remained entitled to temporary total compensation during the healing period because her condition had not reached maximum medical improvement ("MMI"). The Employer does not claim that Ms. Moran's condition reached MMI.

Instead, the Employer claims that in addition to the statutory "MMI" basis for terminating temporary total, there is a

non-statutory, court-created, basis for terminating temporary total to severely injured workers. The Employer claims that injured workers are barred from temporary total if their injury is so severe that when it finally reaches MMI the injured worker will not be able to return to the former position of employment. This Court has already rejected the argument that temporary total eligibility depends on an ability to ultimately return to the former position of employment:

A claimant's permanent inability to return to his former position of employment does not mean the claimant's medical condition will not improve. Appellee's argument [that temporary total is barred] is thus unpersuasive.

State ex rel. General American Transp. Corp. v. Indus. Comm. (1990), 48 Ohio St.3d 25, 26 (bracketed material added).

PROPOSITION OF LAW:

INJURED WORKERS REMAIN ENTITLED TO TEMPORARY TOTAL COMPENSATION WHEN THEIR INJURY HAS NOT REACHED MAXIMUM MEDICAL IMPROVEMENT EVEN IF THEY HAVE SUFFERED A WORK-RELATED INJURY SO SEVERE THAT THEY WILL NOT BE ABLE TO RETURN TO THEIR FORMER POSITION OF EMPLOYMENT WHEN THEIR CONDITION FINALLY REACHES MAXIMUM MEDICAL IMPROVEMENT.

A. MS. MORAN REMAINED ENTITLED TO TEMPORARY TOTAL BECAUSE HER CONDITION HAD NOT REACHED MAXIMUM MEDICAL IMPROVEMENT.

Ms. Moran was receiving temporary total compensation as a result of surgery. She was entitled to continue receiving

temporary total during the healing period from this surgery because temporary total compensation is compensation which is paid "while the injury heals." State ex rel. Gross v. Indus. Comm. (2007), 115 Ohio St.3d 249, 250.

Because Ms. Moran was in a healing period resulting from her injury, the Commission correctly found that Ms. Moran was entitled to continued payments of temporary total:

As is the case in other states, temporary total benefits will be paid during the healing and treatment period for the condition until the claimant has reached some certain level of stabilization. See 2 Larson, *The Law of Workmen's Compensation* (1991), Sections 57.12(b) and (c).

State ex rel. Matlack, Inc. v. Indus. Comm. (Ohio App. 10 Dist. 1991), 73 Ohio App.3d 648, 655; appeal to Ohio Supreme Court dismissed sua sponte on November 13, 1991.

The concept of "maximum medical improvement" or "MMI" exists in recognition of the fact that temporary total is paid during the healing period. MMI exists only when the injury reaches

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.

O.A.C. 4121-3-32(A) (1) (emphasis added).

Ms. Moran's condition was not at a "treatment plateau" and did not fit the definition of maximum medical improvement.

Therefore, there is no basis for terminating temporary total. As

this Court has recognized:

so long as the claimant's condition has not stabilized, and further medical improvement can be expected, TTD benefits are payable.

State ex rel. Eberhardt v. Flxible Corp.
(1994), 70 Ohio St.3d 649, 653.

In the present case, Ms. Moran's injury was healing. She had recently undergone surgery as a result of the allowed conditions and was still recovering from that surgery, as even the Employer's doctor, Dr. Purewal, recognized. [Magistrate's op. at para. 15.] Her condition had not stabilized, and she remained entitled to temporary total compensation.

B. The Legislature (R.C. 4123.56) and the Industrial Commission (O.A.C. 4121-3-32) Have Only Provided that Temporary Total is Terminated when the Condition Reaches MMI; there is no Provision for Terminating Temporary Total Because the Condition is so Severe that it will Prevent a Return to the Former Position of Employment when MMI is Reached.

The Legislature (through R.C. 4123.56(A)) and the Industrial Commission (through O.A.C. 4121-3-32(B)) have specified when temporary total may be terminated. Because the Employer's motion does not satisfy the requirements for terminating temporary total created by the Legislature and the Industrial Commission, the Commission properly rejected the Employer's motion to terminate temporary total.

The Legislature has created only four reasons for terminating temporary total compensation:

payment shall not be made for the period [1] when any employee has returned to work, [2] when an employee's treating physician has made a written statement that the employee is capable of returning to the employee's former position of employment, [3] when work within the physical capabilities of the employee is made available by the employer or another employer, or [4] when the employee has reached the maximum medical improvement.

R.C. 4123.56(A) (bracketed material added).

The Legislature did not provide in R.C. §4123.56 that temporary total should be terminated when the injury is so severe that it will prevent a return to the former position of employment when MMI is reached.

The Industrial Commission's temporary total rule, O.A.C. 4121-3-32(B), sets forth the same four (and only the same four) reasons for the BWC, the Industrial Commission, or a self-insured employer to terminate temporary total.

The Employer does not argue that its motion to terminate temporary total satisfies any of these four criteria for terminating temporary total. Therefore, the Commission properly denied the Employer's motion to terminate.

C. Injured Workers Remain Entitled to Temporary Total When Their Condition Is Not at MMI Even If the Injury They Suffered While Working for the Employer Will Prevent Them from Returning to the Former Position of Employment.

1. Temporary Total Can Only Be Terminated for "Permanence" when a Condition is at MMI."

Maximum medical improvement is the test for "permanency" under State, ex rel. Ramirez v. Indus. Comm. (1982), 69 Ohio St.2d 630. State, ex rel. Matlack, Inc. v. Indus. Comm. (1991), 73 Ohio App.3d 648; appeal to Ohio Supreme Court dismissed sua sponte on November 13, 1991. Matlack recognized that the MMI "plateau" concept is the proper standard to use when determinating whether to terminate temporary total based on "permanency."

The Employer argues against using MMI as the standard for "permanence." The Employer claims that Ramirez creates an additional, non-statutory, basis for terminating temporary total and argues that temporary total should be terminated if the condition is either permanent or at MMI.

This argument is incorrect. As Matlack recognized, the Ramirez concept of "permanency" must be considered in light of the statutory and administrative code concepts of "MMI", because the word "permanent" has a specific meaning for workers' compensation: "[p]ermanency relates to the perceived longevity of

the condition." State ex. rel Youghiogheny and Ohio Coal v. Kohler (1990), 55 Ohio St. 3d 109, 110, citing Vulcan Material Co. v. Ind. Comm. (1986) 25 Ohio St. 3d 31.

The Employer argues that when an injury permanently prevents the injured worker from returning to their former position of employment temporary total is barred and claims that because Ms. Moran will never be completely "whole", the MMI concept of plateau does not apply.

In so arguing, the Employer fails to understand that for purposes of terminating temporary total "permanency" does not refer to the severity of the injury, but to the perceived longevity. As Dr. Purewal (who examined Ms. Moran for the Employer) recognized, Ms. Moran needs a healing period to recover from the effects of the injury. Because her condition is healing, it is not "permanent" in the Ramirez sense:

MMI is based on the concept of recuperation or healing. It is the time period, based on reasonable medical judgment, in which the claimant is brought back to some level of stabilization or plateau. The fact that this level is less than claimant's pre-injury condition does not mean the claimant's condition is permanent from the inception.

Matlack at 658.

Because a condition which will "permanently" prevent an injured worker from returning to the former position of employment can heal, a condition which is not at MMI is not a "permanent" condition in the sense needed to justify terminating

temporary total compensation and the Employer's argument that Ms. Moran's condition is "permanent" only because she will never be able to return to her former position of employment is incorrect.

2. O.A.C. 4123-19-03 Does Not Provide That Temporary Total is Terminated if an Injured Worker Will Not Be Able to Return to the Former Position of Employment.

Because there is no support in either the statute or the administrative code for its claim that temporary total should be terminated, the Employer cites an inapplicable administrative code provision in support of its argument. O.A.C. 4123-19-03, which the Employer cites at page 7-8 of its brief, is a BWC rule dealing with self-insurers. In section (K) of that rule, the BWC sets out the "[m]inimal level of performance as a criterion for granting and maintaining the privilege to pay compensation directly." O.A.C. 4123-19-03(K)(8), which is cited by the Employer in support of its argument, requires a self-insurer to pay temporary total compensation unless the treating doctor has indicated that the condition is at MMI or is permanent.

This is a BWC rule setting forth standards self-insurers must follow. Because "'permanency' is often used interchangeably with 'maximum medical improvement,'" State ex rel. Miller v. Indus. Comm. (1994), 71 Ohio St.3d 229, 234, the BWC has provided that a self-insurer who terminated temporary total when the treating doctor used the term permanent instead of MMI has not

violated its duties as a self-insurer.

Therefore, contrary to the Employer's claim in its brief, O.A.C. 4123-19-03(K) (8) does not create an additional standard for terminating temporary total. O.A.C. 4123-19-03(K) (8) permits a self-insurer to terminate temporary total when the treating doctor indicates that the injured worker's condition is at MMI by using the term "permanent." It does not apply to the present case because, as the Commission found, "Dr. Andreshak does not state that the Injured Worker's temporary disability has become permanent." [Order, quoted in Magistrate's opinion at para. 21.]

O.A.C. 4123-19-03(K) (8) does not provide additional reasons for temporary total termination beyond those provided by the Legislature in R.C. 4123.56(A) or the Industrial Commission in O.A.C. 4121-3-32(B). O.A.C. 4123-19-03(K) (8) does not (and could not) provide that temporary should be terminated if an injury is so severe that it will prevent a return to the former position of employment when MMI is reached. Therefore, O.A.C. 4123-19-03(K) (8) provides no support for the Employer's argument.

3. **Ramirez does not Create a Basis for Terminating Temporary Total Because the Condition will Prevent the Injured Worker from Returning to the Former Position of Employment.**

The Legislature has set forth four specific reasons for terminating temporary total. The reason which the Employer claims would justify terminating Ms. Moran's temporary total

compensation - an injury which is too severe to permit return to the former position of employment when it finally stabilizes - was not included by the Legislature in R.C. 4123.56 as one of the reasons for terminating temporary total.

Had the Legislature intended to deprive severely injured workers of temporary total while they recover from their injury because their injury is too severe to permit return to the former position of employment when it finally reaches MMI, it could have - and would have - said so in the statute.

"In considering the statutory language, it is the duty of the court to give effect to the words used in a statute, not to . . . insert words not used." Bailey v. Republic Engineered Steels, Inc. (2001), 91 Ohio St.3d 38, 39-40. The legislature has set forth the bases for terminating temporary total in R.C. 4123.56, and there is no reason for this Court to engraft an additional requirement onto that statute contrary to the system created by the legislature.

Nevertheless, the Employer claims at p. 6 of its brief that the 1986 amendment resulted in two standards for terminating temporary total (one from Ramirez and one from the 1986 amendments).

The Employer's argument that Ramirez requires consideration of the ability to return to the former position of employment is incorrect. Ramirez never indicated that the permanent inability

to return to the former work barred temporary total of a condition which was not at MMI and never considered the issue involved in the present case.

The only issue before the Court in Ramirez was whether an injured worker who could not return to the former position of employment was entitled to temporary total compensation, or whether the Commission could properly award a form of compensation which was then called "temporary partial" compensation.

Ramirez did not consider whether or not temporary total should be terminated when an injured worker is incapable of returning to their former position of employment. The issue of termination, or when it is appropriate to terminate temporary total was not before the Court in Ramirez.

The Employer also relies on State, ex rel. Advantage Tank Lines v. Indus. Comm. (2005), 107 Ohio St.3d 16, and claims that Advantage demonstrates that there must be an ability to return to the former position of employment in order for an injured worker to be entitled to temporary total. As in Ramirez, however, Advantage did not involve the issue of whether to deny temporary total to injured workers whose injury is so severe that it will prevent a return to the former position of employment when MMI is reached. The issue in Advantage was whether an injured worker was entitled to permanent partial and temporary total at the same

time.

This Court has never held that a worker who suffers an injury which is so severe that it will permanently prevent a return to the former position of employment, but which is not at MMI, is barred from temporary total. The Legislature never provided that temporary total is barred in such a situation and this Court should not add such a bar to R.C. 4123.56.

III. CONCLUSION

The Employer argues that because the effects of the injury suffered by Ms. Moran - an injury she suffered as a result of working for this Employer - are so severe that she will never recover sufficiently to be able to perform her former position of employment, she should be deprived of the right to temporary total compensation while she heals from the injury.

There is probably no time that an injured worker needs compensation more than when they are temporary total due to their industrial injury. For this Court to adopt the result advocated by the Employer in the present case would be contrary to the humanitarian purpose of the workers' compensation act. Thompson v. Indus. Comm. (1982), 1 Ohio St.3d 244, 247.

Oh. Const. Art. II, Sec. 35 created a workers' compensation system to provide compensation to workers who have suffered injuries as a result of their employment. The Employer's argument is contrary to the purpose of the workers' compensation system because it would deny temporary total benefits to those workers who are most seriously injured. Such a result would have a devastating effect on injured workers because

almost all injuries or diseases are permanent and irreversible in the sense that the body has been changed and will not return to the exact state prior to the onset of the injury or disease.

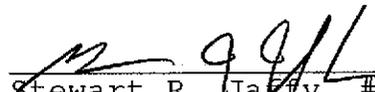
Matlack at 658.

Such a result would also be contrary to the statutory provisions enacted by the Legislature (R.C. 4123.56), and the administrative provisions enacted by the Commission (O.A.C. 4121-3-32), to govern temporary total.

There is no basis for this Court to engraft such an additional requirement on to the temporary total statute. For the Court to engraft such a requirement would be contrary to R.C. 4123.95, which provides that the Ohio workers' compensation law shall be liberally construed in favor of injured workers.

Under the workers' compensation law, temporary total is not terminated based on the permanent inability to return to the former position of employment, but based on whether the condition has reached "MMI", which requires a "treatment plateau." Because there is no evidence that Ms. Moran's condition has reached such a plateau, there is no basis for terminating temporary total compensation.

Respectfully submitted,


Stewart R. Jaffy #0011377
Marc J. Jaffy #0046722
STEWART JAFFY & ASSOCIATES CO.,
LPA
306 East Gay Street
Columbus, Ohio 43215
Telephone: 614/228-6148
Facsimile: 614/228-6140

Attorneys for Amicus Ohio AFL-CIO

CERTIFICATE OF SERVICE

A true and accurate copy of the foregoing has been served upon the following this 14th day of April 2008, by placing a copy in the United States Mail, postage pre-paid, addressed to: [1] Thomas J. Gibney, A. Brooke Phelps, EASTMAN & SMITH LTD., One SeaGate 24th Floor, P.O. Box 10032, Toledo, OH 43699, Attorneys for Appellant DaimlerChrysler Corp.; [2] John R. Polofka, Trevor P. Van Berkom, POLOFKA & VAN BERKOM, 500 Madison Ave. Suite 605, Toledo, OH 43604, Attorneys for Appellee Moran; and [3] Andrew Alatis, ASSISTANT ATTORNEY GENERAL, 150 E. Gay St., 22nd Floor, Columbus, Ohio 43215, Attorney for Appellee Commission



Marc J. Jaffy #0046722

Attorney for Amicus Ohio AFL-CIO

APPENDIX A

O Const II Sec. 35, Workers' compensation

For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom. Such compensation shall be in lieu of all other rights to compensation, or damages, for such death, injuries, or occupational disease, and any employer who pays the premium or compensation provided by law, passed in accordance herewith, shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease. Laws may be passed establishing a board which may be empowered to classify all occupations, according to their degree of hazard, to fix rates of contribution to such fund according to such classification, and to collect, administer and distribute such fund, and to determine all rights of claimants thereto. Such board shall set aside as a separate fund such proportion of the contributions paid by employers as in its judgment may be necessary, not to exceed one per centum thereof in any year, and so as to equalize, insofar as possible, the burden thereof, to be expended by such board in such manner as may be provided by law

for the investigation and prevention of industrial accidents and diseases. Such board shall have full power and authority to hear and determine whether or not an injury, disease or death resulted because of the failure of the employer to comply with any specific requirement for the protection of the lives, health or safety of employees, enacted by the general assembly or in the form of an order adopted by such board, and its decision shall be final; and for the purpose of such investigations and inquiries it may appoint referees. When it is found, upon hearing, that an injury, disease or death resulted because of such failure by the employer, such amount as shall be found to be just, not greater than fifty nor less than fifteen per centum of the maximum award established by law, shall be added by the board, to the amount of the compensation that may be awarded on account of such injury, disease, or death, and paid in like manner as other awards; and, if such compensation is paid from the state fund, the premium of such employer shall be increased in such amount, covering such period of time as may be fixed, as will recoup the state fund in the amount of such additional award, notwithstanding any and all other provisions in this constitution.

APPENDIX B

R.C. 4123.56 Temporary disability compensation; termination; examination; compensation for wage losses of returning employee; employee of professional sports franchise (excerpts)

(A) Except as provided in division (D) of this section, in the case of temporary disability, an employee shall receive sixty-six and two-thirds per cent of the employee's average weekly wage so long as such disability is total, not to exceed a maximum amount of weekly compensation which is equal to the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code, and not less than a minimum amount of compensation which is equal to thirty-three and one-third per cent of the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code unless the employee's wage is less than thirty-three and one-third per cent of the minimum statewide average weekly wage, in which event the employee shall receive compensation equal to the employee's full wages; provided that for the first twelve weeks of total disability the employee shall receive seventy-two per cent of the employee's full weekly wage, but not to exceed a maximum amount of weekly compensation which is equal to the lesser of the statewide average weekly wage as defined in division (C) of section 4123.62 of the Revised Code or one hundred per cent of the employee's net take-home weekly wage. In the case of a self-insuring employer, payments shall be for a

duration based upon the medical reports of the attending physician. If the employer disputes the attending physician's report, payments may be terminated only upon application and hearing by a district hearing officer pursuant to division (C) of section 4123.511 of the Revised Code. Payments shall continue pending the determination of the matter, however payment shall not be made for the period when any employee has returned to work, when an employee's treating physician has made a written statement that the employee is capable of returning to the employee's former position of employment, when work within the physical capabilities of the employee is made available by the employer or another employer, or when the employee has reached the maximum medical improvement. Where the employee is capable of work activity, but the employee's employer is unable to offer the employee any employment, the employee shall register with the director of job and family services, who shall assist the employee in finding suitable employment. The termination of temporary total disability, whether by order or otherwise, does not preclude the commencement of temporary total disability at another point in time if the employee again becomes temporarily totally disabled.

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

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

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

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

or agreement of the claimant.

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

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APPENDIX C

R.C. 4123.95 Liberal construction

Sections 4123.01 to 4123.94, inclusive, of the Revised Code shall be liberally construed in favor of employees and the dependents of deceased employees.

APPENDIX D

4121 INDUSTRIAL COMMISSION

CHAPTER 4121-3. CLAIMS PROCEDURES

4121-3-32 Temporary disability

(A) The following provisions shall apply to all claims where the date of injury or the date of disability in occupational disease claims accrued on or after August 22, 1986. The following definitions shall be applicable to this rule:

(1) "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.

(2) "Physical capabilities" includes any psychiatric condition allowed in a claim.

(3) "Suitable employment" means work which is within the employee's physical capabilities.

(4) "Treating physician" means the employee's attending physician of record on the date of the job offer, in the event of a written job offer to an employee by an employer. If the injured worker requested a change of doctors prior to the job offer and in the event that such request is approved, the new doctor is the treating physician.

(5) "Work activity" means sustained remunerative employment.

(6) "Job offer" means a proposal, made in good faith, of suitable employment within a reasonable proximity of the injured worker's residence. If the injured worker refuses an oral job offer and the employer intends to initiate proceedings to terminate temporary total disability compensation, the employer must give the injured worker a written job offer at least forty-eight hours prior to initiating proceedings. If the employer files a motion with the industrial commission to terminate payment of compensation, a copy of the written offer must accompany the employer's initial filing.

(B)

(1) Temporary total disability may be terminated by a self-insured employer or the bureau of workers' compensation in the event of any of the following:

(a) The employee returns to work.

(b) The employee's treating physician finds that the employee is capable of returning to his former position of employment or other available suitable employment.

(c) The employee's treating physician finds the employee has reached maximum medical improvement.

(2) Except as provided in paragraph (B)(1) of this rule, temporary total disability compensation may be terminated after a

hearing as follows:

(a) Upon the finding of a district hearing officer that either the conditions in paragraph (B)(1)(a) or (B)(1)(b) of this rule has occurred.

(b) Upon the finding of a district hearing officer that the employee is capable of returning to his/her former position of employment.

(c) Upon the finding of a district hearing officer that the employee has reached maximum medical improvement.

(d) Upon the finding of a district hearing officer that the employee has received a written job offer of suitable employment.

If a district hearing officer determines, based upon the evidence, that as of the date of the hearing, the injured worker is no longer justified in remaining on temporary total disability compensation, he shall declare that no further payments may be made. If the district hearing officer determines that the injured worker was not justified in receiving temporary total disability compensation prior to the date of the hearing, he shall declare an overpayment from the date the injured worker was no longer justified in remaining on temporary total disability compensation. Such payment shall be recovered from future awards related to the claim or any other claim. The recovery order shall provide a method for the repayment of any such overpayment as is reasonable, taking into account such factors as the amount of

money to be recouped, the length of the periodic payments to be made under any future award, and the financial hardship that would be imposed upon the employee by any specific schedule of repayment.

APPENDIX E

4123 WORKERS' COMPENSATION BUREAU

CHAPTER 4123-19. STATE INSURANCE FUND; SELF-INSURING EMPLOYERS

4123-19-03 Where an employer desires to secure the privilege to pay compensation, etc., directly (excerpts)

* * *

(K) Minimal level of performance as a criterion for granting and maintaining the privilege to pay compensation directly.

* * *

(8) The employer may notify the medical section and the claimant at least sixty days prior to the completion of the payment of two hundred weeks of compensation for temporary total disability with the request that the claimant be scheduled for examination by the medical section. Payment of temporary total disability compensation after two hundred weeks shall continue uninterrupted until further order of the commission up to the maximum required by law, unless the claimant has returned to work, or the treating physician has made a written statement that the claimant is capable of returning to his former position of employment or has reached maximum medical improvement or that the disability has become permanent, or, after hearing, an order is issued approving the termination of temporary total disability compensation.

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