

ORIGINAL

IN THE SUPREME COURT OF OHIO

MARK A. BENNETT,

Plaintiff-Appellant,

v.

ADMINISTRATOR,
OHIO BUREAU OF WORKERS'
COMPENSATION,

Defendant-Appellee,

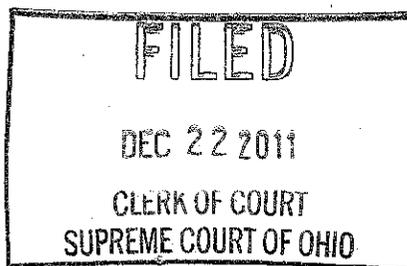
and

GOODREMONT'S INC.

Defendant.

Case No. 2011-0902

On Appeal from the
Lucas County Court of Appeals
Sixth Appellate District



MERIT BRIEF OF APPELLANT MARK A. BENNETT

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	i.
TABLE OF AUTHORITIES	ii.
STATEMENT OF THE FACTS AND THE CASE	1-3
ARGUMENT	4-11
 <u>Proposition of Law No. I:</u> THE ONLY ISSUE(S) TO BE CONSIDERED IN AN R.C. 4123.512 APPEAL ARE THOSE WHICH WERE DETERMINED IN THE ADMINISTRATIVE ORDER APPEALED.....	
CONCLUSION	12
PROOF OF SERVICE	13

<u>APPENDIX</u>	<u>Appx. Page</u>
Notice of Appeal to the Ohio Supreme Court May 26, 2011	1-2
Decision and Judgment of the Lucas County Court of Appeals March 18, 2011	3-10
Decision and Judgment of the Lucas County Court of Appeals April 12, 2011	11-13
Findings of Fact, Conclusions of Law, and Judgment Entry of the Lucas County Court of Common Pleas June 4, 2010	14-20
 STATUTES:	
R.C. 4123.512	21-23
R.C. 4123.511	24-28
R.C. 4123.01(C)	29-33
R.C. 4121.35	34
R.C. 4121.36	35-38
OAC 4123-3-09	39-43

TABLE OF AUTHORITIES

<u>CASES:</u>	<u>Page</u>
<i>Indus. Comm. v. Baker</i> 127 Ohio St. 345, 188 N.E. 560	5
<i>Starkey v. Builders FirstSource Ohio Valley LLC</i> 130 Ohio St.3d 114, 2011-Ohio-3278.....	4
<i>Ward v. Kroger Co.</i> 106 Ohio St.3d 35, 2005-Ohio-3560	4, 6-7, 9, 12
 <u>STATUTES:</u>	
O.A.C. 4123-3-09(B)	4,5
R.C. 4121.35	6,
R.C. 4121.36	6,
R.C. 4123.01(C)	4,
R.C. 4123.511	5, 6, 7-8
R.C. 4123.512	4, 6, 8, 9, 10, 11, 12
 <u>OTHER AUTHORITIES:</u>	
Fulton, Philip J. <i>Ohio Workers' Compensation Law</i> (3 Ed. 2008)	8

STATEMENT OF THE FACTS AND THE CASE

On February 28, 2006 the Plaintiff/Appellant, Mark Bennett, was in route to a sales presentation for his employer, Goodremont's Inc. when he was rear-ended by another motorist. (Appx p.15, Findings of Fact, Conclusions of Law and Judgment Entry, Trial Court Record (TCR) #70, ¶2&3)

On March 29, 2006 Mr. Bennett filed with the Bureau of Workers' Compensation (BWC) the First Report of an Injury, Occupational Disease or Death (FROI-1) (Supp p.1). The employer disputed the claim on the sole basis that Mark Bennett "...was on his daily commute into work..." (Supp p.2). Three days later BWC denied the claim because "The employee was going to or coming from work." (Supp p.4) That decision was appealed through the Industrial Commission (I.C.) with a final order finding the claim was denied because "...the coming and going doctrine applies." (Supp p.9)

Mr. Bennett filed his R.C. 4123.512 notice of appeal (TCR #1) and Petition (Supp p.12, TCR #3) in the Common Pleas Court of Lucas County. The Petition set forth specifically that the appeal was from the order denying his claim on the basis of the "...going to or coming from work" doctrine. (Supp Id. ¶5) The employer, Defendant, answered, "Goodremont's states that Mr. Bennett was injured on February 28, 2006..." but denied his injuries were in the "...course and scope of his employment..." (TCR #10 ¶4 & 3) because of its position that the claim was barred by the "coming and going" exclusion. The employer and BWC each filed motions for summary judgment (TCR #29 & #25). Both motions maintained that there were no other issues except the purely legal issue of the coming and going rule. (TCR #29 p.1 & 8, TCR #25 p.6) The trial court

granted the employer's and BWC's motions for summary judgment "...as a matter of law because Mr. Bennett's claim is barred by the so-called 'coming-and-going' rule" (TCR #45 p.4).

That decision was appealed in *Bennett v. Goodremont's Inc.*, 2009-Ohio-2920, ¶20, 29, L-08-1193 (OHCA6) (*Bennett I*) and the Court found that a "...genuine issue of fact with respect to [the coming and going rule]" remained and remanded the case "...for proceedings consistent with this decision."

The employer and BWC filed in the trial court a "Joint Motion in Limine to Exclude Irrelevant Matters at Trial" (TCR #38 p.1) seeking "...to exclude the admission and presentation of any evidence...concerning...Plaintiff's injuries...because it would be irrelevant to...the purely legal issue in this case..." (I.d. p4) of the coming and going rule.

After the remand, a trial to the court was held. At the close of Mr. Bennett's case BWC moved for a directed verdict. The Administrator argued, "...first and foremost Plaintiff has to prove an injury" (Trial Transcript, P 55, L13-14) while admitting that throughout the case it had only contested the issue of the "coming and going" rule. (Trial Transcript, P62, L14-16).

The trial court found from the evidence in its conclusions of law, "...the coming and going rule would not apply to preclude Workers' Compensation benefits for Mr. Bennett." (Appx p.17-18, TCR # 70, P4&5, ¶4) but granted BWC's motion for directed verdict.

That decision was appealed. *Bennett v. Goodremont's, Inc.*, 2011-Ohio-1264, L-10-1185 (OHCA6) (*Bennett II*) (Appx p.3)

The Court of Appeals in *Bennett II* decided that R.C. 4123.512 hearing is “...de novo, regarding the specific medical condition that was presented to the Industrial Commission. *Ward v. Kroger*, 106 Ohio St. 3d 35, 2005-Ohio-3560 ¶8-9” and required that the employee prove his “injury” even though no determination of his medical condition had been made by the BWC or I.C. or included in the order appealed (Appx p.6) (emphasis added). An application for reconsideration was filed by Mr. Bennett (*Bennett II*, Court of Appeals Record #15) and denied (Appx p.11). An appeal to this Court ensued. (Appx p.1).

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

PROPOSITION OF LAW NO. I: THE ONLY ISSUE(S) TO BE CONSIDERED IN AN R.C. 4123.512 APPEAL ARE THOSE WHICH WERE DETERMINED IN THE ADMINISTRATIVE ORDER APPEALED.

This case presents an important issue of first impression involving R.C. 4123.512 not answered by *Starkey v. Builders FirstSource Ohio Valley LLC*; 130 Ohio St.3d 114, 2011-Ohio-3278 or *Ward v. Kroger Co.*, 106 Ohio St.3d 35, 2005-Ohio-3560. *Starkey* involved the issue of raising new theories of causation at the R.C. 4123.512 trial level. *Ward* addressed the question of introducing entirely new injuries or conditions for the first time in the R.C. 4123.512 trial. This case examines the distinctly different issues of the scope of the review by the court in an R.C. 4123.512 proceeding when the only administrative order on appeal is the denial of the claim on the basis of the initial determination by BWC of “compensability”, meaning “...the validity of the industrial claim (hereinafter “validity”). OAC 4123-3-09(B) (Appx p.39).

The first step in the administrative process is the filing by the employee of a “First Report of an Injury, Occupational Disease or Death” (FROI-1) with the Bureau of Workers’ Compensation (BWC) (Supp p.1). The form, in part, requests the employee to briefly describe the “accident” and the “injury” (Supp Id.).

The second step per OAC 4123-3-09(B) (Appx p.39) is for an “Initial Review...” that will be made by BWC “...on the question of compensability...” which “...means making a determination of the validity of the industrial claim”. This “validity” review encompasses numerous situations that will result in a denial of the claim on the sole basis that the that the “Injury” as defined in R.C. 4123.01(C) was not “...received in the course of and arising out of, the injured employee’s employment.” (Appx p.32)

As part of this “validity” review, BWC solicits the response of the employer to the FROI-1. As provided in OAC 4123-3-09(B)(1) (Appx p.39), “A contested or disputed claim...arises where the employer...questions the validity of a claim...”.

Here, the Employer contested the claim (Supp p.2) on the sole basis of the “coming and going” rule which was defined in *Indus. Comm. v. Baker* (1933), 127 Ohio St. 345, 188 N.E. 560, Syllabus 4.

Two days later BWC issued its Order finding, “The employee did not sustain an injury in the course of and arising out of employment. The employee was going to or coming from work.” (Supp p.4).

This was a “validity” decision only by BWC that ended the claim and negated any need to proceed to determine the injury or condition caused by the occurrence.

This conclusion is mandated by OAC 4123-3-09(B)(1) that provides if the “validity” requirement is met then “...the claims specialist shall have authority to approve such claim...The approval of the claim must contain the description of the condition or conditions for which the claim is being allowed and part or parts of the body affected.” OAC 4123-3-09(B)(1)(a).

Obviously, if “validity” is not found, then BWC does not proceed to a “...description of the conditions...or the parts of the body affected.” *Id.* Further, as a practical matter it would be a waste of time and money for BWC, the claimant and the claimant’s medical providers to obtain or provide any medical information when there has been a “validity” denial.

The Administrator’s “Order” (Supp p.6) was duly appealed per R.C. 4123.511(C) to the district hearing officer. “The district hearing officer shall hold a hearing on a

disputed issue or claim...” R.C. 4123.511(C). The only disputed issue that existed was the “validity” question. The order of the district hearing officer establishes that the only “issue” he considered in the hearing was that the “Injured worker was not in the course of his employment when he was injured; therefore, this claim is DISALLOWED” (Supp p. 6).

Mark Bennett appealed that order to the staff hearing officer under R.C. 4121.35(B)(2) and R.C. 4123.511(D). The staff hearing officer’s order affirmed the denial of the FROI-1 on “validity” grounds only and merely MODIFIED the district hearing officer’s order by finding the “...coming and going doctrine applies” under “...*Ruckman v. Cubby Drilling Inc.*,... (no citation)”(1988), 81 Ohio St. 3d 117 (Supp p.9). Again absent from this final administrative order under R.C. 4121.35(C) is any “description of the part of the body or nature of the disability...” as required by R.C. 4121.36(B)(4) (Appx p.36).

That order was appealed to the Industrial Commission pursuant to R.C. 4123.511(E) (Appx p.25) which the commission refused to hear but gave notice of the right to appeal the order to the Court of Common Pleas per R.C. 4123.512 (Appx p.21).

R.C. 4123.512(A) provides, “The claimant ... may appeal an order of the industrial commission...to the court of common pleas...” (Appx p.21). Clearly where the final administrative order determines only the “validity” of the claim that is the only issue for the court to consider. Since no administrative inquiry or decision was made as to Mr. Bennett’s injury or medical condition there was no Order as to these issues to be appealed or for the Court to review. The syllabus in *Ward v. Kroger Co.* provided;

The claimant in an R.C. 4123.512 appeal may seek to participate in the Workers' Compensation Fund only for those conditions that were addressed in the administrative order from which the appeal is taken.

The key language of the syllabus is that the "appeal" is "for those conditions" ... "addressed in the administrative order" (emphasis added). *Ward* was an appeal of the order denying "...the conditions of medical meniscus tear and chondromalacia of the right knee." *Ward*, ¶1. In the trial court the employee amended his petition to add "...two conditions never presented to the administrative body." *Ward*, ¶2. The court of appeals had held that "the scope of the trial is limited to the conditions ruled upon below" *Ward*, ¶4. That decision was affirmed by this Court. *Ward* ¶18.

The rationale of the *Ward* decision as to "conditions" applies equally to the appeal of a "validity" denial. As stated in *Ward* at ¶9, "The requirement that workers' compensation claims be presented in the first instance for administrative determination is a necessary and inherent part of the overall adjudicative framework of the Workers' Compensation Act."

The trial court should not waste its time litigating an injury or medical condition issue that has not been considered or decided in the administrative process. Further, it is illogical for the employee, employer, BWC, or IC to waste their money or time in an R.C. 4123.511 (A) trial litigating the claimant's medical conditions which may or may not be relevant depending on the trial court's decision on "validity".

Furthermore, if an employee is required to prove, for the first time, in the R.C. 4123.511 trial his medical conditions, the claimant is denied his fundamental statutory right to have the medical aspect of his claim determined through the administrative process. R.C. 4123.511(A) provides;

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

When these administrative proceedings are bypassed, the worker's rights are not only infringed, but the legislative purpose is subverted.

The procedural law of workers' compensation, like the substantive law, is supposed to permit the effectuation of the beneficent and remedial character of the generative legislation... The...informal workers' compensation proceedings are designed to avoid the cumbersome procedures and pleading technicalities of the common law and facilitate the making of a just and expeditious decision... This anti-technical bias implicit in workers' compensation proceedings is intended to prevent technicalities from preventing just claims. *Philip J. Fulton, Ohio Workers' Compensation Law* (3 Ed. 2008) p. 87

The only issue that Mr. Bennett presented in his R.C. 4123.512 petition was that "the BWC denied the claim based on its determination that Appellant was coming or going to work." (Supp p.13, ¶5).

The trial court found on this issue that "...the coming-and-going rule would not apply to preclude Workers' Compensation benefits for Mr. Bennett." (Appx p.17-18 ¶4).

The trial court, however, exceeded its jurisdiction under R.C. 4123.512 when it directed a verdict against Mr. Bennett because he did not "...establish a compensable injury nor a causal relationship between such an injury and his accident." (Appx. P.19, ¶7.) These are not elements of a "validity" appeal. These are not claims that were ever addressed in the administrative proceedings or a finding in the order of the IC appealed to the court.

The court of appeals decision, here on appeal, misapplied *Ward* by failing to distinguish between a “validity” denial and those cases involving a dispute of the injury or medical condition determined in the administrative process.

The court of appeals in *Bennett II* found, “A trial court conducting a hearing pursuant to R.C. 4123.512 does so *de novo*, regarding the specific medical condition that was presented to the Industrial Commission. *Ward v. Kroger*, 106 Ohio St.3d 35, 2005-Ohio-3560, ¶8-9.” (Appx. P.6, ¶12)

As established, no “specific medical condition” was decided in the administrative process, nor should it be when the denial is on “validity” grounds.

Just as *Ward* determined, at ¶10, “allowing consideration of the right to participate for additional conditions to originate at the judicial level is inconsistent with the statutory scheme...”, is equally true when the issue appealed is a “validity” denial. The administrative process is by-passed, the “medical conditions” in dispute have not been administratively considered, and as shown the litigation of the “medical conditions” is irrelevant if the “validity” denial is upheld.

The appellate court failed to distinguish between the “right to participate” because of a “validity” denial and one that involves the determination of “specific medical conditions”. The court of appeals erred in construing R.C. 4123.512 to require a “*de novo*” review of all issues pertaining to the right to participate rather than a “*de novo*” review of the issue appealed from the I.C.

As this Court stated in *Ward*, at ¶11; “Simply put, R.C. 4123.512 provides a mechanism for judicial review, not for amendment of administrative claims at the judicial level.” Here the trial court and the court of appeals were amending the administrative

order appealed to include issues of “medical conditions” which had not been administratively decided.

R.C. 4123.512(D) supports this conclusion as it provides; “The court...shall determine the right of the claimant to participate...”. The statute does not require that the Court determine the injury or medical condition when that issue has not been administratively addressed or a part of the order appealed. When the issue as to participation is an administrative order denying “validity” then that is the only issue to be determined.

Further, R.C. 4123.512(E)&(G) provide the mechanism to effectuate the balance between the judiciary’s review of I.C. orders and the administrative function of the BWC to decide the “medical conditions.” The statute provides that the court shall certify its decision to the I.C. and the BWC who shall proceed as if the judgment were the decision of the commission.” (Appx p.22) Where the Court finds that the claimant has established that the “validity” denial was wrong the claim will return to the BWC through the I.C. to the stage of the administrative process for a determination of the injury or medical condition caused.

This is the most efficient and logical course, alleviating the time and financial costs of litigating medical conditions for the very first time in the courts and deferring to the BWC their function to investigate and determine the questions as to the injury or medical condition(s) once the threshold issue of the “validity” denial has been judicially decided.

This result also reaffirms the syllabus and analysis in *Ward*, and clarifies that in “validity” appeals only those issue(s) determined in the administrative order are to be considered in the R.C. 4123.512 appeal.

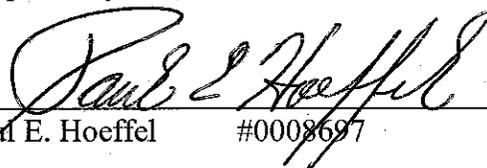
CONCLUSION

This appeal involves an issue of “first impression”. Although *Ward v. Kroger* remains as “good law”, it addressed only the question of the claimant asserting new medical conditions at the R.C. 4123.512 trial. The analysis in *Ward* applies equally here when the issue is the administrative denial of the claim on “validity” grounds. The Administrator can not add the issue of “injury” at the R.C. 4123.512 level, nor should the jurisdiction of the court extend beyond the issue delineated in the administrative order.

There is no rationale for the employee, BWC, or the courts to address the “injury” issue when the claim has been denied on “validity” grounds.

Here, Mark Bennett established that the denial of his claim on the basis of the “coming and going” rule was wrong, only to be denied participation for not proving his “injury” when he had no opportunity to have that issue decided in the administrative process. Such an injustice must be rectified by a reversal of the decision below.

Respectfully submitted,



Paul E. Hoeffel #0008697

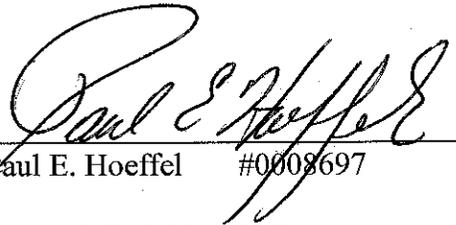
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I certify that a copy of this Merit Brief of Appellant Mark A. Bennett was sent by ordinary U.S. mail to the following on December 22nd, 2011:

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IN THE SUPREME COURT OF OHIO

11-0902

Mark A. Bennett	:	On Appeal from the Lucas
	:	County Court of Appeals,
Appellant,	:	Sixth Appellate District
	:	
v.	:	
	:	Court of Appeals
Goodremont's Inc., et al.	:	Case No. L-10-1185
	:	
Appellees.	:	

NOTICE OF APPEAL OF APPELLANT, MARK A. BENNETT

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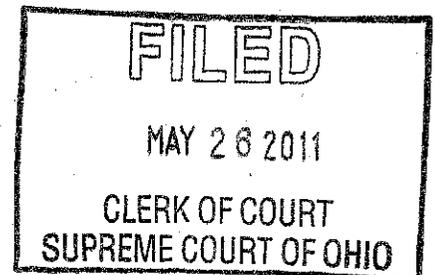
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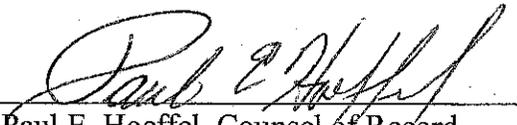


Notice of Appeal of Appellant, Mark A. Bennett

Appellant, Mark A. Bennett, hereby gives notice of his discretionary appeal to the Supreme Court of Ohio from the judgment of the Lucas County Court of Appeals, Sixth Appellate District, entered in Court of Appeals Case No. L-10-1185 on March 18, 2011. On March 30, 2011, a timely application for reconsideration was filed with the Court of Appeals. On April 12, 2011, the Court of Appeals filed an entry denying the application for reconsideration.

This case is one of public or great general interest.

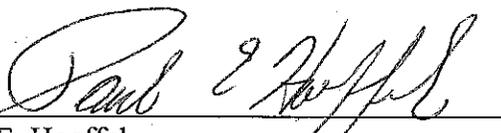
Respectfully submitted,

By: 
Paul E. Hoeffel, Counsel of Record

COUNSEL FOR APPELLANT,
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Certificate of Service

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail to counsel for Appellees, Joshua W. Lanzinger, Ohio Attorney General's Office, One Government Center, Suite 1340, Toledo, Ohio 43604-2261 and Roman Arce, Marshall & Melhorn, LLC, Four SeaGate, Eighth Floor, Toledo, Ohio 43604, on this 26th day of May, 2011.


Paul E. Hoeffel

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FILED
COURT OF APPEALS
2011 MAR 18 A 8:53

COMMON PLEAS COURT
BERNIE QUILTER
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Mark A. Bennett

Court of Appeals No. L-10-1185

Appellant

Trial Court No. CI0200605864

v.

Goodremont's, Inc., et al.

DECISION AND JUDGMENT

Appellee

Decided: **MAR 18 2011**

* * * * *

Paul E. Hoeffel, for appellant.

Mike DeWine, Attorney General of Ohio, and Joshua W.
Lanzinger, Assistant Attorney General, for appellee Administrator,
Bureau of Workers' Compensation.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas, which granted the Administrator of the Bureau of Workers' Compensation's ("BWC") motion for a directed verdict on appellant's civil action to participate in the

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MAR 18 2011

Ohio workers' compensation fund for alleged injuries incurred during an automobile accident on February 28, 2006. For the reasons set forth below, this court affirms the judgment of the trial court.

{¶ 2} Appellant, Mark A. Bennett, sets forth the following two assignments of error:

{¶ 3} "ASSIGNMENT OF ERROR NO. 1: The Court erred in directing a verdict for Appellees on the issue of "injury" which was not a finding made in the decision of the Industrial Commission that was appealed.

{¶ 4} "ASSIGNMENT OF ERROR NO. 2: The Court erred in directing a verdict where there was sufficient evidence that reasonable minds could well differ as to Appellant sustaining an injury, if such proof was necessary."

{¶ 5} The following undisputed facts are relevant to the issues raised on appeal. In January 2006, appellant was hired by defendant, Goodremont's, as a territory manager. In this position, appellant spent approximately 80 percent of his work time contacting current and prospective clients at their places of business to demonstrate and sell photocopiers.

{¶ 6} On February 28, 2006, appellant was en route to Goodremont's central office for a presentation to a prospective client. While waiting at a yield on an exit ramp for the expressway, appellant's automobile was struck in the rear by another motorist.

{¶ 7} On March 29, 2006, appellant filed a claim with the BWC for alleged injuries to his back and neck sustained in the above accident. The BWC denied the claim

based on its determination that appellant was coming or going to work. As such, it did not arise out of appellant's employment. Appellant appealed this decision to a district hearing officer, and later to a staff hearing officer of the Industrial Commission. Both officers sustained the decision of the BWC. After the Industrial Commission denied appellant's further appeal, appellant began an action in the Lucas County Court of Common Pleas to "determine the claimant's right to participate in the fund upon the evidence adduced at the hearing."

{¶ 8} In May 2008, the trial court granted summary judgment to the BWC and Goodremont's, Inc., finding that appellant was barred from participation in the workers' compensation fund by the coming and going rule. On appeal of that decision, this court determined that the trial court's analysis of appellant's status as a semi-fixed situs employee was in error and remanded for further proceedings.

{¶ 9} On remand, a bench trial was conducted on April 16, 2010. At the close of appellant's case, appellee moved for a directed verdict based on appellant's failure to provide evidence of a compensable injury. The trial court heard arguments and considered post-trial briefs on the matter. The court then determined that appellant's alleged injuries were not of the sort that were common knowledge and required medical testimony to establish proximate cause.

{¶ 10} On June 24, 2010, based on this determination, and appellant's failure to offer any medical testimony establishing the proximate cause of appellant's injuries, the trial court granted appellee's motion for directed verdict. This appeal ensued.

{¶ 11} We begin our review by noting the well-established rule that, when an appeal is made to a trial court from a denial of claim of the Industrial Commission under R.C. 4123.512, the court has a mandatory duty to determine a claimant's right to participate in the workers' compensation fund. *Wagner v. Fulton Indus.* (1997) 116 Ohio App.3d 51, 54. See, also, *Marcum v. Barry* (1991), 76 Ohio App.3d 536, 539-40. It is not within the court's discretion to remand the case back to the Industrial Commission. *Wagner* at 54.

{¶ 12} A trial court conducting a hearing pursuant to R.C. 4123.512 does so de novo, regarding the specific medical condition that was presented to the Industrial Commission. *Ward v. Kroger*, 106 Ohio St.3d 35, 2005-Ohio-3560, ¶ 8-9. The decision is based upon the evidence before it, not the evidence that was before the Industrial Commission. *Marcum* at 539-40; R.C. 4123.512(D). A claimant's right to participate in the fund will be predicated on his showing to the court by a preponderance of evidence, not only that his "injury rose out of and in the course of employment, but also that a direct or proximate causal relationship existed between his injury and his harm or disability." *White Motor Corp. v. Moore* (1976), 48 Ohio St.2d 156, paragraph one of the syllabus.

{¶ 13} In his first assignment of error, appellant claims that, where the Industrial Commission did not make a finding on the issue of injury, the trial court could not base its decision on this. However, once the decision of the Industrial Commission was appealed to the court, the issue to be determined was whether appellant had a right to

participate in the fund. To decide this issue, the court, in its de novo review, had to make a determination, based on the evidence before it, of whether the accident was a proximate cause of the alleged injuries.

{¶ 14} Appellant suggests that the trial court should have only ruled on whether the injury happened in the course of employment, and left the Industrial Commission to determine whether or not there was proximate cause. But, as stated above, once a court takes jurisdiction of an appeal from the Industrial Commission the court cannot remand it back to the commission. The court must make the determination of whether or not the claimant can participate in the fund. In doing so, both the issue of whether the injury occurred during the course of employment and whether there is a causal relationship between the accident and the injury being claimed must be addressed. Where the claimant fails to show a causal relationship, as occurred here, there is no error in directing a verdict adverse to the claimant. Accordingly, we find appellant's first assignment of error not well-taken.

{¶ 15} In appellant's second assignment of error, he claims that sufficient evidence and inferences were adduced at trial to support his claim of injury resulting from the automobile accident. In this assignment, appellant reiterates the argument made from his first assignment of error that the issue of injury was not before the court. Given that we have already determined this argument to be without merit, no further discussion of it is warranted. Rather, our inquiry in appellant's second assignment of error will focus on

whether appellant entered sufficient evidence or inferences to the court showing a causal relationship between his accident and his alleged injuries to avoid a directed verdict.

{¶ 16} When a claimant attempts to prove proximate cause of his injury, two general types of cases arise. *White Motor Corp.* at 159. In the first type, where the injury and the subsequent disability are matters of common knowledge, no medical testimony is required to carry the claimant's burden. Courts have interpreted these types of injuries to include such things as a visible bruise, *id.* at 160, or a fractured ankle, *Canterbury v. Skulina*, 11th Dist. No. 2000-0-0060, 2001-Ohio-8768.

{¶ 17} However, where the injury is "internal and elusive in nature, unaccompanied by any observable evidence," *Gibbs v. General Motors Corp.* (Mar. 27, 1987), 11th Dist. No. 3625, then the injury moves outside the realm of common knowledge and requires medical testimony to establish a causal link. *Id.* This standard has been applied in cases involving neck and back injuries caused by lifting heavy weights, *Howard v. Seaway Food Town, Inc.* (Aug. 14, 1998), 6th Dist. No. L-97-1322, neck and back injuries caused by being pushed, *Wright v. City of Columbus*, 10th Dist. No. 05AP-432, 2006-Ohio-759, ¶ 19, and neck and back injuries caused in automobile accidents. *Rogers v. Armstrong*, 1st Dist. No. C-010287, 2002-Ohio-1131. See, also, *Krull v. Ryan*, 1st Dist. No. C-100019, 2010-Ohio-4422, ¶ 13 (discussing the applicability of *Rogers* to workers' compensation cases).

{¶ 18} In the present case, appellant's claimed injury is generic. The testimony by both appellant and his wife vaguely alleges only that appellant was injured without any

specific substance or detail. This by itself puts appellant's claim at odds with *Ward*, which requires a claimant to state a specific injury or medical condition upon which he seeks to participate in the fund. *Ward* at ¶ 10. Nonetheless, even were we to accept appellant's statements made in discovery that he injured his neck and back, his claim would still fail.

{¶ 19} As previously determined by this court, back and neck injuries require medical testimony to show a causal relationship. *Howard*, supra. These injuries are not normally visible, like a bruise or a break. A common person cannot ordinarily verify the cause or existence of such injuries in another person. Instead, they fit very neatly into the category of "internal or elusive injuries." Given the nature of such injuries, it is logical that a court must require expert medical testimony to prove causation for such injuries. See *Chilson v. Conrad*, 11th Dist. No. 2005-P-0044, 2006-Ohio-3423, ¶ 25.

{¶ 20} Appellant's argument that injury can be inferred by the fact that he was in an automobile accident is also unconvincing. There is no special category for automobile accidents that waives the need to provide expert medical testimony to show causation of injuries. Neck and back injuries suffered in automobile accidents cannot be determined by using the common knowledge standard. Expert medical testimony to show proximate cause is required. See *Rogers v. Armstrong*, 1st Dist. No. C-010287, 2002-Ohio-1131; *Mahaffey v. Stenzel* (Jan. 25, 1999), 4th Dist. No. 97CA2391, *Langford v. Dean* (Sept. 30, 1999), 8th Dist. No. 74854.

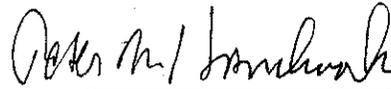
{¶ 21} Appellant failed to claim a specific injury for which he was seeking a right to participate in the fund, or provide any expert medical testimony showing a proximate causal relationship between any alleged injuries and his automobile accident. For the reasons stated herein, we find appellant's second assignment of error not well-taken.

{¶ 22} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

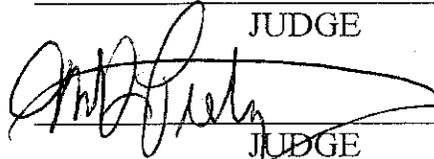
A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.



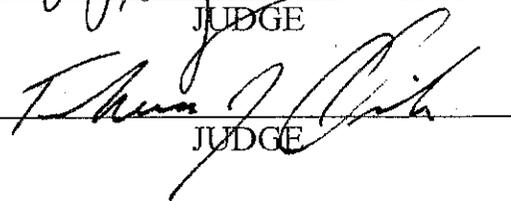
JUDGE

Mark L. Pietrykowski, J.



JUDGE

Thomas J. Osowik, P.J.
CONCUR.



JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.

FILED
COURT OF APPEALS
2011 APR 12 P 3:23

COMMON PLEAS COURT
BERNIE QUILTER
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Mark A. Bennett

Court of Appeals No. L-10-1185

Appellant

Trial Court No. CI0200605864

v.

Goodremont's, Inc., et al.

DECISION AND JUDGMENT

Appellees

Decided: **APR 12 2011**

* * * * *

This matter is pending before the court on appellant's application for reconsideration filed on March 30, 2011. Although not expressly captioned or stated by appellant, the motion is deemed to be made pursuant to App.R. 26(A)(1). On March 18, 2011, this court affirmed the trial court judgment of a directed verdict in favor of appellee, concluding that appellant had failed to assert a specific medical injury or establish a causal relationship between his generic injury claims in the underlying motor vehicle accident. As such, the judgment of the trial court was affirmed.

E-JOURNALIZED

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As stated in *Matthew v. Matthews* (1981), 5 Ohio App.3d 140, paragraph two of the syllabus:

"The test generally applied upon the filing of a motion for reconsideration in the court of appeals is whether the motion calls to the attention of the court an obvious error in its decision or raises an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been."

In support of the application, appellant first reiterates the assertion that the trial court somehow erred or breached the parameters of its authority in its proximate cause consideration. This issue has been thoroughly contested and considered during the course of this case. The procedural history of this case precluded the remand of the matter to the Industrial Commission for proximate cause purposes. We remain unconvinced that *Ward v. Kroger*, 106 Ohio St.3d 35, 2005-Ohio-3560, establishes the propriety of appellant's contention. *Ward* pertained to alleging new medical conditions. Such was not the scenario involved in the instant case. In addition, *Ward* reflects that a claimant must state a specific medical injury or condition as the basis of seeking compensation from the fund. The record clearly reflects that appellant failed to do so. Appellant made wholly generic claims necessitating medical testimony in support of causation.

Appellant also contends in support of his motion that it was somehow improper or irrelevant for this court to consider caselaw outside of that which was directly cited by the parties. Appellant summarily concludes that such independent analysis by the court

constitutes nothing more than "semantics" and thus does not constitute a "substantive issue." We respectfully disagree with both the characterization and the unilateral conclusion accompanying same.

Lastly, appellant unpersuasively suggests that his own testimony alleging generic injury and the equally generic testimony of a lay witness should suffice for medical proximate cause purposes. Suffice it to say, we are not persuaded of the merits of any such contention.

We have reviewed and considered appellant's application for reconsideration and memorandum in support. We find that there was not an incomplete or incorrect review as summarily suggested by appellants. We find that appellant has set forth no substantive grounds for relief. On consideration whereof, we find appellant's application to be without merit. It is denied.

Peter M. Handwork, J.

Mark L. Pietrykowski, J.

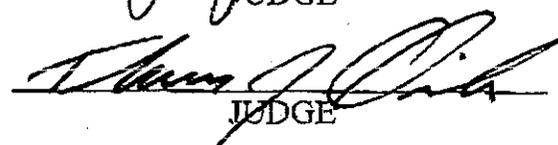
Thomas J. Osowik, P.J.
CONCUR.



JUDGE



JUDGE



JUDGE

FILED
LUCAS COUNTY

**THIS IS A FINAL
APPEALABLE ORDER**

2010 JUN -4 A 8:58

COMMON PLEAS COURT
BERNIE QUILTER
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

Mark A. Bennett,

Plaintiff-Appellant,

v.

Goodremont's, Inc., et al.,

Defendants-Appellees.

*

* Case No. CI0200605864

* FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND JUDGMENT ENTRY

*

Hon. Charles J. Doneghy

*

*

Following a bench trial on April 16, 2010, this R.C. 4123.512 workers' compensation appeal is before the Court for a decision on a motion for directed verdict, filed by appellee-defendant the Administrator, Bureau of Workers' Compensation ("Administrator" of the "Bureau"), and for a judgment of the Court on the trial. Upon review of the pleadings, evidence adduced in this case, memoranda of the parties, and applicable law, the Court finds that it should: 1) sustain the Administrator's motion for directed verdict; and 2) accordingly, enter judgment concluding that the plaintiff-appellant, Mark Bennett, is not entitled to participate in the workers' compensation fund.

I. FINDINGS OF FACT

1. On January 23, 2006, defendant-appellee Goodremont's, Inc. ("Goodremont's) hired Mr.

Bennett to work as a Territory Manager, essentially a "traveling salesperson," to sell photo-copy machines to commercial businesses. (Trial Transcript ["Tr."] pp.15,18-19;Plaintiff's Exhs.2,5.) The bulk of his job was to spend "80%" of his work time "in the field" making sales calls to prospective and current customers. (Tr.p.25; Plaintiff's Exh.5,p.2.)

2. On the morning of February 28, 2006, Mr. Bennett was traveling from his home to Goodremont's central office in Toledo in order to give a sales presentation to a prospective customer at 9:00 a.m. (Tr.pp.27-29.) Mr. Bennett's sales manager had scheduled the appointment for Mr. Bennett. (Tr.p.27.)

3. While Mr. Bennett was on an expressway off-ramp yielding to traffic, another motorist struck the rear of Mr. Bennett's car. (Tr.p.28; Petition para.3.) Mr. Bennett "receive[d] injuries from that accident." (Tr.p.28; see Petition para.4.)

4. On or about March 29, 2006, Mr. Bennett made a workers' compensation claim for the injuries he sustained in the accident. (Petition para.5.) The Bureau denied the claim on the following basis: "The employee did not sustain an injury in the course of and arising out of employment. The employee was going to or coming from work." (Id.) After Mr. Bennett appealed the Bureau's decision, a district hearing officer ("DHO") for the Industrial Commission sustained the Bureau's decision. (Petition para.6.) After Mr. Bennett appealed the DHO's decision, a staff hearing officer sustained the DHO's decision. (Petition para.7.) The Industrial Commission denied a further appeal. (Petition para.8.) Mr. Bennett instituted the instant appeal to this Court. (Petition para.9.) In his appeal, Mr. Bennett requested that the finder of fact "determine the claimant's right to participate in the fund upon the evidence adduced at the hearing." (Petition para.10.)

5. By opinion and judgment entry filed May 22, 2008 ("May 2008 Entry"), this Court granted

summary judgment to the Administrator and Goodremont's concluding that "Mr. Bennett was a semi-fixed situs employee who is barred from recovering workers' compensation benefits by the coming-and-going rule." (May 2008 Entry p.5, citing Ruckman v. Cubby Drilling, Inc., 81 Ohio St.3d 117, 119, 1998-Ohio-455, 689 N.E.2d 917.) Upon Mr. Bennett's timely appeal, by decision and judgment filed June 19, 2009, the Sixth Appellate District reversed the May 2008 Entry and remanded Mr. Bennett's claim concluding that the Court's "semi-fixed-situs" analysis was error. Bennett v. Goodremont's, Inc., 6th Dist. No. L-08-1193, 2009-Ohio-2920, at ¶29.

II. CONCLUSIONS OF LAW

1. In general terms, when a court reviews whether a worker has a right to participate in the workers' compensation fund, the court must determine "whether a 'causal connection' existed between an employee's injury and his employment either through the activities, the conditions or the environment of the employment." (Emphasis added.) Bennett v. Goodremont's, Inc., supra, 2009-Ohio-2920, at ¶17, quoting Bralley v. Daugherty (1980), 61 Ohio St.2d 302, 303, 401 N.E.2d 448. R.C. 4123.01(C) defines "injury"; in relevant part the statute reads as follows: "[i]njury' includes any injury, whether caused by external accidental means or accidental in character and result, received in the course of, and arising out of, the injured employee's employment." (Emphasis added.) The "in the course" prong relates to "the time, place and circumstances of the injury," and the "arising out of" prong "contemplates a causal connection between the injury and the employment." Fisher v. Mayfield (1990), 49 Ohio St.3d 275, 277-278, 551 N.E.2d 1271. The claimant must establish both prongs. Bennett v. Goodremont's, Inc., supra, 2009-Ohio-2920, at ¶17. The court is to assess the claimant's showing on these prongs liberally in favor of allowing compensation. *Id.* citing to R.C. 4123.95. See, also, Fisher at 278 (workers' compensation statutes

must be construed liberally in favor of the employee.)

2. "[T]he coming-and-going rule is 'a tool used to determine whether an injury suffered by an employee occurs "in the course of" and "arise[s] out of" the employment relationship so as to constitute a compensable injury under R.C. 4123.01(C).'" Bennett v. Goodremont's, Inc., supra, 2009-Ohio-2920, at ¶18, quoting Ruckman v. Cubby Drilling, Inc., 81 Ohio St.3d 117, 119, 1998-Ohio-455, 689 N.E.2d 917. Generally, the rule provides that an employee who operates at a fixed place of employment, and who is injured while traveling to or from that place of employment, "is not entitled to participate in the Workers' Compensation Fund because the requisite causal connection between injury and the employment does not exist." Bennett at ¶18, quoting MTD Products, Inc. v. Robatin (1991), 61 Ohio St.3d 66, 68, 572 N.E.2d 661.

3. "To determine whether an employee is a fixed-situs employee and, thus, subject to the coming-and-going rule, the focus must be on 'whether the employee commences his substantial employment duties only after arriving at a specific and identifiable work place designated by his employer.'" (Emphasis added.) Bennett v. Goodremont's, Inc., supra, 2009-Ohio-2920, at ¶19. "Where traveling itself is part of the employment, either by virtue of the nature of the occupation or by virtue of the contract of employment, the employment situs is non-fixed, and the coming-and-going rule is, by definition, inapplicable." *Id.*

4. The Court concludes that the facts in the instant case demonstrate that Mr. Bennett was a traveling salesman, and he did not commence his substantial employment duties "only after" arriving at the Goodremont's central office. The Court further concludes that the traveling itself, to and from his clients' places of business, was a fundamental part of his employment. Thus, the Court concludes that Mr. Bennett's employment situs was non-fixed, and the coming-and-going rule would

not apply to preclude workers' compensation benefits for Mr. Bennett.

5. Mr. Bennett argues that the Court should remand this matter to the Bureau to determine his injuries. However, pursuant to R.C. 4123.512(D) "[t]he court, or the jury under the instructions of the court, if a jury is demanded, shall determine the right of the claimant to participate or to continue to participate in the fund upon the evidence adduced at the hearing of the action." (Emphasis added.) Williams v. Truck & Bus Div. GMC (Nov. 9, 2000), 2d Dist. No. 18455, 2000 Ohio App.Lexis 5187, *7. Thus, the court of common pleas, entertaining an R.C. 4123.512 "appeal," has no power to remand a case back to the Industrial Commission. Marcum v. Barry (1991), 76 Ohio App.3d 536, 540, 602 N.E.2d 419 (addressing predecessor section R.C. 4123.519). See, also, Wagner v. Fulton Indus. (1997), 116 Ohio App.3d 51, 54-55, 686 N.E.2d 559 (court has no power to remand pursuant to R.C. 4123.512). Rather, the common pleas court has "a mandatory duty * * * to proceed to a final determination of * * * the right to participate in the Workers' Compensation Fund upon the law and the evidence adduced before that court." (Emphasis added.) Marcum v. Barry, 76 Ohio App.3d at 541, 602 N.E.2d 419. See, also, Wagner v. Fulton Indus., 116 Ohio App.3d at 55, 686 N.E.2d 559 (court has the duty to determine the right to participate).

6. The claimant bears the burden of establishing his or her right to participate in the workers' compensation fund "for harm or disability claimed to have resulted from an accidental injury [by showing] that his injury arose out of and in the course of his employment, [and] also that a direct or proximate causal relationship existed between his injury and his harm or disability." White Motor Corp. v. Moore (1976), 48 Ohio St.2d 156, 357 N.E.2d 1069, paragraph one of the syllabus. "As a general rule of law involving complex medical problems, medical evidence is necessary to establish a direct or proximate causal relationship between an industrial accident and the resulting injury."

Id. at 159. Only "[w]here the issue of causal connection between an injury and the specific subsequent physical disability involves questions which are matters of common knowledge, [is] medical testimony * * * not necessary in order to submit the case to the jury." (Emphasis added.)

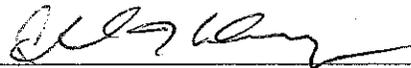
Id. at paragraph two of the syllabus. Thus, "for injuries that are 'internal and elusive in nature,' and 'unaccompanied by any observable external evidence,' expert medical testimony is required to establish the proximate cause of the injury." Wright v. Columbus, 10th Dist. No. 05AP-432, 2006-Ohio-759, at ¶14. Injuries to the neck and the back, with no outward manifestation, must be established by medical evidence. Id. at ¶19. In such a situation, the claimant's testimony seeking to establish a causal connection between an accident and a compensable injury is insufficient. Id. See, also, Maney v. Jernejcic (Nov. 16, 2000), 10th Dist. No. 00AP-483, 2000 Ohio App.Lexis 5296, *4-5 (plaintiff's injuries sustained in a rear-end collision were internal, soft tissue injuries that do not usually produce any observable external injuries; expert medical testimony was required to establish a causal connection between the accident and the injuries); Dean v. West (Sept. 14, 2000), 5th Dist. No. 00CA00014, 2000 Ohio App.Lexis 4164, *11 (soreness in the rib area, restrictive movements, and loss of sleep allegedly arising from automobile accident are not so apparent as to be matters of common knowledge). Indeed, a court properly sustains a directed verdict when a plaintiff fails to present medical evidence of a claimed internal injury. Dean at *11.

7. The Court concludes that Mr. Bennett did not present medical evidence to establish a compensable injury nor a causal relationship between such an injury and his accident. Thus, the Court concludes that the Court should sustain the Administrator's motion for directed verdict. The Court concludes that Mr. Bennett has failed to establish he is entitled to participate in the workers' compensation fund.

JUDGMENT ENTRY

The Court hereby ORDERS that the defendant Administrator's motion for directed verdict is sustained. The Court further ORDERS that the plaintiff is not entitled to participate in the workers' compensation fund for the claim now before the Court. The Court further ORDERS that the plaintiff's claims are dismissed with prejudice. The Court finds no just reason for delay.

June 3, 2010



Charles J. Doneghy, Judge

Distribution: Paul E. Hoeffel
Joshua W. Lanzinger
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§ 4123.512. Appeal to court.

Archive

Ohio Statutes

Title 41. LABOR AND INDUSTRY

Chapter 4123. WORKERS' COMPENSATION

Includes legislation filed in the Secretary of State's office through 10/21/2011

§ 4123.512. Appeal to court

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

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

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

(B) The notice of appeal shall state the names of the claimant and the employer, the number of the claim, the date of the order appealed from, and the fact that the appellant appeals therefrom.

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

(C) The attorney general or one or more of the attorney general's assistants or special counsel designated by the attorney general shall represent the administrator and the commission. In the event the attorney general or the attorney general's designated assistants or special counsel are absent, the administrator or the commission shall select one or more of the attorneys

in the employ of the administrator or the commission as the administrator's attorney or the commission's attorney in the appeal. Any attorney so employed shall continue the representation during the entire period of the appeal and in all hearings thereof except where the continued representation becomes impractical.

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

The claimant shall, within thirty days after the filing of the notice of appeal, file a petition containing a statement of facts in ordinary and concise language showing a cause of action to participate or to continue to participate in the fund and setting forth the basis for the jurisdiction of the court over the action. Further pleadings shall be had in accordance with the Rules of Civil Procedure, provided that service of summons on such petition shall not be required and provided that the claimant may not dismiss the complaint without the employer's consent if the employer is the party that filed the notice of appeal to court pursuant to this section. The clerk of the court shall, upon receipt thereof, transmit by certified mail a copy thereof to each party named in the notice of appeal other than the claimant. Any party may file with the clerk prior to the trial of the action a deposition of any physician taken in accordance with the provisions of the Revised Code, which deposition may be read in the trial of the action even though the physician is a resident of or subject to service in the county in which the trial is had. The bureau of workers' compensation shall pay the cost of the stenographic deposition filed in court and of copies of the stenographic deposition for each party from the surplus fund and charge the costs thereof against the unsuccessful party if the claimant's right to participate or continue to participate is finally sustained or established in the appeal. In the event the deposition is taken and filed, the physician whose deposition is taken is not required to respond to any subpoena issued in the trial of the action. The court, or the jury under the instructions of the court, if a jury is demanded, shall determine the right of the claimant to participate or to continue to participate in the fund upon the evidence adduced at the hearing of the action.

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

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

(G) If the finding of the court or the verdict of the jury is in favor of the claimant's right to participate in the fund, the commission and the administrator shall thereafter proceed in the matter of the claim as if the judgment were the decision of the commission, subject to the power of modification provided by section 4123.52 of the Revised Code.

(H)(1) An appeal from an order issued under division (E) of section 4123.511 of the Revised Code or any action filed in court in a case in which an award of compensation or medical benefits has been made shall not stay the payment of compensation or medical benefits under the award, or payment for subsequent periods of total disability or medical benefits during the pendency of the appeal. If, in a final administrative or judicial action, it is determined that payments of compensation or benefits, or both, made to or on behalf of a claimant should not have been made, the amount thereof shall be charged to the surplus fund account under division (B) of section 4123.34 of the Revised Code. In the event the employer is a state risk, the amount shall not be charged to the employer's experience, and the administrator shall adjust the employer's account accordingly. In the event the employer is a self-insuring employer, the self-insuring employer shall deduct the amount from the paid compensation the self-insuring employer reports to the administrator under division (L) of section 4123.35 of the Revised Code.

(2)(a) Notwithstanding a final determination that payments of benefits made to or on behalf of a claimant should not have been made, the administrator or self-insuring employer shall award payment of medical or vocational rehabilitation services submitted for payment after the date of the final determination if all of the following apply:

(i) The services were approved and were rendered by the provider in good faith prior to the date of the final determination.

(ii) The services were payable under division (I) of section 4123.511 of the Revised Code prior to the date of the final determination.

(iii) The request for payment is submitted within the time limit set forth in section 4123.52 of the Revised Code.

(b) Payments made under division (H)(1) of this section shall be charged to the surplus fund account under division (B) of section 4123.34 of the Revised Code. If the employer of the employee who is the subject of a claim described in division (H)(2)(a) of this section is a state fund employer, the payments made under that division shall not be charged to the employer's experience. If that employer is a self-insuring employer, the self-insuring employer shall deduct the amount from the paid compensation the self-insuring employer reports to the administrator under division (L) of section 4123.35 of the Revised Code.

(c) Division (H)(2) of this section shall apply only to a claim under this chapter or Chapter 4121., 4127., or 4131. of the Revised Code arising on or after the effective date of this amendment.

(3) A self-insuring employer may elect to pay compensation and benefits under this section directly to an employee or an employee's dependents by filing an application with the bureau of workers' compensation not more than one hundred eighty days and not less than ninety days before the first day of the employer's next six-month coverage period. If the self-insuring employer timely files the application, the application is effective on the first day of the employer's next six-month coverage period, provided that the administrator shall compute the employer's assessment for the surplus fund account due with respect to the period during which that application was filed without regard to the filing of the application. On and after the effective date of the employer's election, the self-insuring employer shall pay directly to an employee or to an employee's dependents compensation and benefits under this section regardless of the date of the injury or occupational disease, and the employer shall receive no money or credits from the surplus fund account on account of those payments and shall not be required to pay any amounts into the surplus fund account on account of this section. The election made under this division is irrevocable.

(l) All actions and proceedings under this section which are the subject of an appeal to the court of common pleas or the court of appeals shall be preferred over all other civil actions except election causes, irrespective of position on the calendar.

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

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

History. Amended by **129th General Assembly File No. 16, HB 123, §101**, eff. 7/29/2011.

Effective Date: 08-06-1999; 2006 SB7 10-11-2006; 2007 HB100 09-10-2007

§ 4123.511. Notice of receipt of claim.

Archive

Ohio Statutes

Title 41. LABOR AND INDUSTRY

Chapter 4123. WORKERS' COMPENSATION

Includes legislation filed in the Secretary of State's office through 10/21/2011

§ 4123.511. Notice of receipt of claim

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

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

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

The administrator, with the advice and consent of the bureau of workers' compensation board of directors, may adopt rules that identify specified medical conditions that have a historical record of being allowed whenever included in a claim. The administrator may grant immediate allowance of any medical condition identified in those rules upon the filing of a claim involving that medical condition and may make immediate payment of medical bills for any medical condition identified in those rules that is included in a claim. If an employer contests the allowance of a claim involving any medical condition identified in those rules, and the claim is disallowed, payment for the medical condition included in that claim shall be charged to and paid from the surplus fund created under section **4123.34** of the Revised Code.

(B)(1) Except as provided in division (B)(2) of this section, in claims other than those in which the employer is a self-insuring employer, if the administrator determines under division (A) of this section that a claimant is or is not entitled to an award of compensation or benefits, the administrator shall issue an order no later than twenty-eight days after the sending of the notice under division (A) of this section, granting or denying the payment of the compensation or benefits, or both as is appropriate to the

claimant. Notwithstanding the time limitation specified in this division for the issuance of an order, if a medical examination of the claimant is required by statute, the administrator promptly shall schedule the claimant for that examination and shall issue an order no later than twenty-eight days after receipt of the report of the examination. The administrator shall notify the claimant and the employer of the claimant and their respective representatives in writing of the nature of the order and the amounts of compensation and benefit payments involved. The employer or claimant may appeal the order pursuant to division (C) of this section within fourteen days after the date of the receipt of the order. The employer and claimant may waive, in writing, their rights to an appeal under this division.

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

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

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

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

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

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

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

receipt of the order, subject to the limitations contained in that section.

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

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

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

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

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

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

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

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

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

(4) The date of receipt by the employer of an order of a district hearing officer, a staff hearing officer, or the industrial commission issued under division (C), (D), or (E) of this section.

(I) Payments of medical benefits payable under this chapter or Chapter 4121., 4127., or 4131. of the Revised Code shall commence upon the earlier of the following:

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

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

(J) The administrator shall charge the compensation payments made in accordance with division (H) of this section or medical benefits payments made in accordance with division (I) of this section to an employer's experience immediately after the employer has exhausted the employer's administrative appeals as provided in this section or has waived the employer's right to an administrative appeal under division (B) of this section, subject to the adjustment specified in division (H) of section **4123.512** of the Revised Code.

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

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

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

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

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

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

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

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

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

(O) Upon application of a party who resides in an area in which an emergency or disaster is declared, the industrial commission and hearing officers of the commission may waive the time frame within which claims and appeals of claims set forth in this section must be filed upon a finding that the applicant was unable to comply with a filing deadline due to an emergency or a disaster.

As used in this division:

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

(2) "Disaster" means any natural catastrophe or fire, flood, or explosion, regardless of the cause, that causes damage of sufficient magnitude that the governor of Ohio or the president of the United States, through a public declaration, orders state or

federal assistance to alleviate damage, loss, hardship, or suffering that results from the occurrence.

History. Amended by **128th General Assembly ch. 4, HB 16, §101**, eff. 9/29/2009.

Effective Date: 06-14-2000; 06-21-2005; 2007 HB100 09-10-2007

Archive

§ 4123.01. Workers' compensation definitions.

Archive

Ohio Statutes

Title 41. LABOR AND INDUSTRY

Chapter 4123. WORKERS' COMPENSATION

Includes legislation filed in the Secretary of State's office through 10/21/2011

§ 4123.01. Workers' compensation definitions

As used in this chapter:

(A)(1) "Employee" means:

(a) Every person in the service of the state, or of any county, municipal corporation, township, or school district therein, including regular members of lawfully constituted police and fire departments of municipal corporations and townships, whether paid or volunteer, and wherever serving within the state or on temporary assignment outside thereof, and executive officers of boards of education, under any appointment or contract of hire, express or implied, oral or written, including any elected official of the state, or of any county, municipal corporation, or township, or members of boards of education.

As used in division (A)(1)(a) of this section, the term "employee" includes the following persons when responding to an inherently dangerous situation that calls for an immediate response on the part of the person, regardless of whether the person is within the limits of the jurisdiction of the person's regular employment or voluntary service when responding, on the condition that the person responds to the situation as the person otherwise would if the person were on duty in the person's jurisdiction:

(i) Off-duty peace officers. As used in division (A)(1)(a)(i) of this section, "peace officer" has the same meaning as in section 2935.01 of the Revised Code.

(ii) Off-duty firefighters, whether paid or volunteer, of a lawfully constituted fire department.

(iii) Off-duty first responders, emergency medical technicians-basic, emergency medical technicians-intermediate, or emergency medical technicians-paramedic, whether paid or volunteer, of an ambulance service organization or emergency medical service organization pursuant to Chapter 4765. of the Revised Code.

(b) Every person in the service of any person, firm, or private corporation, including any public service corporation, that (i) employs one or more persons regularly in the same business or in or about the same establishment under any contract of hire, express or implied, oral or written, including aliens and minors, household workers who earn one hundred sixty dollars or more in cash in any calendar quarter from a single household and casual workers who earn one hundred sixty dollars or more in cash in any calendar quarter from a single employer, or (ii) is bound by any such contract of hire or by any other written contract, to pay into the state insurance fund the premiums provided by this chapter.

(c) Every person who performs labor or provides services pursuant to a construction contract, as defined in section 4123.79 of the Revised Code, if at least ten of the following criteria apply:

(i) The person is required to comply with instructions from the other contracting party regarding the manner or method of performing services;

(ii) The person is required by the other contracting party to have particular training;

(iii) The person's services are integrated into the regular functioning of the other contracting party;

(iv) The person is required to perform the work personally;

(v) The person is hired, supervised, or paid by the other contracting party;

(vi) A continuing relationship exists between the person and the other contracting party that contemplates continuing or recurring work even if the work is not full time;

(vii) The person's hours of work are established by the other contracting party;

(viii) The person is required to devote full time to the business of the other contracting party;

(ix) The person is required to perform the work on the premises of the other contracting party;

(x) The person is required to follow the order of work set by the other contracting party;

(xi) The person is required to make oral or written reports of progress to the other contracting party;

(xii) The person is paid for services on a regular basis such as hourly, weekly, or monthly;

(xiii) The person's expenses are paid for by the other contracting party;

(xiv) The person's tools and materials are furnished by the other contracting party;

(xv) The person is provided with the facilities used to perform services;

(xvi) The person does not realize a profit or suffer a loss as a result of the services provided;

(xvii) The person is not performing services for a number of employers at the same time;

(xviii) The person does not make the same services available to the general public;

(xix) The other contracting party has a right to discharge the person;

(xx) The person has the right to end the relationship with the other contracting party without incurring liability pursuant to an employment contract or agreement.

Every person in the service of any independent contractor or subcontractor who has failed to pay into the state insurance fund the amount of premium determined and fixed by the administrator of workers' compensation for the person's employment or occupation or if a self-insuring employer has failed to pay compensation and benefits directly to the employer's injured and to the

dependents of the employer's killed employees as required by section **4123.35** of the Revised Code, shall be considered as the employee of the person who has entered into a contract, whether written or verbal, with such independent contractor unless such employees or their legal representatives or beneficiaries elect, after injury or death, to regard such independent contractor as the employer.

(d) Every person to whom all of the following apply:

(i) The person is a resident of a state other than this state and is covered by that other state's workers' compensation law;

(ii) The person performs labor or provides services for that person's employer while temporarily within this state;

(iii) The laws of that other state do not include the provisions described in division (H)(4) of section **4123.54** of the Revised Code.

(2) "Employee" does not mean:

(a) A duly ordained, commissioned, or licensed minister or assistant or associate minister of a church in the exercise of ministry;

(b) Any officer of a family farm corporation;

(c) An individual incorporated as a corporation; or

(d) An individual who otherwise is an employee of an employer but who signs the waiver and affidavit specified in section **4123.15** of the Revised Code on the condition that the administrator has granted a waiver and exception to the individual's employer under section **4123.15** of the Revised Code.

Any employer may elect to include as an "employee" within this chapter, any person excluded from the definition of "employee" pursuant to division (A)(2) of this section. If an employer is a partnership, sole proprietorship, individual incorporated as a corporation, or family farm corporation, such employer may elect to include as an "employee" within this chapter, any member of such partnership, the owner of the sole proprietorship, the individual incorporated as a corporation, or the officers of the family farm corporation. In the event of an election, the employer shall serve upon the bureau of workers' compensation written notice naming the persons to be covered, include such employee's remuneration for premium purposes in all future payroll reports, and no person excluded from the definition of "employee" pursuant to division (A)(2) of this section, proprietor, individual incorporated as a corporation, or partner shall be deemed an employee within this division until the employer has served such notice.

For informational purposes only, the bureau shall prescribe such language as it considers appropriate, on such of its forms as it considers appropriate, to advise employers of their right to elect to include as an "employee" within this chapter a sole proprietor, any member of a partnership, an individual incorporated as a corporation, the officers of a family farm corporation, or a person excluded from the definition of "employee" under division (A)(2) of this section, that they should check any health and disability insurance policy, or other form of health and disability plan or contract, presently covering them, or the purchase of which they may be considering, to determine whether such policy, plan, or contract excludes benefits for illness or injury that they might have elected to have covered by workers' compensation.

(B) "Employer" means:

(1) The state, including state hospitals, each county, municipal corporation, township, school district, and hospital owned by

a political subdivision or subdivisions other than the state;

(2) Every person, firm, professional employer organization as defined in section 4125.01 of the Revised Code, and private corporation, including any public service corporation, that (a) has in service one or more employees or shared employees regularly in the same business or in or about the same establishment under any contract of hire, express or implied, oral or written, or (b) is bound by any such contract of hire or by any other written contract, to pay into the insurance fund the premiums provided by this chapter.

All such employers are subject to this chapter. Any member of a firm or association, who regularly performs manual labor in or about a mine, factory, or other establishment, including a household establishment, shall be considered an employee in determining whether such person, firm, or private corporation, or public service corporation, has in its service, one or more employees and the employer shall report the income derived from such labor to the bureau as part of the payroll of such employer, and such member shall thereupon be entitled to all the benefits of an employee.

(C) "Injury" includes any injury, whether caused by external accidental means or accidental in character and result, received in the course of, and arising out of, the injured employee's employment. "Injury" does not include:

(1) Psychiatric conditions except where the claimant's psychiatric conditions have arisen from an injury or occupational disease sustained by that claimant or where the claimant's psychiatric conditions have arisen from sexual conduct in which the claimant was forced by threat of physical harm to engage or participate;

(2) Injury or disability caused primarily by the natural deterioration of tissue, an organ, or part of the body;

(3) Injury or disability incurred in voluntary participation in an employer-sponsored recreation or fitness activity if the employee signs a waiver of the employee's right to compensation or benefits under this chapter prior to engaging in the recreation or fitness activity;

(4) A condition that pre-existed an injury unless that pre-existing condition is substantially aggravated by the injury. Such a substantial aggravation must be documented by objective diagnostic findings, objective clinical findings, or objective test results. Subjective complaints may be evidence of such a substantial aggravation. However, subjective complaints without objective diagnostic findings, objective clinical findings, or objective test results are insufficient to substantiate a substantial aggravation.

(D) "Child" includes a posthumous child and a child legally adopted prior to the injury.

(E) "Family farm corporation" means a corporation founded for the purpose of farming agricultural land in which the majority of the voting stock is held by and the majority of the stockholders are persons or the spouse of persons related to each other within the fourth degree of kinship, according to the rules of the civil law, and at least one of the related persons is residing on or actively operating the farm, and none of whose stockholders are a corporation. A family farm corporation does not cease to qualify under this division where, by reason of any devise, bequest, or the operation of the laws of descent or distribution, the ownership of shares of voting stock is transferred to another person, as long as that person is within the degree of kinship stipulated in this division.

(F) "Occupational disease" means a disease contracted in the course of employment, which by its causes and the characteristics of its manifestation or the condition of the employment results in a hazard which distinguishes the employment in character from employment generally, and the employment creates a risk of contracting the disease in greater degree and in a different manner from the public in general.

(G) "Self-insuring employer" means an employer who is granted the privilege of paying compensation and benefits directly under section 4123.35 of the Revised Code, including a board of county commissioners for the sole purpose of constructing a

sports facility as defined in section 307.696 of the Revised Code, provided that the electors of the county in which the sports facility is to be built have approved construction of a sports facility by ballot election no later than November 6, 1997.

(H) "Public employer" means an employer as defined in division (B)(1) of this section.

(I) "Sexual conduct" means vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of gender; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal cavity of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

(J) "Other-states' insurer" means an insurance company that is authorized to provide workers' compensation insurance coverage in any of the states that permit employers to obtain insurance for workers' compensation claims through insurance companies.

(K) "Other-states' coverage" means insurance coverage purchased by an employer for workers' compensation claims that arise in a state or states other than this state and that are filed by the employees of the employer or those employee's dependents, as applicable, in that other state or those other states.

History. Effective Date: 08-01-2003; 11-05-2004; 2006 SB7 10-11-2006; 2008 SB334 09-11-2008

§ 4121.35. Staff hearing officers - jurisdiction.

Archive

Ohio Statutes

Title 41. LABOR AND INDUSTRY

Chapter 4121. INDUSTRIAL COMMISSION; BUREAU OF WORKERS' COMPENSATION

Includes legislation filed in the Secretary of State's office through 10/21/2011

§ 4121.35. Staff hearing officers - jurisdiction

(A) Staff hearing officers shall consider and decide all matters specified in division (B) of this section. All staff hearing officers are full-time employees of the industrial commission and shall be admitted to the practice of law in this state. Staff hearing officers shall not engage in any other activity that interferes with their full-time employment by the commission during normal working hours.

(B) Except as provided in division (D) of this section, staff hearing officers have original jurisdiction to hear and decide the following matters:

- (1) Applications for permanent, total disability awards pursuant to section **4123.58** of the Revised Code;
- (2) Appeals from an order of a district hearing officer issued under division (C) of section **4123.511** of the Revised Code;
- (3) Applications for additional awards for violation of a specific safety rule of the administrator of workers' compensation pursuant to Section 35 of Article II of the Ohio Constitution;
- (4) Applications for reconsideration pursuant to division (A) of section **4123.57** of the Revised Code. Decisions of the staff hearing officers on reconsideration pursuant to division (A) of section **4123.57** of the Revised Code are final.
- (5) Reviews of settlement agreements pursuant to section **4123.65** of the Revised Code. Decisions of the staff hearing officer under that section are final and not appealable to the commission or to court under section **4123.511** or **4123.512** of the Revised Code.

(C) The decision of a staff hearing officer under division (D) of section **4123.511** of the Revised Code is the decision of the commission for the purposes of section **4123.512** of the Revised Code unless the commission hears an appeal under division (E) of section **4123.511** of the Revised Code.

(D) Staff hearing officers shall hold hearings on all matters referred to them for hearing. Hearing procedures shall conform to the rules the commission adopts pursuant to section **4121.36** of the Revised Code.

History. Effective Date: 09-29-1997

§ 4121.36. Industrial commission hearing rules.

Archive

Ohio Statutes

Title 41. LABOR AND INDUSTRY

Chapter 4121. INDUSTRIAL COMMISSION; BUREAU OF WORKERS' COMPENSATION

Includes legislation filed in the Secretary of State's office through 10/21/2011

§ 4121.36. Industrial commission hearing rules

(A) The industrial commission shall adopt rules as to the conduct of all hearings before the commission and its staff and district hearing officers and the rendering of a decision and shall focus such rules on managing, directing, and otherwise ensuring a fair, equitable, and uniform hearing process. These rules shall provide for at least the following steps and procedures:

(1) Adequate notice to all parties and their representatives to ensure that no hearing is conducted unless all parties have the opportunity to be present and to present evidence and arguments in support of their positions or in rebuttal to the evidence or arguments of other parties;

(2) A public hearing;

(3) Written decisions;

(4) Impartial assignment of staff and district hearing officers and assignment of appeals from a decision of the administrator of workers' compensation to a district hearing officer located at the commission service office that is the closest in geographic proximity to the claimant's residence;

(5) Publication of a docket;

(6) The securing of the attendance or testimony of witnesses;

(7) Prehearing rules, including rules relative to discovery, the taking of depositions, and exchange of information relevant to a claim prior to the conduct of a hearing;

(8) The issuance of orders by the district or staff hearing officer who renders the decision.

(B) Every decision by a staff or district hearing officer or the commission shall be in writing and contain all of the following elements:

(1) A concise statement of the order or award;

(2) A notation as to notice provided and as to appearance of parties;

(3) Signatures of each commissioner or appropriate hearing officer on the original copy of the decision only, verifying the

commissioner's or hearing officer's vote;

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

(C) The commission shall adopt rules that require the regular rotation of district hearing officers with respect to the types of matters under consideration and that ensure that no district or staff hearing officer or the commission hears a claim unless all interested and affected parties have the opportunity to be present and to present evidence and arguments in support of their positions or in rebuttal to the evidence or arguments of other parties.

(D) 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, a public hearing, and a statement in any order of the circumstances that justified such expeditious hearings.

(E) All meetings of the commission and district and staff hearing officers shall be public with adequate notice, including if necessary, to the claimant, the employer, their representatives, and the administrator. Confidentiality of medical evidence presented at a hearing does not constitute a sufficient ground to relieve the requirement of a public hearing, but the presentation of privileged or confidential evidence shall not create any greater right of public inspection of evidence than presently exists.

(F) The commission shall compile all of its original memorandums, orders, and decisions in a journal and make the journal available to the public with sufficient indexing to allow orderly review of documents. The journal shall indicate the vote of each commissioner.

(G)(1) All original orders, rules, and memoranda, and decisions of the commission shall contain the signatures of two of the three commissioners and 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 employees, and any printed record of the "yes" and "no" vote of a commission member or of a hearing officer on such original is invalid.

(2) Written copies of final decisions of district or staff hearing officers or the commission that are mailed to the administrator, employee, employer, and their respective representatives need not contain the signatures of the hearing officer or commission members if the hearing officer or commission members have complied with divisions (B)(3) and (G)(1) of this section.

(H) The commission shall do both of the following:

(1) Appoint an individual as a hearing officer trainer who is in the unclassified civil service of the state and who serves at the pleasure of the commission. The trainer shall be an attorney registered to practice law in this state and have experience in training or education, and the ability to furnish the necessary training for district and staff hearing officers.

The hearing officer trainer shall develop and periodically update a training manual and such other training materials and courses as will adequately prepare district and staff hearing officers for their duties under this chapter and Chapter 4123. of the Revised Code. All district and staff hearing officers shall undergo the training courses developed by the hearing officer trainer, the cost of which the commission shall pay. The commission shall make the hearing officer manual and all revisions thereto available to the public at cost.

The commission shall have the final right of approval over all training manuals, courses, and other materials the hearing officer trainer develops and updates.

(2) Appoint a hearing administrator, who shall be in the classified civil service of the state, for each bureau service office, and sufficient support personnel for each hearing administrator, which support personnel shall be under the direct supervision of the hearing administrator. The hearing administrator shall do all of the following:

(a) Assist the commission in ensuring that district hearing officers comply with the time limitations for the holding of hearings and issuance of orders under section **4123.511** of the Revised Code. For that purpose, each hearing administrator shall prepare a monthly report identifying the status of all claims in its office and identifying specifically the claims which have not been decided within the time limits set forth in section **4123.511** of the Revised Code. The commission shall submit an annual report of all such reports to the standing committees of the house of representatives and of the state to which matters concerning workers' compensation are normally referred.

(b) Provide information to requesting parties or their representatives on the status of their claim;

(c) Issue compliance letters, upon a finding of good cause and without a formal hearing in all of the following areas:

(i) Divisions (B) and (C) of section **4123.651** of the Revised Code;

(ii) Requests for the taking of depositions of bureau and commission physicians;

(iii) The issuance of subpoenas;

(iv) The granting or denying of requests for continuances;

(v) Matters involving section **4123.522** of the Revised Code;

(vi) Requests for conducting telephone pre-hearing conferences;

(vii) Any other matter that will cause a free exchange of information prior to the formal hearing.

(d) Ensure that claim files are reviewed by the district hearing officer prior to the hearing to ensure that there is sufficient information to proceed to a hearing;

(e) Ensure that for occupational disease claims under section **4123.68** of the Revised Code that require a medical examination the medical examination is conducted prior to the hearing;

(f) Take the necessary steps to prepare a claim to proceed to a hearing where the parties agree and advise the hearing administrator that the claim is not ready for a hearing.

(I) The commission shall permit any person direct access to information contained in electronic data processing equipment regarding the status of a claim in the hearing process. The information shall indicate the number of days that the claim has been in process, the number of days the claim has been in its current location, and the number of days in the current point of the process within that location.

(J)(1) The industrial commission may establish an alternative dispute resolution process for workers' compensation claims that are within the commission's jurisdiction under Chapters 4121., 4123., 4127., and 4131. of the Revised Code when the commission determines that such a process is necessary. Notwithstanding sections **4121.34** and **4121.35** of the Revised Code, the commission may enter into personal service contracts with individuals who are qualified because of their education and experience to act as facilitators in the commission's alternative dispute resolution process.

(2) The parties' use of the alternative dispute resolution process is voluntary, and requires the agreement of all necessary parties. The use of the alternative dispute resolution process does not alter the rights or obligations of the parties, nor does it delay the timelines set forth in section **4123.511** of the Revised Code.

(3) The commission shall prepare monthly reports and submit those reports to the governor, the president of the senate, and the speaker of the house of representatives describing all of the following:

(a) The names of each facilitator employed under a personal service contract;

(b) The hourly amount of money and the total amount of money paid to each facilitator;

(c) The number of disputed issues resolved during that month by each facilitator;

(d) The number of decisions of each facilitator that were appealed by a party;

(e) A certification by the commission that the alternative dispute resolution process did not delay any hearing timelines as set forth in section **4123.511** of the Revised Code for any disputed issue.

(4) The commission may adopt rules in accordance with Chapter 119. of the Revised Code for the administration of any alternative dispute resolution process that the commission establishes.

History. Effective Date: 1996 HB413 10-01-1996

4123-3-09. Procedures in the processing of applications for benefits.

Ohio Administrative Code

4123. Bureau of Workers' Compensation

Chapter 4123-3. Claims Procedure

Updated for all rules final filed and adopted through November 21, 2011

4123-3-09. Procedures in the processing of applications for benefits

(A) Numbering and recording.

(1) Upon receipt, the bureau will assign a claim number to each initial application for benefits. The bureau shall provide the claim number to the claimant and employer. In cases where a deceased employee has filed, during his or her lifetime, an industrial claim for the injury or disability which is the subject matter of the death claim, the application for death benefits shall be assigned the original claim number.

(2) The claim number should be placed on all documents subsequently filed in each claim and the claim number should be given when inquiry is made concerning each claim.

(B) Initial review and processing of new claims.

Immediately after numbering and recording, all new claim applications, except applications of employees of self-insuring employers, shall be reviewed and processed by the bureau's claims specialists on the question of compensability. "Processing on the question of compensability" means making a determination on the validity of the industrial claim.

(1) Noncontested or undisputed claims.

A "contested or disputed claim," as used herein, is where the employer or the bureau of workers' compensation questions the validity of a claim for compensation or benefits. No claim shall be regarded as a contested or a disputed claim requiring a formal (public) hearing, solely by reason of incomplete information, unless every effort has been made to complete the record.

(a) If a state fund claim meets the statutory requirements of compensability, the claims specialist shall have authority to approve such claim for payment of medical bills and temporary total disability compensation. The approval of the claim must contain the description of the condition or conditions for which the claim is being allowed and part or parts of the body affected.

(b) In the processing of initial applications in state fund claims, requesting payment of compensation in addition to medical benefits, the claims specialist may approve temporary total disability compensation over a period not to exceed four weeks, without medical proof in the record, provided that the application has been properly completed and signed, certified by the employer and was otherwise noncontroversial. If medical proof was submitted with the initial application, the above limitation shall not apply. Upon approval of the claim the claimant shall be notified in writing that his or her attending physician's report will be necessary for consideration of any additional payment of compensation and an appropriate form shall be enclosed, with the necessary instructions, for the claimant's convenience.

(c) Immediately after the initial processing and execution of orders, claims shall be referred to the proper location for housing, as provided in division (B)(11) of section 4121.121 of the Revised Code.

(2) Contested or disputed claims.

(a) Contested or disputed claims as well as claims requiring investigation shall be referred, immediately after the initial review, to the appropriate office of the bureau from which investigation and determination of issues may be made most expeditiously.

(b) If the bureau or the employer contests the claim application and the claimant is not available for an adjudication due to the claimant's service in the armed services of the United States, the bureau shall continue the matter in accordance with the Servicemembers Civil Relief Act until such the as the claimant is available for adjudication of the claim.

(3) Applications for death benefits.

Immediately after numbering and recording, all applications for death benefits shall be referred to the appropriate office of the bureau from which investigation and determination of issues may be made most expeditiously. Every effort should be made to complete the investigation within the shortest time possible, depending on the facts and circumstances of each particular case, to enable prompt adjudication of such claims by the bureau.

(4) Contested (disputed) applications for workers' compensation benefits filed by employees of self-insuring employers shall be referred to the industrial commission for a hearing.

(C) Proof.

(1) In every instance the proof shall be of sufficient quantum and probative value to establish the jurisdiction of the bureau to consider the claim and determine the rights of the applicant to an award. "Quantum" means measurable quantity. "Probative" means having a tendency to prove or establish.

(2) Proof may be presented by affidavit, deposition, oral testimony, written statement, document, or other forms.

(3) The burden of proof is upon the claimant (applicant for workers' compensation benefits) to establish each essential element of the claim by preponderance of the evidence. Essential elements shall include, but will not be limited to:

(a) Establishing that the applicant is one of the persons who under the act have the right to file a claim for workers' compensation benefits;

(b) That the application was filed within the time period as required by law;

(c) That the alleged injury or occupational disease was sustained or contracted in the course of and arising out of employment;

(d) In death claims, that death was the direct and proximate result of an injury sustained or occupational disease contracted in the course of and arising out of employment; the necessary causal relationship between an injury or occupational disease and death may be established by submission of sufficient evidence to show that the injury or occupational disease aggravated or accelerated a pre-existing condition to such an extent that it substantially hastened death;

(e) Any other material issue in the claim, which means a question that must be established in order to determine claimant's

right to compensation and/or benefits.

"Preponderance of the evidence" means greater weight of evidence, taking into consideration all the evidence presented. Burden of proof does not necessarily relate to the number of witnesses or quantity of evidence submitted, but to its quality, such as merit, credibility and weight. The obligation of the claimant is to make proof to the reasonable degree of probability. A mere possibility is conjectural, speculative and does not meet the required standard.

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

(5) Procedure on employer's request for medical examination of the claimant by a doctor of employer's choice.

The employer may require a medical examination of the employee as provided in section 4123.651 of the Revised Code under the following circumstances:

(a) Such an examination, if requested, shall be in lieu of any rights under paragraph (C)(5)(b) of this rule and in no event will the claimant be examined on the same issue by a physician of the employer's choice more than one time. The exercise of this examination right shall not be allowed to delay the timely payment of benefits or scheduled hearings. Requests for further examinations will be made to the bureau or commission following the provisions of paragraph (C)(5)(b) of this rule. The cost of any examination initiated by the employer shall be paid by the employer including any fee required by the doctor, and the payment of all of the claimant's traveling and meal expenses, in a manner and at the rates as established by the bureau from time to time. If employed, the claimant 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 claimant with a proper form to be completed by the claimant for reimbursement of such expenses.

The employer shall promptly inform the bureau or the commission, as well as the claimant'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 bureau or commission and to the claimant's representative upon the employer's receipt of the report from the doctor.

Emergency treatment does not constitute an examination by the employer for the purposes of this rule. Treatment by a company doctor as the treating physician constitutes an examination for the purposes of this rule. The procedure set forth in paragraph (C)(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.

(b) If after one medical examination of the claimant under paragraph (C)(5)(a) of this rule, an employer asserts that a medical examination of the claimant by a doctor of the employer's choice is essential in the defense of the claim by the employer, a written request may be filed with the bureau for that purpose. In such request the employer shall state the date of the last examination of the claimant by a doctor of employer's choice on the question pending. If there was no such prior examination, the request must so indicate.

(c) If the claim is pending before the industrial commission or its hearing officers and the question sought to be clarified by such examination is not within the jurisdiction of the bureau (for example: permanent total disability), the request shall be referred, forthwith, to the industrial commission or to the appropriate hearing officer, as the case may be, for further consideration.

(d) If the question sought to be clarified by the requested examination is within the bureau's jurisdiction (for example:

temporary total disability in otherwise undisputed claim, allowance of additional condition), the bureau shall immediately act upon the request.

If, upon a review of the claim file the bureau is of the opinion that the request should be denied for the reason that the claimant has been recently examined by a doctor of the employer's choice, or for any other reason indicating that further examination would not be pertinent to the defense of the claim, based on the facts and circumstances of each particular case, the matter shall be referred, forthwith, to the appropriate district hearing officer for further consideration. In cases of temporary total disability, a medical examination performed within the past thirty days shall be regarded as "recent." If the question involves additional allowance of claim for an additional condition allegedly causally related to the allowed injury or occupational disease, a medical examination performed within the past sixty to ninety days may be regarded as "recent," depending on the nature and type of the condition and/or disability.

(e) All reasonable expenses incurred by the claimant in submitting to such examination; including any travel expense that the claimant may properly incur, shall be paid by the employer immediately upon 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 claimant with a proper form to be completed by the claimant for reimbursement for traveling expenses. In addition, if the request for such examination is filed on or after January 1, 1979, and the claimant sustains lost wages as a result of such examination, the employer shall reimburse the claimant for such lost wages within three weeks from the date of examination. Expenses incurred by the claimant and wages lost by reason of attending such examination are not to be paid in the claim.

(f) The employer shall make arrangements for such examination within fifteen days from the date of receipt of the order of approval. The examination shall be performed not later than within thirty days from the date of the receipt of approval.

The doctor's report shall be filed with the bureau immediately upon its receipt. Failure of the employer to comply with this rule shall not delay further action in the claim, unless it is established that the omission was due to causes beyond the employer's control.

(6) Procedure for obtaining the deposition of an examining physician. Authority to allow depositions is within the exclusive jurisdiction of the industrial commission. Any such request, if filed with the bureau, shall be referred, forthwith, to the industrial commission for further consideration.

(D) Hearings and orders issued pursuant thereto.

(1) Unless required by law or by the circumstances of the claim, the claim shall be adjudicated without a formal hearing.

(2) Disputed or contested claims shall be set for a formal (public) hearing on the question of allowance before the district hearing officers. A "disputed or contested claim," as used herein, is where the employer or the bureau of workers' compensation questions the validity of a claim for compensation or benefits. No claim shall be regarded as a contested or disputed claim requiring a formal (public) hearing, solely by reason of incomplete information unless every effort has been made to complete the record (see paragraph (F) of this rule).

(3) Upon the request of the industrial commission, the bureau shall assist the district hearing officers in administrative matters preliminary to formal (public) hearings, such as: the setting and publication of dockets, preparation and mailing notices of hearing, assistance in handling requests for continuance of hearing, etc. In addition, the bureau shall make available to each district hearing officer the facilities and assistance of bureau employees, as needed. In all such matters the bureau shall follow the procedural rules of the industrial commission.

(4) If prior to or after a formal hearing it is apparent that additional information is necessary for proper adjudication of a claim, the bureau shall be responsible for securing the necessary information.

(5) The administrator of the bureau of workers' compensation, or his or her designee, shall be given a reasonable advance notice of all formal hearings affecting the state insurance fund and/or the surplus fund. Such notice shall be in writing, sent by inter-office mail. In emergency hearings such notice may be by telephone in addition to inter-office mail. Time limits applicable to advance notification of other parties under the rules of the commission shall apply herein.

(6) The administrator or his or her designee may appear at such hearings to represent the interest of the state insurance fund and/or the surplus fund.

(7) The bureau shall make payment on orders of the commission, and district or staff hearing officers in accordance with law and rules of the bureau and the industrial commission.

(8) If the administrator or his or her designee is of the opinion that an emergency exists which requires an immediate hearing of a claim, he or she may request an emergency hearing. "Emergency," as used herein, means a sudden, generally unexpected occurrence or set of circumstances demanding immediate action. Such request shall be made in accordance with the rule of the industrial commission on emergency hearings (rule 4121-3-30 of the Administrative Code).

(E) Representation of claimants and employers before the bureau. Representation of claimants and employers before the bureau is a matter of individual free choice. The bureau does not require representation nor does it prohibit it. No one other than an attorney at law, authorized to practice in the state of Ohio, shall be permitted to represent claimants for a fee before the bureau.

(F) Procedure governing the appearances of a claimant, employer or their representatives before the bureau.

(1) If the bureau or the parties believe that clarification of issues will facilitate the processing of the claim, the claimant, employer, and/or their duly authorized representatives (see rule 4123-3-22 of the Administrative Code) shall be given an opportunity to be heard by the bureau (service office director, section director or their designee) on questions pertaining to the claim pending before the bureau.

(2) The parties may appear before the bureau together, at the same time, or separately, at different times, as circumstances may require; they may choose to be or not to be represented; a duly authorized representative may appear on behalf of a party, without the party being present.

(3) Evidence may be submitted in writing or offered orally. Oral statements shall be reduced to writing by the bureau's authorized personnel.

(4) The new evidence shall be made a part of the claim file to be considered by the bureau when the determination is made on the issue pending before the bureau.

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