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## STATEMENT OF FACTS

This is an appeal of right from a mandamus action originating in the Tenth District Court of Appeals and involving a workers' compensation issue. Appellee, Industrial Commission of Ohio ("commission") found that Appellant, Delores Roxbury ("Roxbury"), was not entitled to temporary total disability compensation ("TTD").

The Tenth District Court of Appeals found no abuse of discretion in the commission's order. *State ex rel. Roxbury v. Indus. Comm.*, 10th Dist. No. 11AP-125, 2012-Ohio-1310.

Roxbury was employed by Respondent, Catholic Healthcare Partners ("CHP") when she suffered a work-related injury in September 2004. Roxbury has not returned to work since the date of her injury. *Roxbury* at ¶ 10.<sup>1</sup> Her claim was allowed for lumbar strain; aggravation of pre-existing spondylosis L3-L4, L4-L5, retrolisthesis L3 on L2 and spinal stenosis L2-3, but disallowed for L2-3 disc bulge. *Roxbury* at ¶ 9-10. Roxbury received TTD until July 10, 2006 when a commission district hearing officer ("DHO") found that Roxbury's allowed physical conditions had reached maximum medical improvement ("MMI"). *Id.* at ¶11.

In September 2007, Roxbury sought the additional condition of dysthymic disorder, late onset ("dysthymic disorder") and requested a new period of TTD, beginning on August 24, 2007. *Id.* at ¶ 13. In support, Roxbury submitted a medical report and a C-84 from Raymond Richetta, Ph.D. *Id.* CHP had Roxbury examined by Walter Belay, Ph.D. Both Drs. Richetta and Belay found that Roxbury suffered from dysthymic disorder as a result of her work injury, but Dr. Belay disagreed with Dr. Richetta that the condition disabled her from returning to her former job. *Id.* at ¶ 13-14. A DHO additionally allowed dysthymic disorder but denied TTD based on Dr. Belay's report. *Id.* at ¶ 15. No appeal of this decision was filed.

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<sup>1</sup> None of the parties objected to the magistrate's conclusions of fact. To avoid filing unnecessary documents, the background information will be cited from the appellate court decision.

In 2008, Roxbury applied for permanent and total disability compensation (“PTD”) and was examined by Loren Shapiro, Ph.D., at the commission’s request. *Roxbury* at ¶ 17. Dr. Shapiro opined that Roxbury was not MMI because she was experiencing improvement with therapy and medication changes. Dr. Shapiro also concluded that she was capable of working with certain restrictions. *Id.* Relying in part on Dr. Shapiro’s report, the commission, on reconsideration of an SHO’s award of PTD, denied PTD, finding that Dr. Shapiro’s report could not support a finding that Roxbury’s psychological condition was permanent. Second Supplement at pp. 1-2 (“SS. \_\_\_”). Moreover, Roxbury “testified today [at hearing] that her allowed psychological condition is not work prohibitive.” (SS. 2.) Finding Roxbury physically capable of sedentary employment, the commission considered Roxbury’s vocational factors positive as Roxbury demonstrated an ability to “acquire new job skills via on-the-job-training,” adapt to a variety of work environments and maintain sustained employment. (SS. 2.) The commission noted Roxbury began receiving Social Security Disability Insurance benefits (“SSDI”) in March 2005, has not attempted vocational rehabilitation and made no effort to enhance her employability. *Id.* Finding Roxbury’s failure to make “all reasonable efforts to return to sustained remunerative employment” fatal, the commission vacated the SHO order and denied PTD. *Id.*

A few months later, Roxbury sought another period of TTD. *Roxbury* at ¶ 19. In support, Roxbury submitted a C-84 Application for TTD (“C-84”) signed by herself and Jamie Lichstein, Psy.D. on July 16, 2009. (SS. 5-6.) Dr. Lichstein is associated with Weinstein & Associates, the same practice as Dr. Richetta. She stated Roxbury’s disability began on August 24, 2007. (SS. 6.) According to her office note, July 16, 2009, was Dr. Lichstein’s “initial session with Ms. Roxbury to evaluate for a C-84 based on depression.” (SS. 7.) There is no indication, in either

the office note or the C-84, that Dr. Lichstein reviewed Roxbury's prior medical or psychological records. Dr. Lichstein notes that Roxbury states "she has been struggling to cope with her physical pain, the severity of her limitations and how drastically her life has been impacted by injury [and] that she has significant limitations with regard to what activities she is able to do." (SS. 7.) Dr. Lichstein concludes "Roxbury cannot return to work at this time." (SS. 7.)

Dr. Lichstein attempts to correct this discrepancy in her September 9, 2009, letter. (SS. 9.) Dr. Lichstein admits that no psychologist or psychiatrist has participated in Roxbury's care since her initial evaluation by Dr. Richetta in August 2007. Roxbury was referred to Dr. Lichstein by her counselor only because "Ohio BWC rules and regulations [state that] only a psychologist or a psychiatrist can complete a C-84." (SS. 9.) Dr. Lichstein then discussed the commission's PTD decision and draws the *legal conclusion* that, if Roxbury "had not yet reached MMI, then it only stands to reason that if she was not PTD then she was (and still is) TTD for this condition." (SS. 10.) Conspicuously, Dr. Lichstein never indicates that she reviewed the examining doctors' *medical records* for the period before she first examined Roxbury. Moreover, Dr. Lichstein admits that she is not actively involved in Roxbury's treatment but "will [now] closely monitor Ms. Roxbury's progress in therapy and her response to her psychotropic medications." (SS. 10.) Dr. Lichstein specifically relies on the disability opinion of Dr. Richetta, which the commission rejected two years earlier when it denied Roxbury TTD.

At the hearing before the DHO, Roxbury's counsel clarified that the requested disability period should start on November 5, 2007. (SS. 11.) The DHO denied TTD from November 5, 2007, through November 14, 2007, on the basis of *res judicata*, because the commission previously denied this period with Roxbury's prior application for TTD. *Id.* The DHO denied the remaining period of disability because Roxbury herself reports that her physical, not

psychological, conditions prevent her return to work. (SS. 16.)

On appeal, the SHO awarded TTD beginning on November 20, 2007, and continuing based upon the C-84 reports from “Weinstein & Associates.” (SS. 17.) The commission initially refused CHP’s appeal, but later vacated its prior refusal and granted reconsideration. (SS. 19.)

Following a hearing on the merits, the commission exercised continuing jurisdiction under R.C. 4123.52 because the SHO made “a clear mistake of law” by relying on an improper retrospective opinion to award TTD. (SS. 22.) The commission vacated the SHO order and denied TTD from November 15, 2007, through July 15, 2009, (the day before Dr. Lichstein’s first evaluation of Roxbury), based upon the report of Dr. Belay, who opined that Roxbury’s dysthymic disorder did not prevent her return to work. (SS. 23.) The commission specifically rejected Dr. Lichstein’s report because she offered a retrospective opinion without a review of the observations and findings of all the examining doctors from the retrospective period. *Id.* The commission then denied TTD for the period after Dr. Lichstein’s first visit because Roxbury voluntarily abandoned the workforce. (SS. 23.) The commission found that Roxbury retained the physical capacity for sedentary work, but made no attempt to return to the workforce, thus, voluntarily abandoned the workforce. *Id.* The commission denied TTD based on voluntary abandonment. (SS. 23.)

Roxbury sought a writ of mandamus to vacate the commission’s decision. The appellate court referred the matter to a magistrate, who found that the commission had properly exercised jurisdiction to correct the SHO’s reliance upon an invalid medical opinion. Roxbury did not challenge the magistrate’s decision regarding retrospective opinion but did challenge the magistrate’s conclusions regarding voluntary abandonment. *Roxbury* at ¶ 3. The appellate court found no abuse of discretion in the commission’s order. *Roxbury* at ¶ 6. The appellate court

overruled Roxbury's objections and adopted the magistrate's decision, although Roxbury retired from CHP when she was temporarily disabled, her actions since that time demonstrate voluntary abandonment of the workforce and barred TTD. *Roxbury* at ¶ 7 and 60. Roxbury appealed to this court.

### ARGUMENT

Mandamus is an extraordinary remedy brought in the name of the State, the essential purpose of which is to command the performance of an act that the law specially enjoins as a duty. R.C. 2731.01. To obtain a writ of mandamus, the relator must demonstrate *a clear legal right* to the relief sought in addition to respondent's *clear legal duty* to provide such relief. *State ex rel. Pressley v. Indus. Comm.*, 11 Ohio St.2d 141 (1967). Moreover, a mandamus proceeding is not a de novo review of the evidence, with the court substituting its judgment for that of the commission. *State ex rel. Mobley v. Indus. Comm.*, 78 Ohio St. 3d 579, 584 (1997).

The commission's decisions are "presumed to be valid and performed in good faith and judgment," absent a demonstrated abuse of discretion. *State ex rel. Stephenson v. Indus. Comm.*, 31 Ohio St.3d 167, 170 (1987). An abuse of discretion is "not merely an error in judgment but a perversity of will, passion, prejudice, partiality, or moral delinquency, to be found only where there is no evidence upon which the Commission could have based its decision." *State ex rel. Commercial Lovelace Motor Freight v. Lancaster*, 22 Ohio St.3d 191, 193 (1986). The "court's role in the review of mandamus actions [is] limited to a determination as to whether there is some evidence in the record to support the commission's stated basis for its decision." *State ex rel. Burley v. Coil Packing, Inc.*, 31 Ohio St.3d 18, 21 (1987). "It is immaterial whether other evidence, even if greater in quality and/or quantity, supports a decision contrary to the commission's." *State ex rel. Pass v. C.S.T. Extraction Co.*, 74 Ohio St.3d 373, 376 (1996). The

“commission is the *exclusive evaluator of [the] weight and credibility*” of the evidence presented. *State ex rel. Athey v. Indus. Comm.*, 89 Ohio St.3d 473, 475 (2000) (Emphasis added). Thus, the commission does not abuse its discretion and its order is valid so long as “some evidence” supports the commission’s decision regardless of the quantity or quality of other evidence to the contrary. The order in this case is supported by some evidence and should not be disturbed.

**Appellee Industrial Commission’s Proposition of Law No. 1:**

**Voluntary abandonment is primarily a question of intent. A claimant’s actions or inaction in the years after an involuntary departure from the workforce may demonstrate a subsequent voluntary intent to abandon the workforce.**

TTD is payable when, due to an industrial injury, a claimant is unable to a return to her former position of employment. R.C. 4123.56(A). TTD benefits compensate an injured worker for the loss of earnings while the injury heals. *State ex rel. Ashcraft v. Indus. Comm.*, 34 Ohio St.3d 42 (1987). TTD is not payable when the claimant’s disability or refusal to work is caused by factors other than the industrial injury. *State ex rel. Ramirez v. Indus. Comm.*, 69 Ohio St.2d 630 (1982). “Fundamental to receipt of any workers’ compensation benefits is a causal relationship between injury and [the] disability.” *State ex rel. Ellis Super Valu, Inc. v. Indus. Comm.* 115 Ohio St.3d 224, 226, 2007-Ohio-4920. When a claimant’s voluntary actions, rather than an industrial injury, cause a loss of wages, the claimant is not be eligible for TTD. *State ex rel. Baker v. Indus. Comm.*, 89 Ohio St.3d 376 (2000).

To determine whether a claimant has voluntarily abandoned the workforce, the commission must consider the intent demonstrated not only when the claimant initially left the workforce but also her actions since her departure. Contrary to Roxbury’s argument, the focus for determining whether the claimant abandons the workforce is not limited to the date of the industrial injury or

the date the claimant first left the workforce. “If [the claimant’s] departure [from his former employment] was related to the injury, it is not necessary for the claimant to first obtain other employment [to be eligible for TTD], but it is necessary that the claimant has not foreclosed that possibility by abandoning the entire workforce.” *State ex rel. Lackey v. Indus. Comm.*, 129 Ohio St.3d 119, 121, 2011-Ohio-3089, ¶ 11. “[W]here a claimant has voluntarily retired and has no intention of returning to his former position of employment, the claimant is not prevented from returning to the former position of employment by the industrial injury but by his own actions. (Citations omitted).” *State ex rel. Consol. Biscuit Co. v. Indus. Comm.*, 10th Dist. No. 06AP-47, 2007-Ohio-2214, ¶ 34, affirmed by *State ex rel. Consol. Biscuit Co. v. Indus. Comm.*, 117 Ohio St.3d 541, 2008-Ohio-1738. A claimant’s intent, not only at the time of retirement but also in the years that follow, may demonstrate that the claimant abandoned the workforce. *State ex rel. Pierron v. Indus. Comm.*, 120 Ohio St.3d 40, 42, 2008-Ohio-5245, ¶ 10. In *Pierron*, although the claimant did not initiate his departure from his former position, the Court held that “his actions -- or more accurately inaction -- in the months and years that followed evinced an intent to leave the work force.” *Id.* at ¶ 10. The same principle applies in this case.

While Roxbury left her former job due to her injury, when she was able to perform light duty work, she refused. The commission found that, when Roxbury reached MMI she retained the ability to perform sedentary work. (SS. 2.) Despite this ability, Roxbury testified that she never attempted to return to the workforce in any capacity. (SS. 23.) Roxbury never participated in any vocational rehabilitation to enhance her job skills and testified she had “no desire” to participate in any rehabilitation program even if authorized by the BWC. (SS. 26.) Because “some evidence” supports the commission’s decision that Roxbury voluntarily abandoned the workforce in general, with no intent to return, she is not entitled to TTD. The appellate court

correctly found that the commission did not abuse its discretion. *Roxbury* at ¶ 6. Accordingly, this Court should affirm the appellate court's decision and deny the request for a writ of mandamus.

**Appellee Industrial Commission's Proposition of Law No. 2:**

**A party cannot assign as error on appeal the court's adoption of any finding of fact or conclusion of law unless the party has objected to that finding or conclusion under to Civ.R. 53(D)(3)(b)(iv).**

In her second proposition of law before this Court, Roxbury raises the issue of Dr. Lichstein's retrospective opinion. However, Roxbury cannot now assert that the appellate court erred by adopting the magistrate's decision regarding Dr. Lichstein's retrospective opinion, because she failed to object to that portion of the magistrate's decision. Roxbury did file objections in accordance with Loc.R. 12(M)(3) of the Tenth Appellate Judicial District, but objected only to the magistrate's finding as to the issue of voluntary abandonment. Roxbury's argument as to the portion of the appellate court's decision regarding Dr. Lichstein's opinion directly contravenes the Civil Rules, which clearly mandate that a party who does not object to a finding of a lower tribunal may not assign the same finding as error on appeal. Civ. R. 53(D)(3)(b)(iv) provides:

Except for a claim of plain error, a party *shall not assign as error on appeal* the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), *unless the party has objected* to that finding or conclusion as required by Civ.R. 53(D)(3)(b).

(Emphasis added.) Roxbury effectively waived her right to appeal that alleged error when she failed to object to the magistrate's decision on the same issue. *State ex rel. Wilson v. Indus. Comm.*, 100 Ohio St.3d 23, 2003-Ohio-4832 (per curiam); *State ex rel. Abate v. Indus. Comm.*, 96 Ohio St.3d 343, 2002-Ohio-4796 (per curiam); *State ex rel. Booher v. Honda of Am. Mfg.*, 88

Ohio St.3d 52, 2000-Ohio-269 (per curiam). Roxbury must have objected to the magistrate's decision as to Dr. Lichstein's opinion in order to perfect her appeal to this Court on the same issue.

Before the magistrate, Roxbury argued that, because she treated with a counselor and was previously examined by a psychologist in the same practice with Dr. Lichstein, Dr. Lichstein should be treated as a treating physician. Roxbury also argued that because Dr. Lichstein was in the same practice as the treating counselor, she necessarily reviewed the records from the practice. The magistrate rejected both Roxbury's arguments and found that the commission properly exercised continuing jurisdiction because the SHO improperly relied on the Dr. Lichstein's retrospective opinion. *Roxbury* at ¶ 36. The magistrate acknowledged that Dr. Lichstein's September 2009 letter indicated that she reviewed the treatment records of other providers in her practice but there is no indication that Dr. Lichstein reviewed the report from Dr. Belay's examination of Roxbury. *Roxbury* at ¶ 48. Roxbury did not object to this portion of the magistrate's decision. *Id.* at ¶5. Because she failed to object in accordance with the local and civil rules, Roxbury cannot legitimately pursue this portion of her appeal to this Court. Accordingly, the portion of the appellate court's decision addressing its decision and judgment as to Dr. Lichstein's retrospective opinion must be affirmed.

Even assuming that Roxbury had properly brought this matter before this Court, her argument is without merit. The commission may exercise continuing jurisdiction over an SHO's award of TTD where the SHO improperly relied on a retrospective medical opinion. "The jurisdiction of the industrial commission \* \* \* over each case [is] continuing, and the commission may make such modification or change with respect thereto, as, in its opinion, is justified." R.C. 4123.52. The commission's broad statutory authority under R.C. 4123.52 was

judicially limited to five situations, namely: (1) new and changed conditions; (2) clear mistake of fact; (3) cases involving fraud; (4) error by an inferior tribunal; and, (5) clear mistake of law. *State ex rel. Washington v. Indus. Comm.*, 112 Ohio St.3d 86, 2006-Ohio-6505, ¶13, citing *State ex rel. Nicholls v. Indus. Comm.*, 81 Ohio St.3d 454, 459, 1998-Ohio-616. Here the commission exercised its continuing jurisdiction based on a finding that the SHO had made a clear mistake of law by relying on invalid medical evidence to grant TTD for the period before Dr. Lichstein first saw Roxbury.

Dr. Lichstein improperly offered a retrospective disability opinion without reviewing the findings of all the examining physicians during the retrospective period. In general, a doctor cannot opine as to the claimant's extent of disability for a period prior to the date of that doctor's examination. *State ex rel. Foor v. Rockwell Internatl.*, 78 Ohio St.3d 396, 399, 1997-Ohio-200. The commission cannot rely on an examining doctor's report, whether that examination is for treatment or independent evaluation, to grant or deny disability compensation for a period of disability before the date of the examination. *State ex rel. Foreman v. Indus. Comm.*, 64 Ohio St.3d 70 (1992), 72; see also, *State ex rel. Case v. Indus. Comm.*, 28 Ohio St.3d 383, 387 (1986). The commission cannot rely on a treating physician's report to award permanent total disability compensation where the doctor opined that the claimant's condition became permanently disabling nearly four years before the physician's examination. *State ex rel. Abner v. Mayfield*, 62 Ohio St.3d 423 (1992).

An exception to the prohibition against retrospective opinions arises when certain safeguards are observed. A retrospective opinion is akin to "an expert's response to a hypothetical question." *State ex rel. Bowie v. Greater Cleveland Regional Transit Auth.*, 75 Ohio St.3d 458 (1996), 460, citing *State ex rel. Wallace v. Indus. Comm.*, 57 Ohio St.2d 55

(1979), *State ex rel. Hughes v. Goodyear Tire & Rubber Co.*, 26 Ohio St.3d 71 (1986), *State ex rel. Lampkins v. Dayton Malleable, Inc.*, 45 Ohio St.3d 14 (1989). Like a doctor's response to a hypothetical question, a retrospective opinion is valid only if the doctor reviewed all relevant medical evidence generated prior to the doctor's examination. *Bowie*, supra at 460. When a retrospective opinion is offered, the examining physician becomes a non-examining physician for the retrospective period and is required to accept the physical findings of the examining physicians during the retrospective period. *Bowie*, supra at 460, citing *Wallace*, supra. Dr. Lichstein's report contains no specific acknowledgement that she reviewed any treating providers' records. *Roxbury* at ¶ 45. As in *State ex rel. Gray v. Hurosky*, 10th Dist. No. 05AP-1163, 2006-Ohio-4985, ¶ 35-39, one can infer that Dr. Lichstein reviewed Dr. Richetta's report as the start date for Dr. Lichstein's disability opinion corresponds to the date of Dr. Richetta's opinion. There is no indication that Dr. Lichstein was aware of or reviewed the reports of Drs. Shapiro and Belay. *Roxbury* at ¶ 45. The appellate court found this oversight particularly troubling because both reports are lengthy and Dr. Belay opined that Roxbury's psychological condition did not disable her from her former position. *Roxbury* at ¶ 46. Moreover, the commission relied on Dr. Belay's report to deny Roxbury's prior request for TTD based on her psychological condition. *Id.* at ¶ 47. The appellate court found no abuse of discretion in the commission's exercise of continuing jurisdiction, as Dr. Lichstein's report was an invalid retrospective opinion. *Id.* at ¶ 48.

Thus, Roxbury has not properly raised this issue before this court, as she failed to make any objection to the magistrate's decision as to findings regarding Dr. Lichstein's opinion. Moreover, even if she had properly brought the matter to this Court's attention, the court of appeals did not err in holding that the commission had properly exercised its continuing

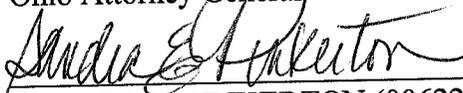
jurisdiction, as the commission had some evidence to hold that Dr. Lichstein had failed to consider all of the relevant medical evidence in making her opinion.

### CONCLUSION

The court of appeals properly found the commission order denying TTD is supported by “some evidence” that Roxbury abandoned the workforce when she retained the capacity to perform sedentary work but never attempted to re-enter the workforce. Moreover, the appellate found that the commission was wholly within its discretion to exercise continuing jurisdiction to vacate the SHO’s order relying on an invalid retrospective medical opinion. The commission’s decision is supported by “some evidence” and the appellate correctly denied Roxbury’s request for a writ of mandamus. Accordingly, the decision of the court of appeals should be affirmed and the requested writ of mandamus denied.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served on this 13<sup>th</sup> day of March, 2013

on:

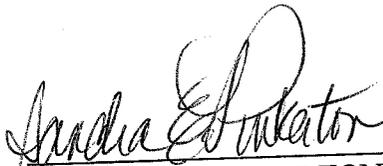
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# APPENDIX

**Ohio Statutes**

**Title 41. LABOR AND INDUSTRY**

**Chapter 4123. WORKERS' COMPENSATION**

*Includes legislation filed in the Secretary of State's office through 7/1/2011, with the exception of HB 153*

**§ 4123.52. [Effective Until 7/29/2011] Continuing jurisdiction of commission**

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

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

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

The commission and administrator of workers' compensation each may, by general rules, provide for the retention and destruction of all other records in their possession or under their control pursuant to section 121.211 and sections 149.34 to 149.36 of the Revised Code. The bureau of workers' compensation may purchase or rent required equipment for the document retention media, as determined necessary to preserve the records. Photographs, microphotographs, microfilm, films, or other direct document retention media, when properly identified, have the same effect as the original record and may be offered in like manner and may be received as evidence in proceedings before the industrial commission, staff hearing officers, and district hearing officers, and in any court where the original record could have been introduced.

**History.** Effective Date: 06-14-2000; 2006 SB7 10-11-2006

**Note:** This section is set out twice. See also § 4123.52, as amended by 129th General Assembly File No. 16, HB 123, §101, eff. 7/29/2011.

PAGE'S OHIO REVISED CODE ANNOTATED  
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\*\*\* CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY  
AND FILED WITH THE SECRETARY OF STATE THROUGH DECEMBER 9, 2008 \*\*\*  
\*\*\* ANNOTATIONS CURRENT THROUGH SEPTEMBER 1, 2008 \*\*\*  
\*\*\* OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH NOVEMBER 11, 2008 \*\*\*

TITLE 41. LABOR AND INDUSTRY  
CHAPTER 4123. WORKERS' COMPENSATION  
COMPENSATION; BENEFITS

**Go to the Ohio Code Archive Directory**

*ORC Ann. 4123.56 (2008)*

§ 4123.56. Temporary total disability benefits; wage loss compensation

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

After two hundred weeks of temporary total disability benefits, the medical section of the bureau of workers' compensation shall schedule the claimant for an examination for an evaluation to determine whether or not the temporary disability has become permanent. A self-insuring employer shall notify the bureau im-

mediately after payment of two hundred weeks of temporary total disability and request that the bureau schedule the claimant for such an examination.

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

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

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

(B) (1) If an employee in a claim allowed under this chapter suffers a wage loss as a result of returning to employment other than the employee's former position of employment due to an injury or occupational disease, the employee shall receive compensation at sixty-six and two-thirds per cent of the difference between the employee's average weekly wage and the employee's present earnings not to exceed the statewide average weekly wage. The payments may continue for up to a maximum of two hundred weeks, but the payments shall be reduced by the corresponding number of weeks in which the employee receives payments pursuant to division (B) of *section 4121.67 Of the Revised Code*.

(2) If an employee in a claim allowed under this chapter suffers a wage loss as a result of being unable to find employment consistent with the employee's disability resulting from the employee's injury or occupational disease, the employee shall receive compensation at sixty-six and two-thirds per cent of the difference between the employee's average weekly wage and the employee's present earnings, not to exceed the statewide average weekly wage. The payments may continue for up to a maximum of fifty-two weeks. The first twenty-six weeks of payments under division (B)(2) of this section shall be in addition to the maximum of two hundred weeks of payments allowed under division (B)(1) of this section. If an employee in a claim allowed under this chapter receives compensation under division (B)(2) of this section in excess of twenty-six weeks, the number of weeks of compensation allowable under division (B)(1) of this section shall be reduced by the corresponding number of weeks in excess of twenty-six, and up to fifty-two, that is allowable under division (B)(1) of this section.

(3) The number of weeks of wage loss payable to an employee under divisions (B)(1) and (2) of this section shall not exceed two hundred and twenty-six weeks in the aggregate.

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

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

**HISTORY:**

GC § 1465-79; 103 v 72(85), § 32; 108 v Ptl, 313; 110 v 224; 117 v 252; 119 v 565; 121 v 660; 122 v 268(280); 123 v 250; 124 v 806; Bureau of Code Revision, 10-1-53; 126 v 1015(1028) (Eff 10-5-55); 128 v 743(757) (Eff 11-2-59); 130 v 926 (Eff 10-1-63); 132 v H 268 (Eff 12-11-67); 133 v H 1 (Eff 3-18-69); 134 v H 280 (Eff 9-20-71); 135 v H 417 (Eff 11-16-73); 136 v H 714 (Eff 1-1-76); 136 v S 545 (Eff 1-17-77); 137 v H 1282 (Eff 1-1-79); 138 v S 30 (Eff 5-14-79); 138 v H 184 (Eff 6-27-79); 141 v S 307 (Eff 8-22-86); 141 v S 390 (Eff 7-17-86); 141 v S 411, § 3 (Eff 7-17-86); 141 v S 411, § 5 (Eff 8-22-86); 143 v H 222 (Eff 11-3-89); 145 v H 107 (Eff 10-20-93); 147 v S 45; \* 148 v H 471. Eff 7-1-2000; 151 v S 7, § 1, 6-30-06.

**NOTES:**

## Section Notes

## FOOTNOTE

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

See provisions of § 3 of 151 v S 7 following *RC § 4121.10*.

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

## EFFECT OF AMENDMENTS

151 v S 7, June 30, 2006, rewrote (B).

Ohio Rules

RULES OF CIVIL PROCEDURE

Title VI. TRIALS

As amended through July 1, 2010

Rule 53. Magistrates

(A) **Appointment.** A court of record may appoint one or more magistrates who shall be attorneys at law admitted to practice in Ohio.

(B) **Compensation.** The compensation of magistrates shall be fixed by the court, and no part of the compensation shall be taxed as costs under Civ. R. 54(D).

(C) **Authority.**

(1) *Scope.* To assist courts of record and pursuant to reference under Civ. R. 53(D)(1), magistrates are authorized, subject to the terms of the relevant reference, to do any of the following:

(a) Determine any motion in any case;

(b) Conduct the trial of any case that will not be tried to a jury;

(c) Upon unanimous written consent of the parties, preside over the trial of any case that will be tried to a jury;

(d) Conduct proceedings upon application for the issuance of a temporary protection order as authorized by law;

(e) Exercise any other authority specifically vested in magistrates by statute and consistent with this rule.

(2) *Regulation of proceedings.* In performing the responsibilities described in Civ. R. 53(C)(1), magistrates are authorized, subject to the terms of the relevant reference, to regulate all proceedings as if by the court and to do everything necessary for the efficient performance of those responsibilities, including but not limited to, the following:

(a) Issuing subpoenas for the attendance of witnesses and the production of evidence;

(b) Ruling upon the admissibility of evidence;

(c) Putting witnesses under oath and examining them;

(d) Calling the parties to the action and examining them under oath;

(e) When necessary to obtain the presence of an alleged contemnor in cases involving direct or indirect contempt

of court, issuing an attachment for the alleged contemnor and setting the type, amount, and any conditions of bail pursuant to Crim. R. 46;

(f) Imposing, subject to Civ. R. 53(D)(8), appropriate sanctions for civil or criminal contempt committed in the presence of the magistrate.

(D) **Proceedings in Matters Referred to Magistrates.**

(1) *Reference by court of record.*

(a) *Purpose and method.* A court of record may, for one or more of the purposes described in Civ. R. 53(C)(1), refer a particular case or matter or a category of cases or matters to a magistrate by a specific or general order of reference or by rule.

(b) *Limitation.* A court of record may limit a reference by specifying or limiting the magistrate's powers, including but not limited to, directing the magistrate to determine only particular issues, directing the magistrate to perform particular responsibilities, directing the magistrate to receive and report evidence only, fixing the time and place for beginning and closing any hearings, or fixing the time for filing any magistrate's decision on the matter or matters referred.

(2) *Magistrate's order; motion to set aside magistrate's order.*

(a) *Magistrate's order.*

(i) *Nature of order.* Subject to the terms of the relevant reference, a magistrate may enter orders without judicial approval if necessary to regulate the proceedings and if not dispositive of a claim or defense of a party.

(ii) *Form, filing, and service of magistrate's order.* A magistrate's order shall be in writing, identified as a magistrate's order in the caption, signed by the magistrate, filed with the clerk, and served by the clerk on all parties or their attorneys.

(b) *Motion to set aside magistrate's order.* Any party may file a motion with the court to set aside a magistrate's order. The motion shall state the moving party's reasons with particularity and shall be filed not later than ten days after the magistrate's order is filed. The pendency of a motion to set aside does not stay the effectiveness of the

magistrate's order, though the magistrate or the court may by order stay the effectiveness of a magistrate's order.

(3) *Magistrate's decision; objections to magistrate's decision.*

(a) *Magistrate's decision.*

(i) *When required.* Subject to the terms of the relevant reference, a magistrate shall prepare a magistrate's decision respecting any matter referred under Civ. R. 53(D)(1).

(ii) *Findings of fact and conclusions of law.* Subject to the terms of the relevant reference, a magistrate's decision may be general unless findings of fact and conclusions of law are timely requested by a party or otherwise required by law. A request for findings of fact and conclusions of law shall be made before the entry of a magistrate's decision or within seven days after the filing of a magistrate's decision. If a request for findings of fact and conclusions of law is timely made, the magistrate may require any or all of the parties to submit proposed findings of fact and conclusions of law.

(iii) *Form; filing, and service of magistrate's decision.* A magistrate's decision shall be in writing, identified as a magistrate's decision in the caption, signed by the magistrate, filed with the clerk, and served by the clerk on all parties or their attorneys no later than three days after the decision is filed. A magistrate's decision shall indicate conspicuously that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ. R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ. R. 53(D)(3)(b).

(b) *Objections to magistrate's decision.*

(i) *Time for filing.* A party may file written objections to a magistrate's decision within fourteen days of the filing of the decision, whether or not the court has adopted the decision during that fourteen-day period as permitted by Civ. R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. If a party makes a timely request for findings of fact and conclusions of law, the time for filing objections begins to run when the magistrate files a decision that includes findings of fact and conclusions of law.

(ii) *Specificity of objection.* An objection to a magistrate's decision shall be specific and state with particularity all grounds for objection.

(iii) *Objection to magistrate's factual finding; transcript or affidavit.* An objection to a factual finding, whether or not specifically designated as a finding of fact under Civ. R. 53(D)(3)(a)(ii), shall be supported by a transcript of all

the evidence submitted to the magistrate relevant to that finding or an affidavit of that evidence if a transcript is not available. With leave of court, alternative technology or manner of reviewing the relevant evidence may be considered. The objecting party shall file the transcript or affidavit with the court within thirty days after filing objections unless the court extends the time in writing for preparation of the transcript or other good cause. If a party files timely objections prior to the date on which a transcript is prepared, the party may seek leave of court to supplement the objections.

(iv) *Waiver of right to assign adoption by court as error on appeal.* Except for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ. R. 53(D)(3)(a)(ii), unless the party has objected to that finding or conclusion as required by Civ. R. 53(D)(3)(b).

(4) *Action of court on magistrate's decision and on any objections to magistrate's decision; entry of judgment or interim order by court.*

(a) *Action of court required.* A magistrate's decision is not effective unless adopted by the court.

(b) *Action on magistrate's decision.* Whether or not objections are timely filed, a court may adopt or reject a magistrate's decision in whole or in part, with or without modification. A court may hear a previously-referred matter, take additional evidence, or return a matter to a magistrate.

(c) *If no objections are filed.* If no timely objections are filed, the court may adopt a magistrate's decision, unless it determines that there is an error of law or other defect evident on the face of the magistrate's decision.

(d) *Action on objections.* If one or more objections to a magistrate's decision are timely filed, the court shall rule on those objections. In ruling on objections, the court shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law. Before so ruling, the court may hear additional evidence but may refuse to do so unless the objecting party demonstrates that the party could not, with reasonable diligence, have produced that evidence for consideration by the magistrate.

(e) *Entry of judgment or interim order by court.* A court that adopts, rejects, or modifies a magistrate's decision shall also enter a judgment or interim order.

(i) *Judgment.* The court may enter a judgment either during the fourteen days permitted by Civ. R. 53(D)(3)(b)(i) for the filing of objections to a magistrate's decision or after the fourteen days have expired. If the court enters a judgment during the fourteen days

permitted by Civ. R. 53(D)(3)(b)(i) for the filing of objections, the timely filing of objections to the magistrate's decision shall operate as an automatic stay of execution of the judgment until the court disposes of those objections and vacates, modifies, or adheres to the judgment previously entered.

(ii) *Interim order.* The court may enter an interim order on the basis of a magistrate's decision without waiting for or ruling on timely objections by the parties where immediate relief is justified. The timely filing of objections does not stay the execution of an interim order, but an interim order shall not extend more than twenty-eight days from the date of entry, subject to extension by the court in increments of twenty-eight additional days for good cause shown. An interim order shall comply with Civ. R. 54(A), be journalized pursuant to Civ. R. 58(A), and be served pursuant to Civ. R. 58(B).

(5) *Extension of time.* For good cause shown, the court shall allow a reasonable extension of time for a party to file a motion to set aside a magistrate's order or file objections to a magistrate's decision. "Good cause" includes, but is not limited to, a failure by the clerk to timely serve the party seeking the extension with the magistrate's order or decision.

(6) *Disqualification of a magistrate.* Disqualification of a magistrate for bias or other cause is within the discretion of the court and may be sought by motion filed with the court.

(7) *Recording of proceedings before a magistrate.* Except as otherwise provided by law, all proceedings before a magistrate shall be recorded in accordance with procedures established by the court.

(8) *Contempt in the presence of a magistrate.*

(a) *Contempt order.* Contempt sanctions under Civ. R. 53(C)(2)(f) may be imposed only by a written order that recites the facts and certifies that the magistrate saw or heard the conduct constituting contempt.

(b) *Filing and provision of copies of contempt order.* A contempt order shall be filed and copies provided forthwith by the clerk to the appropriate judge of the court and to the subject of the order.

(c) *Review of contempt order by court; bail.* The subject of a contempt order may by motion obtain immediate review by a judge. A judge or the magistrate entering the contempt order may set bail pending judicial review of the order.

**History.** Effective: July 1, 1970; amended effective July 1, 1975; July 1, 1985; July 1, 1992; July 1, 1993; July 1, 1995; July 1, 1996; July 1, 1998; July 1, 2003; July 1, 2006.

**Note:**

reconsideration does not extend the time for filing a notice of appeal from the judgment of this Court.

## RULE 12

### ORIGINAL ACTIONS

#### (A) How Instituted

An original action, other than habeas corpus, shall be instituted by the filing of a complaint, together with three copies thereof and sufficient service copies, and service shall be made, and such action shall proceed as any civil action under the Ohio Rules of Civil Procedure.

#### (B) Deposit for Costs

At the time of filing the complaint in an original action in this court, the relator shall deposit with the clerk of this court the sum of one hundred dollars (\$100), as security for the payment of costs.

A party claiming to be indigent shall file with their complaint a motion for leave to proceed *in forma pauperis* supported by an affidavit showing indigency and indicating their actual financial condition and the disposition of any request for similar leave sought in any other court. The motion shall comply with Loc.R. 6 of this court. Upon filing of the motion, the clerk shall forthwith forward a copy to the court administrator and the motion shall be determined in accordance with Loc.R. 6(B). A respondent may oppose the granting of a motion to proceed *in forma pauperis* in the manner set forth in App.R. 15(B). The court will *sua sponte* dismiss any complaint found to be frivolous, malicious or abusive.

#### (C) Alternative Writs

In the absence of extraordinary circumstances, no alternative writ will be issued in an original action, other than a habeas corpus action.

(D) Motion to Dismiss

When a motion to dismiss is filed, four copies of a brief in support of such motion must be filed with such motion, and the movant shall indicate whether ruling on the motion will dispose of the merits.

(E) Brief in Opposition to Motion to Dismiss

Four copies of a brief in opposition to a motion to dismiss shall be filed within fifteen days of the filing of such motion with an indication whether ruling on the motion may be deemed dispositive of the merits.

(F) Oral Argument on Motion to Dismiss

All motions will be ruled upon without oral argument before the Court, except where the Court requests such argument.

(G) Presentation of Evidence

To facilitate the consideration and disposition of original actions, counsel should, whenever possible, file an agreed statement of facts.

When the evidence to be considered consists of all or part of an official record or the record of proceedings before an administrative agency, such as the Industrial Commission claim file, a stipulated or certified copy, rather than the original, must be submitted pursuant to Civ.R. 44, and Evid.R. 902 and 1005. Unless the parties enter into a stipulation concerning the evidence to be submitted to the Court and attach to the stipulation legible copies of such evidentiary materials relevant to the determination of the action, each party shall file with the Court legible certified copies of evidentiary materials

the party feels relevant to the issues before the Court. An original public record will not be accepted for filing as evidence. Two (2) copies of the stipulated evidence, or of each parties evidence in the event that a stipulation cannot be agreed upon, shall be filed with clerk of this court.

When a case, unless referred to a magistrate, has not been submitted by the parties to the Court for its final determination, at the time of, or for, filing of a reply, it shall be referred to the Court Administrator, and the parties shall appear before such Court Administrator or attorney designated by the Court at such reasonable time and place as may be designated on not less than ten days notice, and shall there make arrangements for presenting all evidence which they desire to offer. Such evidence shall be presented by way of deposition or stipulation, or certified copy of official records, unless the Court otherwise orders.

(H) Time for Briefs

The brief of the plaintiff shall be served and filed within fifteen days after completion of the presentation of evidence, pursuant to Section G; the brief of the defendant shall be served and filed within fifteen days after service of the brief of the plaintiff; and any reply brief shall be served and filed within five days after service of the brief of the defendant.

(I) Service of Copy of Brief

Service of a copy of any brief shall be made upon opposing counsel forthwith, and proof of service shall be filed with the clerk.

(J) Briefs

Briefs shall conform to App.R. 19. The brief of the plaintiff shall contain, under appropriate headings, and in the order here indicated:

(1) A table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where they are cited.

(2) A state of the issues presented.

(3) A statement of the case. The statement shall first indicate briefly the nature of the case. There shall follow a statement of the facts relevant to the issues presented.

(4) An argument. The argument shall contain the contentions of the plaintiff with respect to the issues presented, and the reasons therefor, with citations to the authorities and statutes relied on.

(5) A short conclusion, stating the precise relief sought.

The brief of the defendant shall conform to the foregoing requirements except that a statement of the issues and a statement of the case, or of the facts relevant to the issues need not be made unless the defendant is dissatisfied with such statements of the plaintiff.

(K) Election Matters

Because of the necessity of a prompt disposition of an original action relating to a pending election, and in order to give the Court adequate time for full consideration of such case, if such action is filed within ninety days prior to the election, answer day shall be five days after service of summons, and the reply brief of plaintiff must be filed within five days after the filing of the answer. All briefs must be filed no later than five days after

the filing of plaintiff's brief. Only in exceptional cases will time be extended, even though opposing counsel has consented thereto.

(L) Oral Argument

In any original action in this Court, oral argument may be had only on approval of a request therefor, provided that the Court may, if it so desires, require such oral argument in any case. Any request for oral argument must be made in writing, by either party, at the time of the filing of the party's original pleading. The party having the affirmative shall have the right to open and close the argument and the further right to divide the time allotted as desired.

(M) Reference to Magistrate

(1) Original actions in this Court may, either upon motion of a party or of the Court, be referred by the Court to a magistrate, pursuant to Civ.R. 53. Unless otherwise indicated in the order of reference to a magistrate, the magistrate shall have all the powers specified in Civ.R. 53, and the proceedings and decision of the magistrate and objections thereto shall be governed by Civ.R. 53. Sections D through N of this Rule apply to proceedings before the magistrate.

(2) Where the evidence submitted consists of all or part of the record of the proceedings before an administrative agency, such as the Industrial Commission claim file, each party shall attach to any brief and to any memorandum pertaining to objections to the magistrates' decision a *legible* xerographic copy of all evidence in the administrative record which the party considers pertinent to the issues before the Court, including any order of the agency which is claimed to constitute an abuse of discretion. Unless some party indicates to the contrary, the Court will assume that the attachments to

the briefs or memoranda include all the evidence necessary for the magistrate or the Court to determine the issues. Where the parties have entered into a stipulation regarding the evidence to be submitted to the magistrate, copies of the relevant evidence need not be attached to the parties' briefs, but shall be attached to any memorandum pertaining to objections to the magistrate's decision.

(3) Within fourteen days of the filing of a magistrate's decision, a party may file written objections to the magistrate's decision. Any other party may also file objections not later than ten days after the first objections are filed. A memorandum in support shall be served and filed with objections. Any memorandum in opposition shall be served and filed within fourteen days after service of objections. Objections will be submitted to the Court as a part of its regular hearing calendar. Requests for oral argument on objections, made pursuant to Section L of this Rule, shall be filed by a party no later than the time set for filing the initial memorandum. A request for oral argument on objections shall be conspicuously set forth on the front cover page of a party's objections.

(N) Dismissals for Want of Prosecution

Unless all evidence is presented, and the plaintiff's brief is filed within four months after the filing of the complaint, an original action shall be dismissed, after notice to counsel of record, for want of prosecution, unless good cause be shown to the contrary.

**RULE 13**

**MOTIONS TO CERTIFY**

Motions to certify to the Supreme Court because of conflict with a judgment of another Court of Appeals, upon the same question, shall be filed before the judgment of the court has been approved by the court and filed by the court with the clerk for