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Case Law Update

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CASE LAW UPDATE

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COURSE AND SCOPE OF EMPLOYMENT:

Parrish v. Cavaliers Holding, LLC., 2019-Ohio-89

Injured worker was injured while walking to work. He had been given a free pass from his employer to park in a lot adjacent to Tower City. He was not permitted to use the pass for non-work related events. He used the walkway from Tower City to get to work and was injured in the walkway when he slipped and fell. IC denied the claim and he filed an appeal under 4123.512. Court rejected his argument that he was in the zone of employment. The Court agreed that injured worker was "induced" to park in the lot but noted he was not required to do so. The Court also noted that the employer did not have control over the parking lot. The walkway is open to the public and not owned by or controlled by the employer. While the injury occurred in close proximity to his work, the employer did not control the walkway and did not benefit from injured worker's presence at the scene. Accordingly, there was no causal connection based upon the totality of the circumstances.

White v. Quest Diagnostics, Inc., 2018-Ohio-4309

Injured worker clocked out for lunch, exited her building and walked down the sidewalk to the parking lot where she intended to walk during her break. The parking lot was under repair. While walking across the lot, she slipped on the lip of a completed portion of pavement and fell face first into an incomplete section. IC denied the claim. Trial court granted summary judgment for the injured worker. Court of appeals affirms.

The parking lot was owned by the employer. The court distinguished the case of the injured worker who was attempting to move a broken mirror after learning that his car had been vandalized because the broken mirror was not a natural hazard of the parking lot. The court also rejected Quest's argument that it no longer had control over the parking lot because it was under the control of the contractor who was repairing the parking lot.

Garner v. BWC, 2018-Ohio-3398

Injured worker was in employer's parking lot, prior to clocking in for work. Another vehicle entered the parking lot, driven by the husband of a co-employee who was being dropped off for work. An altercation ensued over whose car came too close to the other

and who was calling the police, resulting in injured worker being struck in the face and being hit by the other vehicle when he tried to prevent the vehicle from leaving the scene. The workers' compensation claim was denied by the BWC and the IC at all levels. Trial court granted summary judgment for the employer and BWC.

Court held that the fact this incident occurred in the employer's parking lot was not sufficient to support a claim in light of the following: (1) the incident occurred outside the actual workplace; (2) the incident did not occur during working hours; (3) injured worker was not performing work duties; (4) the assault did not involve another employee; (5) the assault was not related to work duties but was over an entirely personal matter.

INTERVENING INJURY:

State ex rel. Bravo Brio v. Indus. Comm., 2018-Ohio-2735

Injured worker sustained an injury in 2009 which was allowed for multiple back conditions, including disc protrusions, herniations and radiculopathy. She was found MMI in 2012. In 2016 she felt a sudden onset of pain simply going to the bathroom and had surgery the next day. The IC ruled that the incident was not a new, intervening injury but merely an exacerbation of the allowed conditions. Court of appeals agrees, affirming the magistrate's decision that the onset of pain while engaged in ordinary activity did not constitute an intervening injury.

INDEPENDENT CONTRACTOR:

Green v. Admr., Ohio Bur. of Workers' Comp., 2018-Ohio-2618

Green's claim was denied by IC on basis that he did not establish an employment relationship with the alleged employer. Green was a logger who was performing logging work at the request of another logger. He was experienced and needed no direction to cut down and de-limb trees. He only needed to be told what work needed to be performed. Green was paid by the sawmill, not the other logger and no taxes were withheld. The other logger testified that at the initial meeting it was agreed Green would be an independent contractor and would be responsible for his own taxes and worker's compensation coverage. Green did use equipment owned by the other logger but he had no fixed hours and his hours were flexible so long as the work got done. The trial court ruled that Green was an independent contractor and issued findings of fact and conclusions of law.

Green challenged the ruling asserting that the findings of fact and conclusions of law were insufficient for appellate review. The court rejected that argument, finding that there were sufficient facts and evidence which supported the legal conclusions.

Green also objected to testimony from the other logger and another logger working the same property as he claimed they were not qualified as experts as to the practices of the logging industry. The appellate court ruled that the witnesses did not need to be qualified as experts because they did not testify to matters beyond the knowledge or experience possessed by law person which involved scientific, technical or other specialized information. They testified on the customs and practices in the logging industry. That testimony was relevant because one of the factors identified by the Ohio Supreme Court in determining whether an employee or independent contract relationship exists is the "type of business." The court also rejected the manifest weight of the evidence assignment of error.

MANDAMUS RELIEF:

State ex rel. Belle Tire Distributors, Inc. v. Indus. Comm., 2018-Ohio-2122

Employee's surviving spouse filed a death claim against the employer. The BWC denied the claim. On appeal to the IC, the DHO allowed the claim, the SHO denied the claim and the IC refused appeal. The surviving spouse filed for reconsideration and the IC allowed the claim. Employer filed a 512 appeal, but also filed for mandamus relief, alleging that the IC had a clear legal duty to deny the request for reconsideration and to affirm the SHO decision. The surviving spouse filed a motion to dismiss the mandamus action, arguing that the employer had a plain and adequate remedy – a 512 appeal. The 512 action was stayed, pending the pending a decision on the mandamus case. The court of appeals granted the motion to dismiss.

The Ohio Supreme Court vacated the appellate court's decision and denied the motion to dismiss the mandamus action, holding that the employer should have the opportunity to challenge the IC's decision to exercise continuing jurisdiction. The basis for the complaint is whether there was a factual mistake sufficient to invoke the continuing jurisdiction provisions of 4123.52. The Court ruled that the employer should have the opportunity to challenge the commission's decision to exercise continuing jurisdiction and the mandamus action should not have been dismissed.

State ex rel. Peterson v. Indus. Comm., 2018-Ohio-2270

Industrial Commission denied request for a referral for a psych consult for medication management based upon the report of a Ph.D. Injured worker filed a mandamus action, arguing that the Ph.D. was not a psychiatrist and therefore did not have the expertise to determine whether psychiatric medication was necessary or appropriate. Magistrate ruled, and court of appeals affirmed that since this issue was not raised administratively, it could not be raised in mandamus.

OCCUPATIONAL DISEASE CLAIMS:

Bennett v. Scotts Miracle-Gro, 2018-Ohio-3004

Injured worker had a recognized claim for pleural plaque as a result of asbestos exposure. He filed for additional allowance of asbestosis. The claim was denied by the IC. Following a bench trial, the trial court denied the additional condition. His decision was based upon a reviewing physician who noted that the CT did not show interstitial fibrosis and therefore under RC 2307.91(D) and other medical treatises, the injured worker did not have asbestosis. The court noted that a reviewing physician must accept the factual findings of an examining physician but may draw his/her own opinions. There was no evidence that the reviewing physician disputed any factual findings. Accordingly the trial court could rely upon the opinion of the reviewing physician who used the statutory and treatise definition of asbestos.

SUBSTANTIAL AGGRAVATION:

Schaefer v. Lake Hosp. Sys., Inc., 2018-Ohio-3970

Schaefer's initial claim was allowed and she filed for additional allowance of substantial aggravation of pre-existing conditions. These conditions were denied by the IC and she filed a 512 appeal. The employer moved for summary judgment, which was granted, based upon plaintiff's expert's report and deposition testimony. The physician cited no specific objective evidence of aggravation and demonstrated that he had no personal knowledge of whether Schaefer had ever been diagnosed with any of the conditions prior to the injury. He stated that her conditions were "clinically silent" prior to the injury and relied upon the fact that Schaefer sought treatment and her self-reporting of symptomatology which she reported as asymptomatic prior to the injury and symptomatic following the injury. Plaintiff submitted not submit any additional evidentiary evidence in opposition to the motion for summary judgment. The trial court granted summary judgment.

Court of Appeals reversed, finding that while the doctor agreed that his conclusion was based upon Schaefer's self-reporting he was never asked whether that was the sole basis for his conclusion. court held that construing the evidence most favorably to Schaefer, the employer had not met its evidentiary burden to demonstrate no genuine issue of material facts as to substantial aggravation and that the burden never shifted to plaintiff to overcome the motion.

DISCRETION OF IC:

State ex rel. Mignella v. Indus. Comm., 2019-Ohio-463:

> Following Mignella's application for permanent total disability, she was sent for an examination by an IC doctor. The doctor stated she could do light duty work but she could not sit or stand longer than 15 to 20 minutes at a time. Mignella's counsel deposed the doctor who admitted making mistakes in the exam and not examining according to the AMA Guidelines. An interlocutory order was issued stating that the application should not be adjudicated until Mignella submitted to a second medical examination by an IC specialist. Mignella refused, claiming she should not be required to submit to a second examination just because the first examining specialist did not comply with the AMA Guidelines. Her application was suspended for her refusal. She filed a writ of procedendo.
>
> The Ohio Supreme Court affirmed the Court of Appeals, holding that the IC has broad discretion with regard to requiring a claimant to submit to medical examinations, citing *State ex rel. Clark v. Indus. Comm.*, 78 Ohio St.3d 678 and RC 4123.53(A) which does not specifically limit the number of examinations that the IC can schedule on a particular issue. The Court did indicate that IC must explain why an additional examination is necessary and helpful to the IC. Because in this case the IC did provide an explanation, it was proper for the IC to suspend the application until Mignella agreed to submit to another exam. The Court rejected the arguments (1) that *Clark* required the IC to eliminate the possibility of making a decision based upon other evidence before ordering a second exam; (2) that administrative rules are in conflict as to whether the second exam could be required; and (3) that requiring the second exam would defeat the "fair and timely" requirement of 4121-3-34(A).

TTD:

State ex rel. Daffner v. Indus. Comm., 2018-Ohio-4029

> Commission erred in denying TTD where, although injured worker had previously been declared MMI, a new condition was added to the claim which was not considered by the reports relied upon by the commission. There was a prior order in which the commission had determined that the additional allowance was insufficient evidence that the new condition was a new and changed circumstance to warrant temporary total. However, the treating physician had issued a MEDCO-14 indicating that TTD was appropriate. The second SHO decision was based on *res judicata* and the initial finding that the new condition did not warrant TTD. The court of appeals vacated both orders granted the writ.

AWW/FWW:

State, ex rel. Tantarelli v. Decapua Ents, Inc., 2019-Ohio-517:

Injured worker was injured about three weeks after he started work. The self-insured employer used the standard method to calculate is AWW. In 2014, injured worker requested a recalculation based upon special circumstances under RC 4123.61. IC denied his request for recalculation based upon its finding that he failed to submit sufficient credible evidence that he was looking for work because he only identified 3 employers he had contacted in the 49 weeks prior to beginning employment. He also stated he had engaged in some miscellaneous work but provided no documentation of earnings and did not file a tax return for those earnings. Thus, the IC found no special circumstances. In 2016, injured worker again requested recalculation. The Ohio Supreme Court ruled that the matter was *res judicata* and noted that the injured worker had not requested the IC to exercise jurisdiction under RC 4123.52.

TRIAL PRACTICE:

Jacobs v. Shearer's Foods LLC, 2018-Ohio-3863

Plaintiff fell from a loading dock and hit her head. Her claim was allowed for a number of conditions, but not for traumatic brain injury. She filed for the additional conditions of traumatic brain injury, fusion with defective stereopsis and convergence insufficiency. The medical reports she submitted were from Dr. Grant (an optometrist) and Dr. Scheatzle (a physiatrist). Dr. Grant stated that the visual problems are more than likely from the TBI. Dr. Scheatzle stated there was a direct correlation between the "allowed diagnosis" of TBI and her convergence insufficiency and fusion with defective stereopsis. IC denied the additional conditions and plaintiff appealed to court. Trial court granted employer's motion for summary judgment, holding that there was no evidence that the experts named by plaintiff were qualified to testify as medical experts at trial on the issue of traumatic brain injury since that was not already an allowed condition in the claim. Their opinions were based upon their misunderstanding that TBI was already allowed in the claim.

Jackson v. American Bulk Commodities, Inc., 2018-Ohio-3706

Injured worker's claim was disallowed by the IC. She filed a timely notice of appeal in Washington County Common Pleas Court. However, she did not file her appeal until 42 days later. Employer filed a motion to dismiss because the complaint was not filed within 30 days as required by 4123.512. Injured worker filed a voluntary dismissal without prejudice, reserving her right to refile within one year per 2309.19. Approximately 10 months later injured worker filed both a "Refiled Notice of Appeal" and a "Refiled Complaint." Both of these documents were assigned a new case number. Employer filed a motion to dismiss arguing that the prior dismissal and later refiling of the same case did

not cure the untimeliness of filing the complaint in the original case. The trial court granted the motion to dismiss. The appellate court reversed.

The court determined that, although the parties and the court seemed to agree that injured worker dismissed only her complaint and not her appeal, she had actually dismissed both when she filed the voluntary dismissal because she used the word "action" in her dismissal notice. The Employer argued that there is no legal authority which provides for the voluntary dismissal of an appeal. Although this same court had previously ruled that a court retained jurisdiction of an appeal when a notice of dismissal was filed, the court distinguished that case because the notice of dismissal used the term "cause of action" rather than "action," and stated that the dismissal "terminates" her case. The court pointed to a prior decision that suggested that a notice of appeal may be dismissed. The court also focused on the fact that the refiled notice of appeal and complaint were assigned a new case number. The Court also ultimately determined that the savings statute does apply to the dismissal and refiling of a notice of appeal.

Henderson v. Canton City Schools, 2019-Ohio-610

Henderson filed a motion in her claim requesting additional allowance of "partial thickness tear left supraspinatus." This was argued before the commission as direct causation and denied. Henderson filed a 512 appeal. Subsequently, Henderson filed a second motion for substantial aggravation of partial thickness tear left supraspinatus. This was also denied by the commission. A 512 action was filed on this decision while the first appeal was pending. There was no motion to consolidate the cases and Henderson voluntarily dismissed her initial appeal of the direct causation ruling. She also subsequently voluntarily dismissed the appeal of the substantial aggravation ruling. Later, both appeals were re-filed.

Henderson filed a second dismissal of the direct causation appeal. Employer filed for summary judgment in the remaining action which was the appeal of the substantial aggravation decision. Trial court granted summary judgment. Employer argued that under *Starkey v. Builders First Source Ohio Valley, LLC,* 2011-Ohio-3278, that a claim for direct causation must necessarily include a claim for aggravation of that condition for purposes of 4123.512. Accordingly, the initial 512 appeal included both theories of causation. Because the remaining action raised a claim that were or could have been brought in the prior action, summary judgment was appropriate. Court of appeals affirmed, finding that *Ward v. Kroger Co.,* 2005-Ohio-3560 applied only when a claimant attempted to add new conditions in a 512 appeal, not where the issue was a theory of causation.

McCloud v. Duffy, 2018-Ohio-3730

Injured worker's pro se action for fraud against a third party administrator was dismissed by trial court. The appellate court affirmed, holding that .512 appeals are limited to

determination of the injured worker's right to participate which has specific filing requirements which injured worker did not comply with. Although the law is to be liberally construed, pro se litigants are bound by the same rules and procedures as those who retain counsel.

Hayton v. Reliable Staffing Resources, 2018-Ohio-4985

Hayton filed a workers' compensation claim which was denied by BWC in 2014. He did not appeal. In 2015 he filed a new claim for the same injury which the employer argued was barred by *res judicata.* The IC disagreed and allowed the claim. Employer filed a 512 appeal and the trial court granted the employer's motion for summary judgment. The appellate court reversed and held that *res judicata* does not apply to the ministerial acts of the BWC as an administrative agency and stated no court had ruled that Hayton was not entitled to participate stating that "if any entity is entitled to having its finding considered to be binding to the point of *res judicata* status, the commission is that entity." The concurring opinion noted that the BWC denied the claim based upon insufficient medical documentation.

RETALIATORY DISCHARGE:

McGree v. Gateway Healthcare Ctr., 2019-Ohio-988

Plaintiff filed a retaliatory discharge action under RC 4123.90 and public policy against Gateway HealthCare Center. However, plaintiff had never been injured while working at Gateway, nor had she ever thought of filing a workers' compensation claim. She alleged she was terminated because she had filed a claim against her previous employer. The trial court refused to grant Gateway's motion for directed verdict and the jury found in plaintiff's favor. The court of appeals reversed, holding that under the clear language of 4123.90 the workers' compensation claim must be filed against the same employer and there is no public policy basis to support such a cause of action. The plain language of 4123.90 is limited to an employer who retaliates against an employee for pursuing a claim against "that employer."

PTD:

State ex rel. Digiacinto v. Indus. Comm, (2018-Ohio 1999)

Injured worker was injured in 2001 and received TTD through 2003 when he was found to MMI. In 2002 he applied for SSD which was granted in 2003. That decision referenced a non-allowed condition. Injured worker filed for PTD which was denied twice with a finding that he was capable of sustained remunerative employment. Psychological conditions were added to the claim and he received TTD for just under two years until those conditions were deemed MMI. He then re-filed for PTD. The SHO awarded PTD

stating that the BWC had waived the defense of voluntary abandonment. The SHO also considered the SSD decision. On Reconsideration, the IC denied PTD based upon voluntary abandonment of employment. The order did not reference the SSD decision.

Court rejected the decision of the magistrate which ruled that mandamus should be denied. The court ruled that the SSD decision was seemed "to carry considerable weight in the commission's determination of Digiancinto's capability to work and consequently whether he left the workforce of his own volition." It noted that the SSD decision was not submitted in support of the PTD application, but did establish that he did not make the decision to quit working on his own. The court found that there was sufficient medical evidence, without considering the SSD decision, to support that the IW was unable to work due to the allowed conditions. The matter was referred to the IC for another hearing.

State, ex rel. Sun Chem. Corp. v. Indus. Comm., 2019-Ohio-222

Injured Worker had three workers' compensation claims and had been referred to voc rehab three times. The last referral ended with a determination that he was unable to keep pace because he needed to get up and move frequently because of pain. After 20 weeks, he was unable to obtain a job because of his restrictions. He filed for PTD. The SHO denied PTD but made no mention of his attempts at voc rehab. The IC subsequently exercised continuing jurisdiction and granted the PTD application.

The court of appeals refused to accept the magistrate's opinion that mandamus should be granted to the employer. The court stated that the injured worker is entitled to know why a PTD application is being denied, just as an employer is entitled to know why one is granted. The court held that the SHO's failure to discuss the voc rehab attempts in any way was a mistake of law and that the IC's exercise of continuing jurisdiction was appropriate.

State ex rel. Penske Truck Leasing Co., L.P. v. Indus. Comm., 2018-Ohio-2153

The Ohio Supreme Court granted mandamus case filed by employer, finding that the PTD allocations of the IC must be consistent with the evidence expressly relied upon. Penske was the employer on the earliest two of three claims on which some of the body parts overlapped. The SHO allocated the cost of the award among all three claims. The Court held that the IC must explain the basis for the specific allocations. Here the report relied upon by the SHO did not attribute impairments for each of the claim. IC was required to amend its order as it pertained to allocation.

State ex rel. Navistar, Inc., v. Indus. Comm., 2018-Ohio-3386

Industrial Commission was within its discretion to determine that restrictions which stated injured worker could "stand/walk for one hour in an eight-hour workday, and he can sit for

two to three hours in an eight-hour workday" rendered the injured worker unable to engage in sustained remunerative employment. Even though the decision appears contrary to that in *State ex rel. Bonnlander v. Hamon,* 2018-Ohio-4038, the commission's determination is made on a case-by-case basis.

State ex rel. Farrell v. Indus. Comm., 2018-Ohio-2164

Farrell applied for PTD which was denied by the IC based upon a report from the IC specialist which indicated he was capable of performing work under certain expectations in a supportive environment. This same IC specialist had, in a different claim, opined that the injured worker in that claim could work in a low to moderate stress position. The IC found in the other claim that the injured worker was unable to work and awarded PTD. Farrell claimed that the doctrine of *stare decisis* required the commission to award him PTD since the language of the doctor in his claim was similar to the same doctor's report in the prior claim. Court denied mandamus holding that *stare decisis* applies to following controlling precedent and principles of law, not findings of fact. The commission's determinations are fact specific and it is the role of the commission to determine the appropriate weight to give to the evidence in each case.

VSSR'S:

State ex rel. Jackson Tube Serv., Inc. v. Indus. Comm, 2019-Ohio-3892

Impossibility is an affirmative defense to a VSSR application. To establish impossibility an employer must show (1) that it would have been impossible to comply with the specific safety requirement or that compliance would have precluded performance of the work and (2) that no alternative means of employee protection existed or were available.

Injured worker was reinstalling a flywheel in a cutoff machine. A crane held the flywheel in a sling as he and a co-worker worked beneath it. The sling broke, dropping the flywheel which struck the injured worker and broke both his legs. The IC granted the application. The employer filed a motion for rehearing which was denied. The Court of Appeals denied a request for writ of mandamus and employer appealed to the Ohio Supreme Court.

The Court found the IC erred in accepting the testimony of the injured worker that it was his "understanding" that there was a fixture offered by the manufacturer that could have been used to perform the operation differently. The employer submitted an affidavit from the manufacturer stating that it did not manufacture or provide a device or mechanism to assist in removing or replacing the flywheel. This was presented in employer's motion for rehearing.

Dissent noted that employer had created a hook that was intended to enable workers to replace the flywheel without having to work under a suspended load, although that hook

had never been tested. Dissent also noted that the motion for rehearing presented new evidence not considered by the IC at the initial hearing.

Zarbana Industries, Inc. v. Hayes, 2018-Ohio-4965

Injured worker sustained serious injuries to his right hand. He filed a VSSR application which was heard on the merits and a transcript of the hearing was filed. Prior to the mailing of the decision, the parties reached a settlement of $2,000 and the form was filed with IC. A hearing on the settlement was held before the same hearing officer who heard the merits of the VSSR. The hearing officer then issued two orders, one granting the VSSR application and awarding 30% of the maximum rate, the other rejecting the settlement as being neither fair nor equitable. IC found insufficient grounds to exercise continuing jurisdiction.

Employer filed a complaint for declaratory judgment. Trial court dismissed the case for lack of jurisdiction. Court of appeals held common pleas courts do not have inherent jurisdiction in workers' compensation matters, but only such jurisdiction as is conferred on them under the Act. The judgment of the trial court was affirmed.

State ex rel. Byington Builders, Ltd. V. Indus. Comm., 2018-Ohio-5086

Employer filed mandamus action after IC found a VSSR violation. Injured worker was a roofer and fell from the pitched roof of a two-story apartment building. The applicable OAC section provides that catch platforms "shall be" installed, but safety belts or harnesses attached to a lifeline which is securely fastened to the structure "may be used in lieu" of a catch platform. The employer argued that safety harnesses and lifelines were kept in an equipment trailed which was located 10 feet from the building. The Employer admitted, however, that he was aware no one was using the safety equipment on this job. Mandamus was denied, with the Ohio Supreme Court holding that the employer was required to do more than just make the lifelines and harnesses available. It was required to install catch platforms if the safety harnesses were not used. The burden is on the employer to comply with the regulations. Unilateral negligence is not a defense if the employer has not complied with the applicable safety requirement.

MISCELLANEOUS:

Stolz v. J & B Steel Erectors, Inc., 2018-Ohio-5088

Injured worker worked for a subcontractor of a general contractor who had permission from BWC to act as a self-insured employer pursuant to RC 4123.35(O). The subcontractor had enrolled in the general contractor's coverage. Injured worker filed an action for negligence against his employer and other subcontractors. The Supreme Court ruled that RC 4123.35(O) is constitutional. The Ohio Supreme Court rejected claims of

due process and equal rights infringement and held that there is a legitimate governmental interest in extending the limitations on damages to enrolled subcontractors and advances the government's interest in allowing injured workers a certain, prompt mechanism for payment of benefits.

INDUSTRIAL COMMISSION UPDATES

Amendments to Adjudications Before the Ohio Industrial Commission – Effective 4/10/19

1. Memo D5 - attached
2. Memo G3 – attached

Amendment to Resolutions – Effective 4/10/19

1. R19-1-01 – Medical Exam Fee Schedule

Amendments to Rules – Effective 2/1/19

1. 4121-2-01 – Standards of practice for attorneys, agents and representatives
2. 4121-3-12 – Suspension of processing claims for failure to submit to medical exam
3. 4121-3-20 – VSSR rules
4. 4121-15-01 to 4121-15-09 – Code of ethics, standard of conduct for BWC/IC employees

Memo D5 | Voluntary Abandonment

Voluntary abandonment is an affirmative defense to requests for compensation for temporary total disability and permanent total disability. There are three types of voluntary abandonment. When an employer or the Bureau of Workers' Compensation asserts the defense of voluntary abandonment, hearing officers shall specifically identify the type(s) of abandonment the employer or the Bureau of Workers' Compensation is asserting and then address each type separately in their order. What follows are the types of actions the courts have deemed to constitute a voluntary abandonment.

1. **1. Voluntary Retirement:** A voluntary retirement is one that is not causally related to the allowed conditions in the claim. If an injured worker retires due to his or her allowed conditions, the retirement is considered to be involuntary and is not a bar to the receipt of compensation. Conversely, when an injured worker retires due to a reason other than the allowed conditions, the retirement is considered to be voluntary and will bar the receipt of compensation.

2. **2. Termination:** A discharge from employment can constitute a voluntary abandonment if the termination is the result of the injured worker's violation of a written work rule that (1) clearly defined the prohibited conduct, (2) had been previously identified by the employer as a dischargeable offense, and (3) was known or should have been known to the employee.

    - The work rule must be in writing regardless of whether the rule should be common sense.

    - The requirement of a written work rule can be satisfied by a written job description containing specific job duties combined with a written employee handbook that sets out specific behavior expectations. This requirement can also be satisfied by a series of formal "write-ups" or progressive discipline, which placed the employee on notice that further infractions may result in termination. Hearing officers must determine that an injured worker has actually engaged in conduct prohibited by a written work rule in order to make a finding of voluntary abandonment.

    - As to negligent or careless actions that result in termination, there may be situations in which the nature or degree of the conduct, though not characterized as willful, may rise to such a level of indifference or disregard for the employer's workplace rules/policies to support a finding of voluntary abandonment.

    - When an employee is terminated after a workplace injury for conduct prior to and unrelated to the workplace injury, his or her termination does not amount to a voluntary abandonment of employment for purposes of temporary total disability compensation when (1) the discovery of the dischargeable offense occurred because of the injury and (2) at the time of the termination, the employee was medically incapable of returning to work as a result of the workplace injury.

3. Abandonment of the Workforce: A departure from employment with no re-entry into the workforce can constitute a voluntary abandonment. Such an abandonment depends upon the injured worker's intent at the time of the departure. This intent can be inferred from words spoken, acts done and other objective facts. The following examples illustrate fact situations in which the courts have found an intent to abandon the workforce:

    - Medical evidence of maximum medical improvement or an ability to perform modified duty work can support a finding of voluntary abandonment if the evidence demonstrates the injured worker was capable of performing work before his or her departure from employment.
    - Medical evidence that indicates that the injured worker was suffering from non allowed conditions at the time of departure can support a finding of voluntary abandonment.
    - A lack of medical evidence that the allowed conditions were disabling at the time of the departure can support a finding that a departure was not injury-induced.
    - An injured worker can voluntarily abandon his/her former position of employment even if the injured worker is physically unable to perform his/her former position of employment at the time of the abandonment. All relevant circumstances existing at the time of the alleged abandonment of the former position of employment should be considered. If there is evidence the injured worker intends to remain in the workforce inferred from words spoken, acts done, and other objective facts, this is not a voluntary abandonment of the entire workforce.
    - At the time of separation from the former employer, if there is evidence an injured worker left the former employer for another job, searches for other employment, or otherwise intends to remain in the workforce, and the work injury prevents the injured worker from returning to work with a new employer, it does not constitute voluntary abandonment of his/her former position of employment.

The foregoing list of examples is not intended to be all-inclusive. Hearing officers must consider the facts of each case to determine whether the requisite intent exists.

NOTE: State ex rel. Louisiana-Pacific Corp. v. Indus. Comm., 72 Ohio St.3d 401, 650 N.E.2d 469 (1995); State ex rel. McKnabb v. Indus. Comm., 92 Ohio St.3d 559, 752 N.E. 254 (2001); State ex rel. Feick v. Wesley Cmty. Servs., 10th Dist. Franklin No. 04AP-166, 2005-Ohio-3986; State ex rel. Brown v. Hoover Universal, 132 Ohio St.3d 520, 2012-Ohio-3895, 974 N.E.2d 1198; State ex rel. Black v. Indus. Comm., 137 Ohio St.3d 75, 2013-Ohio-4550, 997 N.E.2d 536; State ex rel. Roxbury v. Indus. Comm., 138 Ohio St.3d 91, 2014-Ohio-84, 3 N.E.3d 1190; State ex rel. Floyd v. Formica Corp., 140 Ohio St.3d 260, 2014-Ohio-3614, 17 N.E.3d 547; State ex rel. Cordell v. Pallet Cos., Inc., 149 Ohio St.3d 483, 2016-Ohio-

Memo D5 Continued

8446, 75 N.E.3d 1230 , reconsideration denied, 148 Ohio St.3d 1428, 2017-Ohio-905, 71 N.E.3d 299; State ex rel. Klein v. Precision Excavating & Grading Co., 119 N.E.3d 386, reconsideration denied, 154 Ohio St.3d 1446, 2018-Ohio-4962, 113 N.E.3d 554; State ex rel. Baker v. Indus. Comm., 732 N.E.2d 355 (2000); State ex rel. McCoy v. Dedicated Transport, Inc., 97 Ohio St.3d 25, 2002-Ohio-5305, 776 N.E.2d 51; State ex rel. Quarto Mining Co. v. Foreman, 79 Ohio St.3d 78, 679 N.E2d 706 (1997); State ex rel. Diversitech Gen. Plastic Film Div. v. Indus. Comm., 45 Ohio St.3d 381, 544 N.E.2d 677 (1989) citing State v. Freeman, 64 Ohio St.2d 291, 297, 414 N.E.2d 1044 (1980); State ex rel. Pretty Products, Inc. v. Indus. Comm., 77 Ohio St.3d 5, 670 N.E.2d 466 (1996); State ex rel. Reynolds v. Indus. Comm., 97 Ohio St.3d 53, 2002-Ohio-5352, 776 N.E.2d 77.

Memo G3 | Guidelines for Permanent Total Disability Tentative Grant Orders

Permanent total disability tentative grant orders shall be issued when:

A. The Industrial Commission specialist states that based upon the allowed conditions the injured worker is unable to perform any sustained remunerative employment;

B. The injured worker's medical evidence states that based upon the allowed conditions the injured worker is unable to perform any sustained remunerative employment;

C. If it exists, the employer's medical evidence states that the injured worker is unable to perform any sustained remunerative employment based upon the allowed conditions; and

D. If it exists and addresses the issue of permanent total impairment, the Bureau of Workers' Compensation's medical evidence states that the injured worker is unable to perform any sustained remunerative employment based upon the allowed conditions.

Remember, the permanent total disability tentative order process for grants is for those claims where the granting of the application is obvious.

Objections:

A party may file an objection to the tentative order within 14 days of receipt of the tentative order. If a party files an objection, a hearing will be scheduled before a Staff Hearing Officer on the issue of the appropriateness of the tentative order. If the SHO finds that the granting of permanent total disability was inappropriate due to a colorable legal issue that would preclude the granting of permanent total disability, the tentative order shall be vacated and the IC-2 Application returned for continued processing in accordance with the rules. If the SHO finds that the tentative order was inappropriate because relevant medical evidence was not considered by the IC, the tentative order shall be vacated and the IC-2 application shall be referred to the Hearing Administrator for continued processing in accordance with the rules. Otherwise, the tentative order shall be affirmed.