CASE LAW UPDATE

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2011 OHIO SUPREME COURT OPINIONS

***State ex rel. Kroger Co. v. Johnson*, 128 Ohio St.3d 243, 2011-Ohio-530** - claimant, a meat cutter, sustained an injury to his right hand that resulted in hypersensitivity to extreme temperatures, stiffness, and weakness. The malady affected his ring, middle, and pinky fingers, but not his thumb or index fingers. The injury was especially problematic because claimant's job required extensive work in a freezer and other environments with a very low temperature.

Claimant sought an award for loss of use of the hand under R.C. 4123.57(B) based on a medical report that found 27% impairment of the hand and an addendum that stated that claimant has a "functional loss of his right hand". The employer countered with a medical report which stated that claimant's hand was impaired, but not to the extent as "to be the same as if the extremity had been amputated. An individual does not have a 'loss of use' if he can use the extremity even in a limited capacity."

The Industrial Commission ultimately granted the loss of use of the hand and the employer sought a writ of mandamus in the Tenth District Court of Appeals. The appellate court granted the writ, finding that the claimant's medical evidence was internally inconsistent because a 27% impairment is at odds with a total functional loss. Claimant appealed to the Ohio Supreme Court as of right.

The Court noted that the proper standard for loss of use awards under R.C. 4123.57(B) was set forth in *State ex rel. Alcoa Bldg. Prods. v. Indus. Comm.*, 102 Ohio St.3d 341, 2004-Ohio-3166. In that case, the Court rejected the idea that loss of use must mean the same as if the body part were amputated. Obviously, the two concepts cannot be exactly equivalent because a body part that is still attached is not amputated and still acts as a counterweight. The specific facts of *Alcoa* involved a claimant who still was able to use

his arm for some activities, including holding a newspaper against his side and closing a car door. The Court stated that the correct standard is whether the body part is "useless for all practical purposes."

The Court affirmed *Alcoa* and added that "a total loss of use is not automatically defeated merely because his right hand retains some residual function; the pivotal question is how much function remains. As a general rule, function is expressed in one of two ways - numerically or narratively." The Court went on to note that a strict numerical approach does not always work - while 100% loss would certainly equate to total loss, lower percentages are more problematic and must be reconciled with the physician's reasoning or narrative opinion.

The Court found that the claimant's evidence of a 27% impairment was inconsistent with a total loss of use because there was no additional explanation, other than the phrase "functional loss", to reconcile the 27% with a total loss. The Court found that the claimant's evidence was internally inconsistent and that the Industrial Commission abused its discretion by granting the loss of use of the hand. Accordingly, the Court issued a limit writ returning the matter to the Industrial Commission.

Note: it is well-settled that internally inconsistent evidence is not "some evidence" upon which the Industrial Commission may rely. See *State ex rel. Lopez v. Indus. Comm.* (1994), 69 Ohio St.3d 445. However, what constitutes internal inconsistency is less clear and must be evaluated on a case-by-case basis.

Also, although not mentioned by the Court, the claimant in this case conceded that he had function of at least two fingers of the affected hand. Thus, he was not seeking a traditional loss of use of the hand, but rather a "discretionary" loss of use of the hand. The applicable language from R.C. 4123.57(B) allows for an award up to the amount equivalent to a loss of the entire hand even where there is no such loss - the statute requires the loss or loss of use of at least two fingers and the nature of the job which claimant was performing at the time of the injury must be such that the claimant's handicap or disability from the hand injury exceeds the "normal" handicap or disability from such an injury. Here, because the claimant was a meat cutter and his job required prolonged exposure to cold, the nature of his job resulted in a greater handicap than "normal". That being the case, the fact that the claimant's evidence found only a 27% impairment should not have been analyzed as if the claimant's entire hand was claimed to be useless for all practical purposes, but rather under the discretionary loss of use standard which requires the loss or loss of use of two fingers and then an analysis of the nature of the claimant's job and whether the injury creates a handicap or disability that exceeds the "normal" from such an injury. See, e.g., *State ex rel. Morgan v. Superior Fibers Inc.*, 10th Dist. No. 02AP-20, 2002-Ohio-4550, and *State ex rel. Interstate Brands v. Limon*, 02AP-259, 2002-Ohio-6066.

***State ex rel. Measles v. Indus. Comm.*, 128 Ohio St.3d 458, 2011-Ohio-1523** - claimants were awarded PTD and subsequently requested lump sum advancements under R.C. 4123.64. The claimants signed agreements that their PTD checks would be reduced

permanently for the life of the claim. The BWC continued to recoup money from the claimants' PTD checks even after the full amounts advanced by lump sum were collected. Claimants brought suit in the Cuyahoga County court of common pleas court requesting equitable relief - for BWC to stop reducing the PTD checks and for disgorgement of funds recouped by BWC after the full lump sum advancements had been collected by BWC. The trial court dismissed the case for lack of subject matter jurisdiction, finding that the case was really a request for money damages under a contract. Such a case can be brought against the State of Ohio only in the Court of Claims. By contrast, equitable relief against the state can be sought in common pleas court.

Claimants appealed to the Eighth District Court of Appeals. The appellate court reversed and remanded the case to the common pleas court. The BWC and IC sought discretionary review by the Ohio Supreme Court and the Court agreed to hear the appeal.

The Court held that because part of the relief requested involved restitution (money) under a contract with the state, the action sounded in law and thus could only be brought in the Court of Claims. In reaching this conclusion, the Court compared two other cases involving claims against the BWC: 1) *Cristino v. Ohio Bur. of Workers' Comp.*, 118 Ohio St.3d 151, 2008-Ohio-2013; and 2) *Santos v. Ohio Bur. of Workers' Comp.*, 101 Ohio St.3d 74, 2004-Ohio-28. In *Cristino*, the claimant settled his PTD indemnity, but later accused BWC of improperly calculating the present value of the PTD award. He sought restitution for the improperly withheld funds. After protracted procedural wrangling, the Supreme Court ultimately held that the case was a legal dispute for money damages under a contract with the state and thus could be brought only in the Court of Claims.

By contrast, *Santos* involved a suit to recover money subrogated by BWC under former versions of R.C. 4123.93 and 4123.931 that were declared unconstitutional. The theory was that no statute authorized subrogation during the time in question so the BWC had no authority to subrogate. Under those facts, the Court found that the action sounded in equity and could be brought in common pleas court. The Court has explained that the critical distinction between legal and equitable relief in these cases is whether the restitution sought is based on contract (as in settlement agreements or lump sum advancement agreements) or based on the state's unjust enrichment through improper application of a statute (as in subrogation under laws that are found unconstitutional).

Note: the lump sum advancement agreement signed by the claimants in this case did not offer an option as to the duration of the PTD reduction period. Effective December 1, 2004, Ohio Adm.Code 4123-3-37 requires lump sum advancement agreements to specify the duration of the recoupment period and explicitly states that BWC must "remove the rate reduction" once the time specified passes and the amount advanced has been recouped.

***State ex rel. Fairfield City School v. Indus. Comm.*, 129 Ohio St.3d 312, 2011-Ohio-2378** - claimant had hypertension prior to his work injury. He injured his low back and received temporary total and later permanent total. The employer sought handicap reimbursement under R.C. 4123.343, claiming that claimant's hypertension had delayed

recovery from low back surgery. The Industrial Commission refused the request, finding that hypertension is not one of the 25 enumerated conditions for which handicap reimbursement can be granted. The employer's claim was that hypertension is a form of cardiac disease, a condition that is listed in the statute. However, the DHO and SHO found that the medical evidence offered by the employer in support its position was insufficient because high blood pressure is not necessarily a cardiac problem and because there was no persuasive proof that hypertension was aggravated by the injury or prolonged claimant's recovery. After the SHO hearing, the employer submitted additional medical proof which allegedly explained the connection between hypertension and cardiac disease, but the commission refused a third hearing.

The employer sought a writ of mandamus in the Tenth District Court of Appeals. The appellate court denied the writ and the employer appealed as of right to the Supreme Court. The Court affirmed, finding that hypertension is not necessarily a form of cardiac disease and that the commission was within its discretion to reject the employer's medical evidence. The Court also noted that claimant's hypertension was controlled with medication and so there was no evidence that hypertension was aggravated by the injury or that it prolonged claimant's recovery following low back surgery. The Court also noted that the commission was not required to consider evidence submitted after the SHO hearing, citing *State ex rel. Cordray v. Indus. Comm.* (1990), 54 Ohio St.3d 99. Finally, the Court rejected the employer's contention that a BWC policy statement regarding hypertension and cardiac disease bound the commission to equate the two conditions. The Court noted that BWC policies do not bind the commission and that the commission was within its discretion to find that the employer failed to provide evidence explaining the connection between hypertension and cardiac disease.

Note: the commission has discretion to consider or reject evidence submitted after the SHO hearing. See *State ex rel. Cordray v. Indus. Comm.* (1990), 54 Ohio St.3d 99; State ex rel. Roy v. Indus. Comm. (1996), 74 Ohio St.3d 259. See also, *State ex rel. Wheeler v. Indus. Comm.*, Franklin App. No. 02AP-865, 2003-Ohio-3120. But see *State ex rel. York Internatl. Corp v. Indus. Comm.*, Franklin App. No. 04AP-979, 2005-Ohio-3792 (issues raised in reconsideration motion were considered by the court).

Also, note that the commission is not bound by BWC policies. Like OSHA rules, or FDA rules, BWC policies may be followed by the commission, but can be distinguished or rejected within the commission's discretion. See *State ex rel. Sugardale Foods v. Indus. Comm.* (2000), 90 Ohio St.3d 383 (the commission does not abuse its discretion by authorizing surgery that was considered experimental by the FDA and BWC); *State ex rel. Bax Global, Inc., v. Indus. Comm.*, 10th Dist. No. 06AP-135, 2007-Ohio-695 (same); *State ex rel. Roberts v. Indus. Comm.* (1984), 10 Ohio St.3d 3 (commission not bound by OSHA rules when adjudicating VSSR claims).

***State ex rel. Paneto v. Matos,* 129 Ohio St.3d 1, 2011-Ohio-2857 -** claimant sustained a severe left foot/ankle injury. A request for loss of use compensation under R.C. 4123.57(B) was denied by the commission. Claimant was subsequently awarded PTD and then re-filed for loss of use, arguing that the PTD award constituted a new and

changed circumstance warranting loss of use compensation. The commission denied the request and claimant sought a writ of mandamus in the Tenth District Court of Appeals. The appellate court denied the writ.

Claimant appealed to the Supreme Court as of right. The Court affirmed, finding that there was some medical evidence cited by the commission showing that there was not a loss of use of the left leg for all practical purposes. Moreover, while the case was pending before the Court, the commission terminated PTD and made a finding a fraud based on claimant's work activities as a home remodeler while receiving PTD. The Court found that if claimant could work as a home remodeler, he did not prove a total loss of use of his left leg for all practical purposes.

***Sutton v. Tomco Machinery, Inc.*, 129 Ohio St.3d 153, 2011-Ohio-2723 -** employee was injured and then fired within one hour of reporting the injury. The employee later filed a workers' compensation claim, as well as an action under R.C. 4123.90 and a tort claim for wrongful discharge in violation of public policy. The trial court granted the employer's motion to dismiss both the .90 action and the public policy tort claim. The argument was that claimant was fired before filing a workers' compensation claim so there was no retaliation for participation in the workers' compensation system because no claim had been filed at the time of the termination.

The employee appealed to the Second District Court of Appeals. The appellate court affirmed on the .90 action, but reversed on the public policy tort. The employee sought discretionary review by the Supreme Court which was granted.

The Court noted that it was only ruling on the public policy tort and not the underlying .90 action. The Court held that R.C. 4123.90 expresses public policy prohibiting employers from retaliating against injured employees who have not filed, instituted, or pursued a workers' compensation claim prior to being terminated. The Court explained why violation of this clearly articulated public policy is an exception to Ohio's at-will employment rule. That is, in most cases, an employer can fire an employee for any reason or no reason at all, unless the decision is discriminatory or in violation of public policy. See *Greely v. Miami Valley Maintenance Contrs., Inc.* (1990), 49 Ohio St.3d 228. The Court then found that it is against public policy for employers to fire injured workers because of the injury, regardless of whether a workers' compensation claim has been filed at the time of discharge. The Court rejected the notion that the General Assembly would sanction a "footrace" to see if a workers' compensation claim can be filed before termination occurs since doing so would give employers an incentive to fire injured workers as soon as an injury occurs.

The Court also rejected the employer's argument that *Bickers v. W. & S. Life Ins. Co.*, 116 Ohio St.3d 351, 2007-Ohio-6751, precludes any workers' compensation-based public policy tort. However, the Court distinguished *Bickers*, noting that *Bickers* involved non-retaliatory discharge (termination because the claimant was off of work too long while receiving temporary total), whereas the case before it involved retaliatory discharge.

Unfortunately, the Court also held that even though there is a public policy tort for retaliatory discharge of injured employees, the remedy is limited to the relief allowed under R.C. 4123.90 - reinstatement of employment with back pay.

Note: the relief allowed under R.C. 4123.90 and this new public policy tort are woefully inadequate. In most cases, the injured employee receives workers' compensation benefits, unemployment compensation, or both following termination. Such compensation limits or eliminates any back pay that might be awarded through a .90 or public policy tort claim. Further, reinstatement of employment is typically meaningless because the employer will simply find another reason to terminate the employee upon reinstatement. What is the point of creating a cause of action if the remedy provided is toothless and flaccid?

***State ex rel. Baker v. Coast to Coast Manpower, L.L.C.*, 129 Ohio St.3d 138, 2011-Ohio-2721 -** claimant was injured when a piece of metal penetrated his right eye. Following the injury, his vision was 20/25. Claimant's vision worsened to 20/30 to before he underwent a lens/cornea replacement surgery. Claimant then filed for loss of vision in his right eye under R.C. 4123.57(B). The Industrial Commission denied compensation, finding that R.C. 4123.57(B) requires the focus to be on the percentage of vision actually lost as a result of the injury and that such percentage must be at least 25% for an award to be made. In this claim, the claimant's actual loss of vision percentage was less than 25% before lens replacement surgery.

Claimant sought a writ of mandamus in the Tenth District Court of Appeals. The appellate court denied the writ and claimant appealed to the Supreme Court as of right. The Court affirmed, finding that the actual percentage loss of vision following the injury was less than 25%. The lens replacement surgery itself is not the focus - again, the statutory language requires the focus to be on the percentage of uncorrected vision following the injury prior to any corrective measures. In so finding, the Court distinguished this claim from other claims in which loss of vision compensation was awarded. In those other claims, the post-injury, pre-correction percentage of vision loss of over 25%. See *State ex rel. Kroger v. Stover* (1987), 31 Ohio St.3d 229; *State ex rel. Gen. Elec. Corp.*, 103 Ohio St.3d 420, 2004-Ohio-5585; *State ex rel. Autozone, Inc. v. Indus. Comm.*, 117 Ohio St.3d 186, 2008-Ohio-541; *State ex rel. La-Z-Boy Furniture Galleries v. Thomas*, 126 Ohio St.3d 134, 2010-Ohio-3215.

Note: if the post-injury, uncorrected loss of vision is less than 25%, there is no compensation available under R.C. 4123.57(B).

Also, note that In *Autozone*, the Supreme Court noted that 20/200 vision meets the legal definition of "blind" pursuant to R.C. 3304.28. The Court stated that "it is self-evident that blindness fulfills the requirement of "the loss of the sight of an eye" under R.C. 4123.57(B).

***State ex rel. Lackey v. Indus. Comm.*, 129 Ohio St.3d 199, 2011-Ohio-3089 -** claimant sustained a knee injury which required surgery in 2003. After he recovered from surgery, claimant returned to full duty work. In July of 2004, claimant's counsel wrote to the employer's TPA, informing them that claimant would soon be retiring as a result of the knee injury. Claimant retired in October of 2004 but his retirement paperwork did not mention his knee injury as a reason for retirement. Moreover, claimant was working full-time prior to his retirement and there was no medical evidence contemporaneous with his retirement indicating that the knee injury prohibited or limited claimant from performing his job. Claimant did not search for other employment after retiring.

Approximately one year after retiring, claimant underwent another knee surgery and requested temporary total. The commission denied compensation, finding that claimant had abandoned the entire workforce. The commission noted that there was no medical evidence linking the knee problems to the retirement and that claimant's testimony evinced his intent to not work again. After the SHO order denying temporary total was issued, claimant submitted an affidavit stating that his knee injury was the reason for his retirement. The commission refused to hear the matter again.

Claimant sought a writ of mandamus in the Tenth District Court of Appeals. The appellate court denied the writ and claimant appealed to the Supreme Court as of right. The Court affirmed, holding that the commission was within its discretion to find voluntary abandonment of the entire workforce based on the claimant's testimony and the lack of any medical records linking the retirement and the knee injury. The Court also noted that the commission did not have to consider claimant's affidavit because it was filed after the SHO hearing.

Note: the courts have shown a tendency to look at retirement paperwork/buy-out agreements and scrutinize them for any connection between an injury and the retirement. See, e.g., *State ex rel. Akers v. Custom Works Auto Body, Inc.*, 10th Dist. No. 05AP-1329, 2006-Ohio-6144; *State ex rel. Jorza v. Indus. Comm.*, 124 Ohio St.3d 264, 2010-Ohio-119..

Also, for the current state of the law on voluntary abandonment issues, see the following cases: *State ex rel. Gross v. Indus. Comm.*, 115 Ohio St.3d 249, 2007-Ohio-4916; *State ex rel. Luther v. Ford Motor Co., Batavia Transmission Plant*, 113 Ohio St.3d 144, 2007-Ohio-1250; *State ex rel. OmniSource Corp. v. Indus. Comm.*, 113 Ohio St.3d 303, 2007-Ohio-1951; *State ex rel. Reitter Stucco, Inc. v. Indus. Comm.*, 117 Ohio St.3d 71, 2008-Ohio-499; *State ex rel. Upton v. Indus. Comm.*, 119 Ohio St.3d 461, 2008-Ohio-4758.

***Starkey v. Builders FirstSource Ohio Valley, L.L.C.*, 130 Ohio St.3d 114, 2011-Ohio-3278 –** claimant was injured and the claim was allowed initially for sprain conditions. Claimant subsequently sought an additional allowance for "degenerative osteoarthritis of the left hip". The commission additionally allowed that condition as requested (apparently on a direct cause theory). The employer appealed pursuant to R.C. 4123.512. During discovery, claimant's expert testified that the arthritis was aggravated by the industrial injury. Consequently, the employer moved for dismissal of the case arguing

that aggravation of arthritis and arthritis by direct cause are distinct conditions and because the claim was not pursued on an aggravation basis administratively, the claimant should be precluded from seeking that condition in court. The trial court granted the employer's motion and entered judgment denying the claim for arthritis by direct causation.

Claimant appealed to the First District Court of Appeals. The appellate court reversed, finding that the condition sought administratively was the same as that sought in court – the only difference was the theory or type of causation. The employer sought discretionary review in the Supreme Court which was granted.

The Court affirmed, finding that unless the actual condition is different (for example, pursuing right shoulder sprain administratively, but right shoulder arthritis in court), a claimant can pursue a different theory of causation in court than administratively. The Court relied on R.C. 4123.95 and IC Policy Memo S11 to reach this conclusion. In holding that a different theory of causation is not equivalent to a different condition, the Court answered the question it left open in *Ward v. Kroger Co.*, 106 Ohio St.3d 35, 2005-Ohio-3560. In that case, the Court held that a claimant could not pursue an entirely different condition in court if it was not requested administratively. The *Ward* Court, however, left open the issue of whether a different theory of causation constitutes a separate medical condition. In *Starkey*, the Court held that a different theory of causation is not a different condition.

Note: What is still unclear is whether a condition like carpal tunnel syndrome could be pursued as an OD and then as a *Village* injury in court, or vice versa. Given the holding in *Starkey*, it would appear that as long as the condition could be pursued on one theory administratively, but another in court.

***State ex rel. Aaron Rents, Inc. v. Ohio Bur. of Workers' Comp.*, 129 Ohio St.3d 130, 2011-Ohio-3140 –** employer had a number of its employees reclassified for BWC premium purposes. The BWC made the change retroactive, but failed to explain why it chose to do so. The employer sought a writ of mandamus in the Tenth District Court of Appeals. The appellate court denied the writ and the employer appealed to the Supreme Court as of right.

The Court granted the writ, finding that both the commission and the BWC must adequately explain their decisions so as to inform the parties and a reviewing tribunal of the basis for decisions.

Note: this case, while seemingly limited in its holding, is important because it shows that the requirement of an adequate explanation extends beyond compensation issues. Every decision must be explained and the argument that the requirements of *Mitchell* and *Noll* apply to only certain orders is incorrect.

***State ex rel. Angelo Benedetti, Inc. v. Indus. Comm.*, 129 Ohio St.3d 470, 2011-Ohio-4131 –** claimant sustained a serious injury while shoveling stones out of a hopper. Unfortunately, a grating cover had been removed from the hopper such that augers inside the device were exposed. Claimant slipped while inside the hopper and his left leg was amputated above the knee when it became entangled in the augers.

Claimant filed a VSSR application in 2000. Due to other litigation in the claim, the VSSR was not heard until 2005. Just days before the hearing, claimant amended the VSSR sections allegedly violated. The SHO allowed the amendment over the employer's objection, finding that the amendment did not add any new claims, but rather clarified those raised previously. Importantly, the initial VSSR application had cited specific sections of the VSSR code, but also stated that "[c]laimant cites herein any code section the employer has reasonable notice of … [and] any previously existing code section."

The commission found VSSR liability. The employer apparently sought rehearing as required by Ohio Adm.Code 4123-3-20, but its request was denied. The employer then sought a writ of mandamus in the Tenth District Court of Appeals. The appellate court denied the writ and the employer appealed to the Supreme Court as of right.

The Court affirmed, finding that the commission did not abuse its discretion in allowing amendment of the alleged VSSR sections and finding violations of those sections. because no new claims were raised, the amendments merely clarified the initial allegation and the commission was within its discretion to allow such amendment.

Note: it is a good idea to use the language employed by the claimant in this case on VSSR applications (any section of which the employer has reasonable notice and any previous, similar code section). It makes it easier to amend the allegation if that becomes necessary. Of course, amendments can always be made within two years of the injury/death – only when the amendment is made beyond the two year period will it be scrutinized to determine whether there is a new claim or merely a clarification. If the former, the amendment will not be permitted.

Also, when it comes to VSSRs, failure to request rehearing after the initial SHO decison under Ohio Adm.Code 4123-3-20 is fatal to a mandamus claim. Mandamus is not available if the relator fails to exhaust remedies in the ordinary course of law. Failure to appeal at each necessary level administratively is required. If a remedy exits in the ordinary course of law and that remedy is not pursued, a writ of mandamus cannot issue. See, e.g., *State ex rel. Buckley v. Indus. Comm.*, 100 Ohio St.3d 68, 2003-Ohio-5072. Whether you have exhausted administrative remedies depends upon the issue:

a) VSSR – failure to ask for a rehearing of the SHO's decision pursuant to Ohio Adm.Code 4121-3-20(E) is fatal to a mandamus. See *State ex rel. Koch v. Indus. Comm.* (1992), 63 Ohio St.3d 747;

b) PTD – there is no need to appeal the SHO order administratively because it is the final order. Reconsideration can be pursued, but the failure to do so does not mean that there is a failure to exhaust administrative remedies because the reconsideration process is not part of any statute or administrative rule. See *State ex rel. Novak v. Indus. Comm.* (Nov. 12. 1993), Franklin App. No. 92AP-1326, unreported.

c) PPD – the SHO reconsideration order is the final order;

d) TTD/WL/other forms of compensation – the third level IC denial order issued pursuant to R.C. 4123.511(E) is the final order.

***Ohio Bur. of Workers' Comp. v. McKinley*, 130 Ohio St.3d 156, 2011-Ohio-4432 –** BWC sued third party tortfeasor and claimant in common pleas court to recover statutory subrogation funds under R.C. 4123.931. Tortfeasor asserted a statute of limitations defense, arguing that statutory subrogation rights must be asserted within two years of the creation of the subrogation rights. The trial court agreed and dismissed the BWC's action. BWC appealed to the Seventh District Court of Appeals. The appellate court reversed and held that subrogation rights under R.C. 4123.931 have a six year statute of limitations. The tortfeasor sought discretionary review in the Supreme Court which was granted.

The Court noted that under R.C. 2305.07, a six year statute of limitations applies if the subrogation rights are independent rights created by statute. The Court held that R.C. 4123.931 does create an independent right of recovery for a statutory subrogee and therefore that the applicable statute of limitations is six years. The Court refused to address the BWC's argument that, as the State, no statute of limitations exists when the BWC is the statutory subrogee. BWC failed to raise that argument until the Supreme Court level and therefore waived it.

***State ex rel. Dolgencorp, Inc. v. Indus. Comm.*, 130 Ohio St.3d 20, 2011-Ohio-4606** – claimant sustained an eye injury, but the post-injury, uncorrected loss of vision was estimated at only 5%. Notwithstanding the low percentage of vision loss, claimant did suffer from excessive blinking, tearing, and reduced depth perception. As a result, claimant underwent a corneal transplant surgery and leter sought loss of vision compensation under R.C. 4123.57(B). The commission granted total loss of vision of the left eye.

The employer sought a writ of mandamus in the Tenth District Court of Appeals. The appellate court granted the writ, finding that the commission abused its discretion in awarding the compensation. Claimant appealed to the Supreme Court as of right. The Court affirmed, based on the holding in *State ex rel. Baker v. Coast to Coast Manpower, L.L.C.*, 129 Ohio St.3d 138, 2011-Ohio-2721.

Note: as discussed above, under *Baker*, the focus in loss of vision disputes is the post-injury percentage of uncorrected vision loss. If that loss is less than 25%, then there is no award under R.C. 4123.57(B).

***State ex rel. Cinergy Corp./Duke Energy v. Heber*, ___ Ohio St.3d ___, 2011-Ohio-5027 –** claimant was injured in 1970. He retired in 1989 and did not return to the workforce after retiring. In 2008, he sought PTD which was granted by the commission. The commission noted that claimant testified that he retired because of his work injury. However, the commission did not comment further on that issue or conduct an analysis of whether the retirement was voluntary or involuntary.

The employer sought a writ of mandamus in the Tenth District Court of Appeals. The appellate court granted the writ, finding that the commission failed to address voluntary abandonment. The court of appeals also implied that only medical evidence contemporaneous with retirement can prove that retirement was injury-related. Claimant appealed to the Supreme Court as of right.

The Court affirmed, but noted that medical evidence is not a necessity to prove that a retirement was injury-related. The commission has the discretion to find a lack of such evidence supportive or unsupportive of the claimant's position.

Note: this result is troubling because a claimant's testimony constitutes "some evidence". See *State ex rel. Chrysler Corp. v. Indus. Comm.* (1998), 81 Ohio St.3d 158; *State ex rel. Quest Diagnostics v. Indus. Comm.*, 10th Dist. No. 10AP-153, 2011-Ohio-78. Thus, it is unclear why the commission's reference to claimant's testimony was insufficient to establish that the retirement was involuntary (i.e, injury-related). If the claimant testified that his retirement was not injury related, the Court would likely uphold a denial of PTD benefits.

Also, the commission always abuses its discretion when it fails to address a key issue before it. See, e.g., *State ex rel. Peabody Coal v. Indus. Comm.* 91993), 66 Ohio St.3d 639.

***State ex rel. Mackey v. Ohio Dept. of Edn.*, 130 Ohio St.3d 108, 2011-Ohio-4910 –** claimant filed for PTD and the commission granted the application. However, despite extensive argument over the issue of voluntary abandonment, the PTD order was silent on that issue. Consequently, the employer's request for reconsideration was granted. On rehearing, the commission found that a clear mistake of law was committed by the SHO because no voluntary abandonment analysis was conducted. As such, the commission invoked its continuing jurisdiction and denied PTD, finding that claimant's retirement was not injury-related. In support of its decision, the commission noted that claimant did not treat for four years prior to her retirement and that she was working full duty when she retired.

Claimant sought a writ of mandamus in the Tenth District Court of Appeals. The appellate court denied the writ, finding that the commission correctly invoked its

continuing jurisdiction and was within its discretion in denying PTD based on a lack of contemporaneous medical evidence supporting a connection between the injury and claimant's retirement.

Claimant appealed to the Supreme Court as of right. The Court affirmed, finding that there was a clear mistake of law justifying the commission's use of its continuing jurisdiction power under R.C. 4123.52. Further, the Court cited *State ex rel. Lackey v. Indus. Comm.*, 129 Ohio St.3d 199, 2011-Ohio-3089, for the proposition that the commission does not abuse its discretion by finding a retirement to be voluntary when there is a lack of contemporaneous medical evidence linking the injury and the retirement.

Note: the lack of treatment contemporaneous with a requested period of disability can, but does not automatically, support a denial of compensation. See *State ex rel. Simon v. Indus. Comm.* (1994), 71 Ohio St.3d 186.

***State ex rel. George v. Indus. Comm.*, ___ Ohio St.3d ___, 2011-Ohio-6036 –** claimant requested authorization for shoulder surgery. Employer had claimant evaluated by Dr. Hauser who, shockingly, found nothing wrong with claimant's shoulder. However, Dr. Hauser's report contained several factual errors. The commission denied authorization for surgery based on Dr. Hauser's report.

Claimant sought a writ of mandamus in the Tenth District Court of Appeals. The appellate court granted the writ, finding "troubling inconsistencies" in Dr. Hauser's report. The employer appealed to the Supreme Court as of right. The Court reversed, finding that although Dr. Hauser's report was flawed in certain respects, his opinion on the ultimate issue, the status of claimant's shoulder and whether the allowed conditions warranted surgery, was clear. Accordingly, the Court found that Dr. Hauser's report was not equivocal or inconsistent enough to be removed from consideration under *State ex rel. Eberhardt v. Indus. Comm.* (1994) 70 Ohio St.3d 649, or *State ex rel. Lopez v. Indus. Comm.* (1994) 69 Ohio St.3d 445. The Court stated that for equivocation or internal inconsistency to disqualify a medical report, the problems must be with the "critical issue" that is the subject of the report.

***State ex rel. Donohoe v. Indus. Comm.*, ___ Ohio St.3d ___, 2011-Ohio-5798 –** claimant fell at a construction site and died from his head injury. The surviving spouse filed a VSSR application. The commission denied the application, seemingly because there was no eyewitness testimony. The commission held that without such eyewitness evidence, the widow could not prove a VSSR violation by a preponderance of the evidence. The commission's order stated that "all evidence was reviewed and considered."

The widow sought a writ of mandamus in the Tenth District Court of Appeals. The appellate court granted the writ, finding that the matter should be returned for further consideration. The court felt that the commission's order created a rule that no VSSR liability can exist unless there is eyewitness testimony or evidence.

Both the widow and the employer appealed to the Supreme Court as of right. The Court affirmed, holding that the commission's order was ambiguous. On one hand, the order seemed to require eyewitness testimony. The Court noted that there is no such requirement in VSSR disputes and that direct evidence has never been an absolute requirement. rather, the commission can draw reasonable inference from the evidence and rely on common sense in evaluating the evidence. On the other hand, the commission included the boilerplate phrase that "all evidence was reviewed and considered", leading to the conclusion that reports submitted by the widow really were considered but rejected an unpersuasive. Because both interpretations of the commission's order are plausible, the Court found it too ambiguous and granted a limited writ of mandamus, returning the matter to the commission for further consideration.

COURT OF APPEALS OPINIONS – SUBSTANTIAL AGGRAVATION

***Smith v. Lucas County*, 6th Dist. No. L-10-1200, 2011-Ohio-1548** - claimant sought additional allowance for aggravation of a pre-existing cervical disc condition, The condition was disallowed by the Industrial Commission and claimant appealed to court pursuant to R.C. 4123.512. The trial court granted the employer's motion for summary judgment, finding that there was no pre-injury diagnostic evidence to compare to the post-injury MRI and therefore the claimant failed to prove a "substantial aggravation" under R.C. 4123.01(C).

Claimant appealed to the Sixth District Court of Appeals. The court affirmed the trial court's decision, but noted that

> if appellant had provided sufficient documentation of her symptoms preceding the injury, substantial aggravation could have been established. Such evidence would not necessarily require objective "before" and "after" findings or results. In this case, appellant provided only Dr. Healy's affidavit and chart notes which he specifically stated were based on "the history which she related to me." Appellant failed to provide any information such as records or a statement from her prior physician. The [post-injury] MRI revealed only the existence of [the condition] and provided an explanation for appellant's current symptoms. The testing did not establish that the condition was substantially aggravated by the injury.

Note: the encouraging aspect of this decision is the court's finding that objective "before" evidence is not necessary, but there must be some evidence showing the pre-injury status of the condition in question. Based on the language of the opinion, this could take the form of medical records or a physician's opinion. However, silence on the issue will not work.

Keep in mind that the statute identifies three types of evidence which can provide the objective support for a substantial aggravation: 1) diagnostic findings; 2) clinical findings; **or** 3) test results. The statute does not say "and" - it says "or". Thus, any of

these three can provide the required proof. Moreover, nothing in the statute requires pre and post injury comparisons. However, as the court noted, there must be some evidence to describe the pre-injury status of the condition because there is no other way to determine whether a substantial aggravation occurred without knowing the pre-injury, baseline status of that condition.

***Pflanz v. Pilkington LOF*, 1st Dist. No. C-100574, 2011-Ohio-2670 –** claimant began having low back pain in 1983. In 2001, he underwent an MRI of the lumbar spine that revealed disc displacement at L4-5. Claimant had no low back treatment for a number of years. In 2007, claimant began working for Pilkington. On July 5, 2007, claimant was lifting a large pane of glass and felt a "snap" and an "electric shock" in his low back. Following the injury, he went to a chiropractor who ordered another lumbar MRI. Based on a comparison of the pre-post injury MRIs and his own clinical findings, the chiropractor opined that claimant substantially aggravated pre-existing disc displacement and facet arthritis.

Claimant's motion to additionally allow his claim for the substantial aggravation conditions was granted administratively. The employer appealed to court pursuant to R.C. 4123.512. Following a bench trial, the court ruled in claimant's favor. The employer appealed to the First District Court of Appeals, alleging that the trial court had misapplied the definition of "substantial aggravation" set forth in R.C. 4123.01(C) as amended by SB 7. Specifically, the employer alleged that the trial court relied solely on the fact that claimant had not treated for a number of years as the basis for its decision. However, the appellate court found that the trial court actually relied on the objective findings in the MRIs and the chiropractor's clinical findings to support the finding of a substantial aggravation. Accordingly, the appellate court upheld the trial court's decision.

In discussing the meaning of "substantial aggravation", the appellate court cited the requirement of objective evidence (diagnostic, clinical, or test results) and that subjective complaints can be considered if supported by objective findings. In addition, the court stated that the term "substantial" must be given its usual meaning. The court found that "substantial" means that the aggravation "must be substantial both in the sense of being considerable and in the sense of being firmly established though the presentation of objective evidence."

Note: from this case, it is necessary to have objective evidence of a worsening, and also that the aggravation be "considerable". The court seems to be referring to the mechanism of injury and to the post-injury treatment in this context. Also, in this case, there was a long gap in treatment prior to the injury, heavy lifting involved, a pre/post injury MRI comparison, and clinical findings.