2015 Annual Convention

Workers' Compensation

Tim Bainbridge, Jodie Taylor, and Karen Gillmor

Kitty Ivan

John Van Doorn and Phil Fulton

John Annarino and Jeremy Jackson

David Barnhart

Jon Goodman

Justice William O'Neill

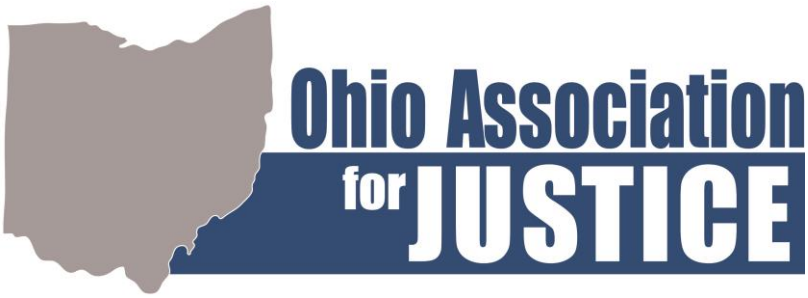
2015 Annual Convention

Workers' Compensation

Updates from the Industrial Commission

Tim Bainbridge, Esq.; Jodie Taylor, Esq.; Karen Gillmor Ph.D.

Columbus, Ohio



2015 Annual Convention

Workers' Compensation

How Your Claimant's Social Media Affects Their Workers' Compensation Claim

Kitty Ivan, Esq.

Columbus, Ohio

How Your Claimant's Social Media Affects His or Her Workers' Compensation Claim

Katherine Ivan, Esq.
Agee Clymer Mitchell & Laret

Recent Statistics show that one out of every seven people on Earth has a Facebook account. Social media has changed the way that workers' compensation cases are handled. Workers' Compensation practitioners cannot turn a blind eye to these changes even if the practitioners themselves do not participate in social media. This discussion will briefly review the most common forms of social media, review how and what is admissible administratively and in court, and what practitioners should be warning claimants about unintentionally harming their claims or even committing fraud. Courts across the country have made clear that discovery of social media is fair game. While most courts have denied social media fishing expeditions, a showing that the social media likely contains relevant material is usually enough for either an *in camera review* of the social media by the court or a finding that the material must be provided.

I. Social Media Types and Descriptions
   a. Facebook, Twitter, Snapchat, Flickr, YouTube, MySpace, iCloud, Google+
   b. Where do Social Media Posts go to die? (Hint: they do not)
      i. Facebook has options for a **Legacy Contact**: a person or person whom you can designate to handle certain actions in the application in the event of your death. The legacy contact does not have full control of your account but can manage certain portions of the account to carry it on in your memory, if you so desire.
      ii. Facebook Chat lives forever
      iii. Subpoenas will be responded to only if all options are exhausted

II. Administrative Social Media Concerns
   a. Employer's Access without Permission
   b. Employer Request for Subpoena from the Industrial Commission
   c. Screening/Monitoring by Claimant Attorney
   d. Mitigating Social Media Evidence Once Admitted to BWC File

III. 4123.512 Court Appeals
   a. Employer's Rights to reasonable narrowly tailored discovery requests vs. Injured Workers' Right to Privacy
      i. Privacy Settings
      ii. Courts decisions: Broad requests for access to all social media during a specific time period is not good enough.

1. *Kennedy v. Contract Pharmacal Corp.*, United States District Court, E.D. New York, May 13, 2013, No. CV 12-2664
    a. Gender discrimination-based suit against an employer
    b. The defendant-employer sought to compel broad discovery from the plaintiff's social media sites requesting "[a]ll documents concerning, relating to, reflecting and/or regarding Plaintiff's utilization of social networking sites."
    c. The court denied a motion to compel this discovery request and held that "[t]here is no specificity to the requests and no effort to limit these requests to any relevant acts alleged in this action."
2. *Ford v. United States*, U.S. District Court for the District of Maryland
    a. The court rejected the government's request for "any documents[,] postings, pictures, messages[,] or entries of any kind on social media within the covered period relating to [c]laims by Plaintiffs or their [e]xperts" by denying the motion to compel.
    b. The court held that the government's request was not narrowly tailored and "does not describe the categories of material sought; rather, it relies on Plaintiffs to determine what might be relevant."

iii. Court decisions: if circumstances change, a quashed request can be renewed.

1. *Root v. Balfour*, U.S. District Court of Appeal, Florida, Second District
    a. A mother had sued the city, contractors, and subcontractors for damages resulting from injuries to her son who was struck by an oncoming vehicle

b. The lower court ordered the mother to produce various types of Facebook postings from both before and after the accident, including "any information about counseling or psychological care she obtained; her relationships with her son and other children; and her relationships with other family members, boyfriends and significant others."
c. The appellate court quashed the order holding that "95 percent, or 99 percent of this may not be relevant." The court further held that if further developments in the litigation indicated that such information may be discoverable, the trial court might have to review information in camera and fashion appropriate limits regarding the discovery.

iv. Court decisions: Before the court will compel the discovery, the request must be narrowly tailored.

1. *Mailhoit v. Home Depot*, Central District of California
a. The defendant requested a wide array of social media-related discovery including: (1) any profiles, postings or messages from social media sites relating to any mental state of the plaintiff; (2) third-party communications to the plaintiff that place her own communications in context; (3) any pictures of the plaintiff; and (4) *social networking communications between the plaintiff and current or former Home Depot employees or that in any way refer or pertain to her employment at Home Depot or the lawsuit*.
b. The court held that the last category was relevant but quashed the rest on the grounds they were not 'reasonably particular' requests likely to lead to discovery of admissible evidence.

v. Court decisions: Requesting litigant must show some information in the public social media profile that undermines the Plaintiff's claim has been required by some courts and criticized by others.
    1. *Potts v. Dollar Tree Stores*, Middle District of Tennessee
        a. In a race-based employment discrimination case, the defendant requested full access to the plaintiff's Facebook page.
        b. The court found that the required showing had not been made because the defendant "lack[ed] any evidentiary showing that Plaintiff's public Facebook profile contains information that will reasonably lead to discovery of admissible evidence."
    2. *Giachetto v. Patchogue Medford Union Free School District*, U.S. District Court for the Eastern District of New York
        a. With respect to the requirement that there be public social media conflicts, this court observed that "[t]his approach can lead to results that are both too broad and too narrow".
        b. The court analyzed category-by-category what the defendant had demanded to determine the scope of the relevant social media information in what the court called a "traditional relevance analysis."
vi. Court decision: Social media discovery can involve the court to review documents in camera to determine relevancy.
    1. *EEOC v. Honeybaked Ham*, the U.S. District Court for the District of Colorado
        a. A class action hostile work environment suit ordered each class member's social media content to be produced for review by the court in camera to determine what was legally relevant.

2. *Offenbach v. Bowman*, Middle District of Pennsylvania
    a. The plaintiff conceded in initial discovery that a limited amount of information in his Facebook account was subject to discovery, but the defendants argued for a much broader scope of discovery from the plaintiff.
    b. The court reviewed the information in camera and, siding with the plaintiff, determined that only a limited amount of information from the Facebook account had to be produced to the defendants.

b. Using Court Discovery to get continuing jurisdiction administratively

IV. Fraud – The BWC and Self-Insured Employer's rights

a. BWC Fraud Squad Social Media Data

b. Self-Insured Employer Surveillance Data

V. Advising the Client

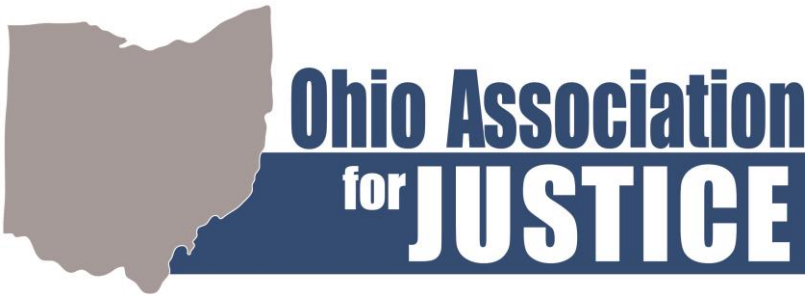
a. The new client
    i. Intake sheets for claims of all ages should include whether the claimant has social media.
    ii. Advising a client not to post about their injury, employer, state of mind, etc. is ethical but advising a client to take something down after the fact is unethical and can be considered tampering with evidence.
    iii. Remember Facebook Chat lives forever! Even if you delete your account, the person you chat with can still access that conversation. A narrowly tailored request for this information by an employer's attorney will likely be relevant and discoverable in court, and definitely would be administratively admissible for consideration.

b. The long-standing PTD Client
    i. When DWRF Orders are issued at the beginning of the year, this is a good opportunity to send a form letter to your clients regarding the increase of surveillance and what they can and cannot be doing while receiving PTD.

ii. Access to technology including social media will continue to grow among these clients.

c. The settling client
    i. If the client is signing settlement documents separate and apart from what the BWC requires with the employer, beware of confidentiality clauses and social media.
    ii. These clauses can state that any disparaging remark about the employer can breach the agreement and require your client to pay back the settlement plus damages.
    iii. Make sure to properly counsel your client that “saying” includes posting on social media about these things.

While social media is generally discoverable, courts are demanding more specificity in requests for social media information to be relevant. The best way to prevent dealing with this issue, is advising your client not to post it in the first place.



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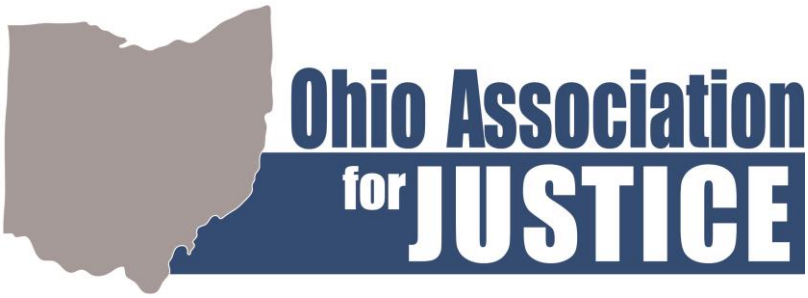
Workers' Compensation

Legislative Update

John Van Doorn and Phil Fulton, Esq.

Columbus, Ohio



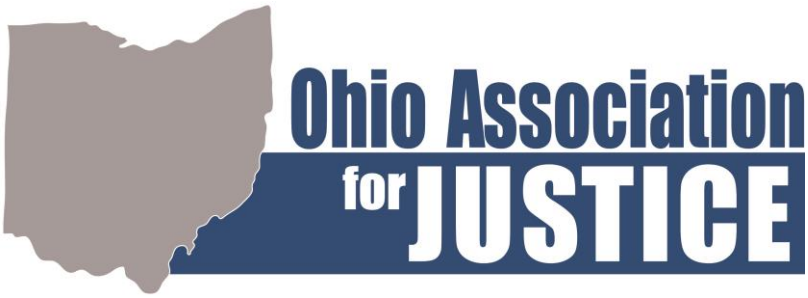
2015 Annual Convention

Workers' Compensation

The New BWC Medical Pilot

John Annarino, Esq. and Jeremy Jackson

Columbus, Ohio



2015 Annual Convention

Workers' Compensation

Continuing Jurisdiction: The Fourth Appeal

David Barnhart, Esq.

Columbus, Ohio

Ohio Association for Justice
Spring Seminar

Reconsideration: Results Oriented Justice

May 2015

David B. Barnhart, Esq.
PHILIP J. FULTON LAW OFFICE
89 E. Nationwide Blvd,, Suite 300
Columbus, Ohio 43215
David@Fultonlaw.com
(614) 224-3838 Fax (614) 224-3933

I Statutory Basis

A. Ohio Rev. Code §4123.52(A)

"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."

1) No modification after five years from the date of injury, the absence of payment of medical benefits.

2) If compensation or wages in lieu of compensation are paid then an additional five years are added to the life of the claim, five years from the last date of payment of compensation.

3) 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. Note that there is no similar provision preventing the IC from deducting compensation beyond two years from the date of application.

B. Ohio Rev. Code §4123.57

1) Except on application for reconsideration, review and modification which is filed within ten days after the receipt of the decision of the DHO, in no instance shall the formal award be modified unless it is found for medical or clinical findings that the condition of the claimant resulted from the injury has so progressed as to have increased the percentage of PPD.

2) No application for a subsequent percentage determination on the same claim for injury or occupational disease shall be accepted for review by the DHO unless supported by substantial evidence of new and changed circumstances developing since the time of the hearing on the original or last determination."

C. **Ohio Admin. Code §4121-3-20(E)**

Three basis for continuing jurisdiction in the VSSR setting

1) New and additional proof not previously considered

1) Obvious mistake of fact

1) Clear mistake of law

1) Failure to exhaust these legal requirements dooms any mandamus application to denial for failure to exhaust administrative remedies. *State ex rel. Bailey v. Indus. Comm.*, 62 Ohio St. 3d 191 (1991)

II **Interplay with *res judicata***

A. **Case Law**

1) *Linda L. Greene v. James Conrad*, 96 APE12-1780, 97-LW3135 (10th District Court of Appeals) held the administrative processing of the appellee's application by the Bureau's claims examiner which culminates in the denial of the claim for failure to provide requested information, was not an adjudication by a judicial or quasi-judicial entity entitled to *res judicata* effect."

2) *State ex rel. Crabtree v. Ohio Bureau of Workers' Compensation* (1994) 71 Ohio St. 3d 504

The BWC does not conduct hearings. Unless the parties have the right to administrative proceedings that are of a judicial nature and where the parties have an ample opportunity to litigate the issues involved in the proceeding, only then can *res judicata* apply. In *Crabtree*, the Supreme Court stated, "The Bureau's role is ministerial not deliberative. The Bureau gives way to the Commission when a party contests an award necessitating a weighing of evidence and a judgment. The Bureau then makes the payments based upon the Commission's judgments."

3) *Linda Greene* is limited to the initial application. The court only decided whether the Bureau's processing of the first application was of a judicial nature and where the parties have had an ample opportunity to litigate the issues

involved.

4) Consequently there must be an order from which reconsideration has to be sought. If there is not a judicial or quasi-judicial order, then a *Linda Greene* application may not be appropriate. See IC Resolution R98-1-02, wherein the Industrial Commission codified the *Linda Greene* decision to apply to Bureau orders issued on the original allowance of the claim which deny the original allowance of the claim because the claimant did not provide all the information requested by the BWC, or that there was insufficient information submitted to establish a claim.

5) *State ex rel. BOC Group, Gen. Motors Court v. Indus. Comm*. (1991), 58 Ohio St. 3d 199.

It is almost too obvious for comment that *res judicata* does not apply if the issue is the claimant's physical condition or degree of disability at two entirely different times...a moments reflection would reveal that otherwise there would be no such thing as reopening for a changing condition. The same would be true of any situation in which the facts are altered by a change in the time frame.

6) *State ex rel. Bing v. Indus. Comm*. (1991), 61 Ohio St. 3d 424.

In enacting [4123.52], the General Assembly recognized that an employee because of an injury or series of injuries suffered in the course of employment, may find herself more than once in her lifetime, temporarily unable to work. Under Ohio Revised Code §4123.52, the Commission is vested with continuing jurisdiction to revisit a case and make lesser awards of temporary total disability compensation where circumstances warrant. *Bing* at 426.

7) The reconsideration power has been a part of the Commission's orders since the beginning of the workers' compensation act. GC section 1465-86.

a) "The power and jurisdiction of the board over each case shall be continuing, and may from time to time make such modification or change with respect to former findings or orders with respect thereto, as, in its opinion, may be justified." GC Section 39

b) 103 Ohio Law 72

B. **Case Law Authority for reconsideration**

7) *State v. Ohio Stove*, 154 Ohio St. 27 (1950)

The power to change an award does not extend to a review of a former action, the modification must be founded upon new and changed circumstances after the order becomes final.

7) The power can be invoked to correct an error in the original award. *State ex rel. New Idea Inc. v. Indus. Comm*., 145 Ohio St. 209 (1945). Commission's control over its orders under Ohio Revised Code §4123.52 may be terminated by the institution of an appeal to the Court of Common Pleas. It may make changes or correction in its orders until such an appeal is taken, or until the appeal period expires. *State ex rel. Prayner v. Indus. Comm.*, 2 Ohio St. 2d 120 (1965).

7) *State ex rel. Todd v. Gen. Motors Corp.*, 65 Ohio St. 2d 18 (1981).

The decision of a SHO on appeal to the IC may be vacated by the Commission and the matters may be ordered set for rehearing before the Commission until the actual institution of a court appeal or the expiration of the 60-day appeal period.

7) *State ex rel. Gatlin v. Yellow Freight System*, 18 Ohio St. 3d 246 (1985).

In this case, *Todd v. Gen. Motors* was approved and extended by the court holding that regardless of the existence of a legislatively prescribed court appeal, the IC has inherent power to reconsider its order for a reasonable period of time absent statutory or administrative regulations restricting the exercise of reconsideration.

In this case, an application for temporary total compensation was reversed by the Columbus Regional Board of Review by two staff hearing officers. Temporary total was granted. The employer filed a notice with the Commission for further review improperly designated as a notice of appeal. The Commission construed the application as one of reconsideration. It was it was granted. The injured worker filed a mandamus action to the order granting reconsideration claiming that no jurisdiction existed for the Commission to vacate a final order by its SHO.

The Court of Appeals granted a limited writ compelling the Commission to specify its reasons and the evidence relied upon when it vacated the order of its SHO, basing that decision on *State ex rel. Mitchell v. Robinson Myers Inc.* (1983), 6 Ohio St. 3d 481. The Supreme Court said that *Mitchell* did not apply to interlocutory orders granting reconsideration. The court focused on the primary issue as to whether or not the Commission possessed the requisite jurisdiction to reconsider its SHO order.

The Court said at page 249, "The facts presented in the case at bar highlight a heretofore unchallenged but recurring practice; that is, the Commission has long granted reconsiderations without express statutory authority or administrative rules, and absent the availability of an appeal under [then] Revised Code §4123.519. The court went back to *Indus. Comm. v. Dell* (1922), 104 Ohio St. 389, wherein the court said at 396-397,

"The Commission should be held to have inherent power to prevent the misappropriation

or the misapplication of the insurance funded claimants who are afterwards found not to be entitled thereto. The State insurance fund is in the nature of a trust fund and it is the duty of the Commission to impartially distribute the same among persons entitled thereto and not to permit the funds to be depleted or become the object of fraud or imposition, and it being clearly their moral and legal duty to correct any mistake or fraud or imposition which will result in a misapplication or misappropriation of any part of the fund. The law should not be so construed even in the case of ambiguity. Neither should the legislature be held to have intended to enact any provision which would in any manner hamper or interfere with the members of the Commission in their efforts to properly protect the fund."

Gatlin was arguing that since the issue was temporary total compensation and thus the extent of disability which was not an appealable order, the Commission was powerless to reconsideration of its order within 60 days. The court disagreed saying that if an administrative agency has the inherent power to reconsider an order prior to an appeal or the expiration of the time for perfecting an appeal, that agency also has the inherent power to reconsider an order for a reasonable period of time where no appeal is statutorily provided. The court did encourage the Commission, in the interest of fairness to claimants and employers, to forthwith promulgate rules according to its rule making authority under Revised Code §4121.11.

B. **Industrial Commission Resolutions**

Rescinded Resolutions

7) Resolution dated 12-18-78
Appeals and reconsiderations to be heard by Staff Hearing Officers now rescinded R95-1-12

7) Resolution R95-1-09 now rescinded R98-1-03.

7) Resolution R98-1-03 now rescinded R05-1-02.

7) Resolution R05-01-02 now rescinded R08-01-01. November 1, 2008

B. **Current Resolution Requirements**

According to *State ex rel. Nicholls v. Indus. Comm.* (1998), 81 Ohio St. 3d 454, continuing jurisdiction of the IC is not unlimited and that its prerequisites are:

(1) new and changed circumstances;

(2) fraud;
(3) clear mistake of fact;
(4) clear mistake of law; or
(5) error by inferior tribunal.

Time frame - fourteen days from date of receipt of order.

Resolution R08-1-01 eliminated the opportunity for a party to file a response within fourteen days to the parties request for reconsideration.

Requirements:

(1) Recitation of the specific grounds upon reconsideration is sought
(2) Identification of the relevant orders of the Administrator and the IC from which reconsideration is sought as well as any other underlying orders addressing the issue in controversy.
(3) Identification of the relevant documents and proof contained within the claim files, and citations to legal authorities relied upon to support the request.
(4) If there exists newly discovered evidence by which due diligence cannot have been discovered and filed prior to the date of the order, that should be attached.

Failure to comply with any of those shall result in denial.

III What do the elements mean, and how to defend against them?

A. Has the request for continuing jurisdiction been brought within a reasonable time?

7) Does it meet the fourteen day requirement required by the resolution?

7) Has the motion been filed seeking continuing jurisdiction within a "reasonable" time?

State ex rel. Smith v. Indus. Comm., 98 Ohio St. 3d 16 (2002).

In this case, claimant was granted permanent total disability. Temporary total had been paid in the claim until August 23, 1993. September of 1993 claimant contacted BWC informing the Bureau it had erroneously paid him TTD for several periods between January and August of 1993. He forwarded the paycheck stubs and offered to repay any overpayment. The Bureau did nothing. Claimant is granted permanent total disability on August 23, 1995. He attempted to work intermittently while awaiting the determination between his termination of TTD and his PTD hearing. On August 23, 1995, PTD was granted retroactively to August 24, 1993, covering periods of time which it knew or should have known the claimant had worked. The Bureau found evidence of 15 jobs that the claimant had worked, which the claimant had disclosed to the hearing officer granting PTD. The Bureau moved for a declaration of overpayment and a finding of fraud. The Commission agreed vacating all TT and PT paid after June 1, 1992. The

court said at paragraph 14, "In our case, a clear mistake of law was indeed present. Receipt of both wages and TT compensation for the same period is contrary to law. Even where a clear mistake exists, however, continuing jurisdiction must still be exercised within a reasonable time. Reasonableness in turn must be judged case by case. Here, six years passed between claimant's notification to the Bureau of an overpayment of TTD and action by the Commission or Bureau. Four years passed between granting of PTD and the Commission's renewed interest in the claimant's eligibility. Given the notice to BWC and the file before the PTD hearing and contemporaneous with receipt of TTD, continuing jurisdiction cannot be considered to have been timely. The court granted the writ of mandamus and instructed the Commission to vacate its order.

State ex rel. Gordon v. Indus. Comm., 63 Ohio St. 3d 469 (1992).

Here the Bureau attempted to seek continuing jurisdiction for an overpayment setting the claimant's overpayment variously between $4455 to a high of $8977. The court said reasonableness depends on the circumstances of each case. The approximate four year time that had lapsed between the DHO's 1984 overpayment calculation and the Bureau's 1988 motion to vacate is not reasonable. The court found that the Commission did not exercise its authority within a reasonable time.

A. **Consideration of Laches**

State ex rel. Sampson v. Ilsco Corp., 2007-Ohio-937

In this case, a 440 day delay in filing a motion to terminate compensation was found to be unreasonable in that the Relator was prejudiced by the delay by virtue of the fact that laches was raised as a defense to the employer's motion.

Elements of laches according to *State ex rel. Chavis v. Sycamore City School District Board of Education* (1994) 71 Ohio St. 3d 26, 35 are:

(1) Unreasonable delay or lapse of time in asserting a right;
(2) Absence of an excuse for such delay;
(3) Knowledge, actual or constructive, of the injury or wrong; and
(4) Prejudice to the other party.

State ex rel. Chavis v. Sycamore City School District Board of Education (1994) 71 Ohio St. 3d 26, 35. Here the court found all elements of laches to be present. (1) The 440 day delay was unreasonable. (2) The employer had no excuse for its delay. (3) The employer did not claim that it was unaware of the Relator's file to submit the 180 day supplemental medical report. (4) Relator was prejudiced by the employer's delay in filing the motion to terminate.

The court found that Relator was clearly prejudiced because Ilsco's failure to promptly move to terminate compensation allowed Relator to perpetuate the failure to obtain the supplemental medical report. Laches was raised as an appropriate defense.

A. **New and Changed Circumstances**

State ex rel. Board of Educ. of Cuyahoga Heights LSD v. Johnston, 58 Ohio St. 3d 132 (1979)

Here claimant had two industrial injuries. However, she only filed for permanent total disability in one claim, and the other claim was not included. The IC examiner found the claimant to be PTD and the hearing officer made the recommendation to the Commission that the claimant is PTD in the claim. PTD was granted solely from the one claim.

Two and a half years later, the school board filed a motion to vacate the order finding claimant PTD based on the fact that the first claim was not considered.

The court rejected this contention saying that the appellant's motion to vacate the PTD order did not allege any new and changed conditions occurring after the award, thus the Commission did not have jurisdiction to vacate its prior order.

A. **Fraud**

State ex rel. Kilgore v. Indus. Comm., 123 Ohio St. 164 (1930)

In this case, non-complying employers were successful in defending the suit brought by the Attorney General to collect the unpaid premiums. The motions were then filed to vacate the awards to the injured workers.

The court says, "After an award has been made by the Commission, the latter has no power, by virtue of its continuing jurisdiction under section 1465-56, to vacate the award, unless there was fraud or imposition practiced upon the Commission in it procurement." Syllabus paragraph 2.

State ex rel. Henegar v. Trinity Home Builders Inc., 2013-Ohio-3339.

In this case, a fraud finding was found by a DHO. SHO reversed finding no fraud. The Commission on further appeal reinstated the fraud findings. The Commission granted reconsideration in doing so finding a clear mistake of fact found by the SHO resulted in a faulty analysis of the pertinent law. The 10th District Court of Appeal said at 10, "A finding of fraud is a finding which frequently involves both issues of law and issues of fact. However, the critical issue in Henegar's case was whether he simply made a series of mistakes when he returned to work in mid-January 2011 and then gave inaccurate information about his return to work on at least three occasions. Intent is a factual issue. Although we may have decided differently than the SHO on its factual finding in Hengegar's case, this is not a clear mistake of law. The Commission could not review the intent finding via continuing jurisdiction."

A. **Clerical Error**

Recoupment of payments made under a mistake of fact depends on the circumstances.

7) *State ex rel. Martin v. Indus. Comm.* (1984) 9 Ohio St. 3d 213 and *Indus. Comm. v. Dell* (1922) 104 Ohio St. 3d 389.

In both of these cases the courts held that at the time the payments were made to the IW they were made and accepted with the good faith belief that they were due. While the BWC has the right to recoup overpayments, such authority does not extend to payments made and accepted in the good faith belief that they were due. Respondent is without authority to recover the payments made to Relator. His attempts to do so constitute an abuse of discretion. *State ex rel. Martin*, supra 214.

7) *State ex rel. DeLong v. Indus. Comm.* (1988) 40 Ohio St. 3d 345 concerns payment of temporary total being made after a DHO hearing but before a regional board hearing was held. TT was not payable until the regional board hearing under the law in existence at the time of this claim. The court distinguished *DeLong* from *Martin* & *Dell* because the payment was not legally due when it was paid. Consequently, the payment was not made or accepted with the good faith belief that it was due, thus the BWC was entitled to recover the improperly made payment to the claimant.

7) *State ex rel. Weimer v. Indus. Comm.*, 62 Ohio St. 2d 159 (1980).

Here the claimant was overpaid nearly $3500 in permanent total disability benefits because of a clerical error. The claims examiner discovered while the application for PTD was pending that she was overpaid this sum because of a clerical error, which is unidentified in the record. The court found that this indisputable clerical error was clearly a mistake of fact. The court relied upon *State ex rel. Dell* giving the Commission broad authority to prevent misappropriation and misapplication of the insurance fund and thus allowed the recoupment of the overpayment by virtue of its fiduciary responsibility to the state insurance fund.

A. **Error by Inferior Tribunal**

7) *State ex rel. Manns v. Indus. Comm.*, 39 Ohio St. 3d 188 (1988).

In this case, claimant was granted PTD and the IW filed an application with the Commission for a Lump Sum Payment of his benefits. That application was granted and a check for $3500 was issued in the name of the decedent. That check was issued in March of 1981. It was never cashed. The IW then died on January 15, 1985 of causes unrelated to the injury. Decedent's attorney returned two checks to the IC, the lump sum advancement and an additional check for PTD benefits and asked that they be reissued to the decedent's widow. The hearing officer denied the request to have these sums reissued to the widow. The Regional Board of review reversed and ordered the claimant be paid the entirety of the lump sum advancement. The Commission on its own motion pursuant to notice to all parties vacated the regional board's order and reinstated its order of the DHO, which had vacated the lump sum advancement.

The Court of Appeals found that the appellee was entitled to reissuance of the check. The Supreme Court disagreed finding that the lump sum advancement did not constitute accrued compensation. For the purposes of our discussion today, however, the court also noted that

continuing jurisdiction would be appropriate in this case because an error by an inferior tribunal would be a sufficient reason for the Commission to invoke continuing jurisdiction. The Regional Board's order had the effect of reversing the Commission's order vacating the lump sum advancement. The Regional Board as an inferior administrative tribunal may not reverse an order of the Commission, and the board's order exceeded its statutory authority because the authority to issue lump sum payments rests exclusively with the Commission pursuant to Ohio Revised Code §4123.64.

7) *State ex rel. Bowman v. Indus. Comm*., 65 Ohio St. 3d 317 (1992).

Here the DHO allowed a claim for industrial asthma. The order allowing the claim was not appealed and the IW sought PPD.

The application was dismissed because Ohio Rev. Code § 4123.68 prohibits PPD for dust claims. The DHO found that the claim had suffered from industrial asthma acquired from exposure to dry chemicals and dust. Appeals were taken from that order which was denied and a writ of mandamus was sought in the Court of Appeals claiming the IC abused its discretion in modifying the allowed conditions so as to preclude PPD. The Court of Appeals allowed the writ finding that the DHO's order did not comply with *Mitchell* and that the Commission had no jurisdiction to modify the allowed conditions. The court agreed with the abuse of discretion finding that the DHO's order finding that the allowance of the claim had been acquired by exposure to dust was an abuse of discretion and that there was an error by an inferior administrative tribunal or subordinate hearing officer because there was no allegation that the first DHO meant to include but inadvertently omitted the additional language or that the allowance of the claim is defective without it.

Thus the order of the DHO was vacated.

7) *State ex rel. Saunders v. Metal Container Corp.*, 52 Ohio St. 3d 85 (1990).

Here a self-insured employer originally certified a sprain and strain of the low back. However, when orders of the IC were published in January and June of 1985, the nature of the disability - sprain, was somehow deleted. The appearance of a statutorily defective allowance in the 1985 orders constituted such a mistake. The error simply could have been corrected by amending the allowed condition to reflect 'back sprain' instead of just 'back'. The Commission, however, went one step further and narrowed the named body part from 'back' to 'lumbosacral and lumbar spine'. It did so, moreover, despite the absence of any allegation that its designation of 'back' as the effected body part was wrong. As such, the Commission's continuing jurisdiction did not allow the extent of the correction attempted here. The court found the mistake was sufficient to invoke the continuing jurisdiction of Ohio Revised Code §4123.52.

A. **Clear mistake of law warranting remedial action**

7) *State ex rel. B&C Machine Co. v. Indus. Comm*., 65 Ohio St. 3d 538 (1992)

In this case, IW was granted a 40% VSSR award. Upon his death, the widow asked for a death claim and a death claim was granted. The death award did not include the additional 40% for the VSSR award.

In 1981, the death claim was administratively affirmed.

In 1986, claimant's counsel wrote asking for the VSSR award to be paid to the surviving spouse. The Commission concluded that the VSSR award abated at his death and that the surviving spouse was not entitled to the additional award because she did not file for that compensation within two years of his death. On July 20th, the claimant asked for reconsideration. The following day claimant also appealed the order pursuant to 4123.519. The Commission vacated the prior order on January 17, 1990 and granted the increased award finding that it retained continuing jurisdiction. The court said once a violation of a specific safety requirement has been filed by the Industrial Commission in the deceased claimant's claim, it is unnecessary for the widow claimant to reapply to the IC for redetermination. B&C Machine filed a complaint of mandamus. The Court of Appeals found no abuse of discretion. The Supreme Court affirmed. The court in *B&C Machine* expanded the continuing jurisdiction to include that a prior order that was clearly a mistake of law. Id at 542. The court says that, "The IC neither exceeds its authority or jurisdiction nor acts unlawfully nor abuses its discretion if it proceeds to make such correction [in a prior order] that this court would clearly have ordered without awaiting either an action being filed in this court or a decision from this court if one be filed." The court found that to require a widow to reestablish a specific safety requirement violation causing the death of her husband would serve no useful purpose. Stated otherwise, the widow had nothing more to prove.

7) *State ex rel Riter v. Indus. Comm.,* 91 Ohio St. 3d 89 (2001).

In this case, the issue was a scheduled loss award. Claimant sought a scheduled loss for loss of use of her thumb. The DHO granted only a one-half loss. Appeals were eventually taken leading to a hearing before a Commission Deputy, who prepared an order awarding the claimant full loss of use. The order was presented to the Commission which refused to approve it by a 2-to-1 vote. But the unapproved order was mailed to the parties. When the Commission learned of this, it vacated the order and set the matter for Commission hearing. The Commission then decided 2-to-1 to void the claimant one-half loss of use of the thumb. Claimant challenged the Commission's jurisdiction to vacate the March 3, 1997 order from the deputy. This was the order that the deputy had written but was unapproved by the Commission.

The court pointed out that deputy issued orders must be approved by a Commission majority. Since it was not approved and was issued, the issuance was a mistake of law sufficient to invoke the Commission's continuing jurisdiction.

7) *State ex rel. Mackey v. Ohio Dept. of Edn.,* 130 Ohio St. 3d 108 (2011)

The Supreme Court holds that the Commission can invoke continuing jurisdiction under Revised Code 4123.52 to correct a clear mistake of law. *State ex rel. Nicholls v. Indus. Comm.* (1998)

81 Ohio State 3d 454. Staff Hearing Officer's failure to determine whether the IW's retirement was voluntary or involuntary is a clear mistake of law as it is critical to Mackey's eligibility for a PTD award.

7) *State ex rel. Sheppard v. Indus. Comm.*, 139 Ohio St. 3d 223, 2014-Ohio-1904.

In this case, an intervening injury is one that is not related to the allowed claim and breaks the causal connection between the industrial injury and the disability. *Casone v. Herb Kay Co.*, 6 Ohio State 3d 155 (1983). An intervening injury could eliminate the industrial injury's proximate cause of the inability to work and thus destroy the claimant's eligibility for PTD compensation. *Sheppard* at 16.
The court held that the hearing officer's failure to address an intervening injury argument was a mistake of law that justified the Commission's reopening of the claim to examine the issue.

7) *State ex rel. Wells v. Indus. Comm.*, 2006-Ohio-2738

Here the Relator sought a writ of mandamus to vacate an order disallowing the claim. The IC vacated an order of the SHO and exercised continuing jurisdiction. The SHO concluded that the decedent's injuries occurred in the scope and course of employment and that the claim should be allowed. The Bureau filed a request for reconsideration.

The IC found there was a clear mistake of law and vacated the claim.

Both a mandamus action and an appeal pursuant to 4123.512 were filed. The Court of Appeals found that the 512 action could not adequately address the issue of the Commission's exercise or continuing jurisdiction.

Relator was arguing that both the magistrate and the Commission improperly applied the standards for continuing jurisdiction, arguing that pursuant to *State ex rel. Noll v. Indus. Comm.* (1991) 57 Ohio St. 3d 203, the hearing officer was required to not only state the evidence relied upon but also explain the rationale as to why the claimant was granted or denied benefits.

The court found that *Noll* was inapplicable to those aspects of a Commission order that may be appealed in a right to participate action. An action under Ohio Revised Code §4123.512 requires a *de novo* review by the Court of Common Pleas. Such a *de novo* proceeding renders irrelevant any prior itemization of the evidence and development of the reasoning expressed by the hearing officer. The only rationale given by the IC to vacate the SHO order was that the SHO failed to explain the rationale for finding that the decedent was in the scope and course of his employment at the time of the accident. The court found that the Commission's recitation that the SHO had failed to comply with *Noll* was not a basis upon which to grant continuing jurisdiction. A clear mistake of law is required by the Commission. *Noll* failure is inapplicable to instances in which the Commission's order is subject to *de novo* review by means of an appeal. Thus there was no clear mistake of law in the SHO's order at least in that respect and the Commission therefore inappropriately exercised its continuing jurisdiction. Thus the Commission's order vacating the SHO order must be vacated and the SHO's order reinstated.

IV The Commission is required to identify and explain the basis for invoking its continuing jurisdiction.

State ex rel. Lowe v. Cincinnati, Inc., 124 Ohio St. 3d 204, 2009-Ohio-5864 at paragraph 17.

A. Clear mistake of fact

1) *State ex rel. Nicholls v. Indus. Comm.*, 81 Ohio St. 3d 454 (1998)

This decision was decided under the prior Commission resolution which permitted reconsideration only in three instances.

(1) Unusual legal, medical or factual questions of interest to the Commission;
(2) New previously undiscoverable evidence; or
(3) Fraud.

The court found that none of these three conditions existed in this case. Fraud was not an issue and the employer claimed that the claimant's non-allowed right arm amputation was considered as a legal question of interest to the Commission. The court said that there has never been a debatable question about the status of non-allowed conditions in a permanent total determination. These conditions have always been excluded. Nothing in the order suggested the hearing officer considered non-allowed conditions.

The other issue was newly discovered evidence. This too lacked support because while the vocational report was new in terms of its submission date, it was not previously undiscoverable. The employer could have discovered the vocational evidence months earlier had it not waited until the adjuditory process was well under way before seeking a vocational evaluation. Id at 458.

The order granting reconsideration only cited the possibility of error, and an unspecified error at that.
The court said that the mere possibility of an unspecified error cannot sustain the invocation of continuing jurisdiction. The IC must reveal what the perceived error is.

2) *State ex rel. Foster v. Indus. Comm.*, 85 Ohio St. 3d 320 (1999).

The PTD was granted and the employer sought reconsideration. Reconsideration was granted by the Commission on the basis that the employer presented probative evidence of a clear mistake of fact or of law in the order from which reconsideration is sought.
The court again rejected the speculative nature of the IC's order relying upon *Nicholls*. "If the Commission does not reveal in a meaningful way why it exercised jurisdiction, continuing jurisdiction cannot be evaluated. Saying an error is 'real' as opposed to 'possible' is equally hollow if there is no way to test the legitimacy of assertion."

Since the IC did not identify an error, the court found that the IW had been adversely affected by

being forced to needlessly re-litigate an issue. Consequently, he was adversely affected and the writ was allowed.

3) *State ex rel. Royal v. Indus. Comm.*, 95 Ohio St. 3d 97 (2002).

PTD was granted to an IW whose right arm was barely functional. Reconsideration was sought by the employer. Reconsideration was denied. A second request for reconsideration was filed and was granted based upon the "possibility of an error in a previous Commission order", vacating its earlier denial of reconsideration and setting the matter for hearing on the merits of PTD. The court, frustrated with the IC's refusal to identify an error, stated that continuing jurisdiction could not be exercised indiscriminately. The court relying upon *Nicholls* and *Foster* recognized that a reference to the *possibility* of *unspecified* error was meaningless and prevented both effective rebuttal and judicial review. The court finally concluded at page 100 saying, "Identification of error *after* reconsideration does not allow a reviewing court to adjudicate the propriety of the Commission's invocation of continuing jurisdiction. It does little to help a party opposing the motion, since it comes too late to allow meaningful challenge to the reconsideration at the administrative level." The mistake of fact being asserted by the employer actually turned in the Commission's mind to an interpretation of the vocational report advanced by the vocational expert. The court said, "This is significant, because a legitimate disagreement as to the evidentiary interpretation does not mean that one of the interpretations is wrong. Thus, any assertion of *clear* error of fact is questionable. Moreover, one must again remember that this 'error', too, was before the Commission when the reconsideration was initially denied. This also renders debatable the prerequisite of clarity as apparently no one felt that a clear error existed the first time around based upon the same material.

4) *State ex rel. Gobich v. Indus. Comm.*, 103 Ohio St. 3d 585.

Claimant was granted PTD in July of 1999. In 2002, the Bureau alleged the claimant had worked during the retroactive period of time and moved to have PTD benefits terminated. Fraud and overpayment assessed, and fraud declared. Claimant did in fact work a couple of odd jobs in 1996 and 1997. These jobs became problematic when the Commission backdated claimant's PTD award to 1996. The SHO denied the Bureau's motion to terminate PTD. It did not find a finding of fraud. The IC granted reconsideration. At hearing, the Commission stopped the PT, declared an overpayment and issued a declaration of fraud.

The court said that the presence of any of the prerequisites for continuing jurisdiction must be both identified and explained. The order must state what the error is. This ensures that the party opposing reconsideration can prepare a meaningful defense to the assertion of continuing jurisdiction is warranted. Id. at 588, citing to *Royal*.

Consequently, the issue before the court was whether or not the clear mistake of law was of such a character that remedial action would clearly follow. The court says that the Bureau's argument regardless of how it tried to characterize the argument, was really an evidentiary one: The Bureau produced evidence it believed to establish a capacity for sustained remunerative employment and the SHO found otherwise. The court says *Royal* has specifically stated a legitimate disagreement as to evidentiary interpretation does not mean that one of them was mistaken and does not, at a minimum, establish that the error was *clear*. (Emphasis on clear) Id.

95 Ohio St. 3d 100.

Evidentiary disputes are factual according to the Supreme Court. This is significant because *Nicholls*, *Foster* and *Royal* are uncompromising in their demand that the basis for continuing jurisdiction be clearly articulated. *Gobich* at 18. From a legal standpoint, the court said the SHO's analytical foundation was more sound than the Bureau's or the Commission's. The SHO recognized that it was not the capacity for remunerative employment that bars PTD award; it is the capacity for sustained remunerative employment. The Commission's order granting reconsideration must adequately apprize the claimant of why the case is being reopened.

5) *State ex rel. Knapp v. Indus. Comm.*, 134 Ohio St. 3d 134.

This factually confusing case deals with a reinstatement of TT compensation based upon the IW's examining physician allegedly repudiating some of his early certifications of disability. Because of the physician's repudiation, the Commission declared TT had been overpaid and sought recoupment of over $15,000 from the IW. The Tenth District agreed with the IW finding the Commission did not have adequate grounds to exercise continuing jurisdiction.

The Supreme Court found the Commission abused its discretion in exercising continuing jurisdiction. The court found that the later note from the attending physician was unreliable and held that the doctor cannot offer an opinion on the claimant's extent of disability for a period that precedes the doctor's examination of the claimant unless certain safeguards are observed. *See State ex rel. Bowie v. Greater Cleveland Regional Transit Authority*, 75 Ohio St. 3d 458 (1996). On six occasions after the industrial injury, the attending physician had certified to the Bureau that the right forearm contusion prevented the IW from working. Then he changed his position and notes that the contusion had actually reached MMI before he first examined the IW, and that it was not the contusion but rather other aspects of the IW's injury that rendered him incapable of work. The court said there can be no continuing jurisdiction under circumstances like these. First, there were no new and changed circumstances. It was not newly discovered evidence. There was no fresh review of the file by the doctor, let alone a new examination before the doctor authored the March 6th note. It was simply untrustworthy new evidence. Secondly, continuing jurisdiction is not appropriate where the claimed new evidence was readily discoverable at the time of the award. *State ex rel. Keith* requires that the evidence must be not newly acquired information but rather proof that the conditions have changed subsequent to the initial award. The IC resolution defines newly discovered evidence as that which by due diligence could not have been discovered and filed by the appellant before the initial awards.

The court then said, "We reserve continuing jurisdiction with the potential of destabilizing Commission determinations for situations in which the circumstances have truly changed since the award." Paragraph 18. Finally, unreliable information such as equivocal evidence should not give rise to continuing jurisdiction with its ability to unravel settled determinations for injured workers. As the court says, "Equivocation occurs when a doctor repudiates an earlier opinion or renders contradictory or uncertain opinions." *State ex rel. Eberhardt v. Flxible Corp.*, 70 Ohio St. 3d 649. It is difficult to image evidence more equivocal than a doctor's

handwritten note that contradicts without explanation, his six prior certifications to the Commission. It was a mistake of law to invoke the Commission's continuing jurisdiction.

6) *State ex rel. Meris v. Indus. Comm.* (2006) 108 Ohio St. 3d 113

In this case, the Commission granted reconsideration on a Bureau motion on the basis that non-disclosure of work activities rendered the examining physicians' reports fatally defective and justified continuing jurisdiction on the basis of a clear mistake of fact in relying upon them.

The Supreme Court rejected this indicating that decisions granting reconsideration must state the error to be clear not speculative. *Meris* at ¶6. The court concluded that the claimant's ability to work prior to the date of the examination is irrelevant to the issue of permanent total disability at the time of the adjudication of the application. The court concluded that work activity years before the claimant sought PTD is of no consequence to his present inabilities, or to an examiner's opinion of the claimant's ability to engage in sustained remunerative employment. Consequently, the Commission abused its discretion in exercising continuing jurisdiction and reopening the grant of PTD.

2015 Annual Convention

Workers' Compensation

Case Law Update

Jon Goodman, Esq.

Worthington, Ohio

2015 CASE LAW UPDATE

Prepared By:
Jon Goodman, Esq.
Jon Goodman Law, LLC
6797 North High Street, Suite 314
Worthington, Ohio 43085
(614) 985-3552 (phone)
(614) 985-4133 (fax)
jon@jongoodmanlawoffice.com

***State ex rel. Evert v. Indus. Comm.*, ___Ohio St.3d ___, 2015-Ohio-120** – claimant underwent surgery for the allowed conditions in his claim, but died due to complications associated with the surgery. Claimant's widow filed a death claim which was allowed.

More than one year after the claimant died, the widow filed a motion requesting compensation under R.C. 4123.57(B) for the loss of use of claimant's arms and legs. The Industrial Commission denied the motion on the basis that the application was untimely filed under R.C. 4123.60. That statute allows dependents one year from the date of the claimant's death to apply for compensation that claimant would have been "lawfully entitled" to request at the time of his/her death.

Approximately one year later, the widow filed a request for continuing jurisdiction, arguing that the initial decision denying the loss of use award was based on a clear mistake of law and that new changed circumstances were present. A SHO denied the motion and the widow sought reconsideration. The Industrial Commission heard the issue again, but only two Commissioners were present at the hearing. The Industrial Commission then issued an order denying reconsideration, finding no valid basis for it to invoke its continuing jurisdiction. On the order denying reconsideration, Commissioner Taylor indicated that although she was not present at the hearing, she reviewed all of the relevant evidence and discussed the matter with a hearing officer who was present at the hearing.

The widow sought a writ of mandamus in the Tenth District Court of Appeals. The widow raised three arguments:

1) that a medical report that was filed within one year of claimant's death which discussed the loss of use issue constituted an application, such that R.C. 4123.60 was satisfied;

2) that the application for loss of use was timely filed based on *State ex rel. Leto v. Indus. Comm.*, 180 Ohio App.3d 17, 2008-Ohio-7056 (10th Dist. Franklin); and

3) that she was denied due process because a Commissioner who was not present at the reconsideration hearing voted on the issue before the Industrial Commission.

The appellate court refused to address the first two issues raised by the widow, because it found the third issue dispositive. Specifically, the appellate court granted a limited writ ordering the Industrial Commission to hear the matter again with all three Commissioners present. The court relied on its decision in *State ex rel. Siegler v. Lubrizol Corp.*, 10th Dist. Franklin No. 10AP-255, 2011-Ohio-4917. In *Siegler*, the 10th District held that the Industrial Commission abuses its discretion by allowing a Commissioner to vote on an issue when s/he did not attend the hearing and no record of the hearing was kept for the absent Commissioner to review.

The Industrial Commission and BWC appealed to the Supreme Court as of right. While the appeal was pending, the Supreme Court issued its decision in *State ex rel. Siegler v. Lubizol Corp.*, 136 Ohio St.3d 298, 2013-Ohio-3686, vacating the appellate decision in that case. *Siegler* held that due process requires the Commissioner to, "in some meaningful manner, consider and appraise all the evidence to justify the decision." The Court noted that the method of review is secondary because of the presumption of regularity that attaches to Industrial Commission decisions. See *State ex rel. Ormet v. Indus. Comm.*, 54 Ohio St.3d 102 (1990).

Because *Siegler* found the same type of review provided in the instant case to be consistent with due process, the parties agreed that the appellate decision should be reversed and the matter remanded to the 10th District to decide the merits of the other two arguments raised by the widow.

Note: the *Leto* case involved a situation where the allowance of the claim was not finalized until after the claimant's death. Once the claim was allowed, the surviving spouse filed for loss of use compensation within one year of the time the claim was allowed. The Industrial Commission denied the loss of use motion as untimely under R.C. 4123.60. Claimant sought and was granted a writ of mandamus in the 10th District. The appellate court found that, under the circumstances of that particular claim, the one year limitation under R.C. 4123.60 runs from the date the claim was allowed, as opposed to one year from the date of the claimant's death.

Leto also states that loss of use compensation under R.C. 4123.57(B) can be paid during the pendency a court appeal under R.C. 4123.512 on the allowance of the claim. IC Policy Memo I5 is in conflict with *Leto* with respect to such situations.

***State ex rel. McCormick v. McDonald's,* 141 Ohio St.3d 528, 2015-Ohio-123** – claimant was injured in 2002 and received temporary total for an extended period. In 2010, BWC requested a finding of MMI based on the report on one of its physicians. Approximately two weeks after the BWC exam, a series of epidural injections was approved by the MCO. The injections were performed while the MMI issue was being litigated. Ultimately, the Industrial Commission terminated TTD based on the BWC's MMI report.

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, upholding the Industrial Commission's MMI finding. The Court rejected claimant's argument that the MMI report was invalid because the BWC physician was unaware of the epidural injections that were requested, approved, and performed after the MMI exam. Claimant argued

that an MMI report is not some evidence when the medical report is based on incomplete or inaccurate facts. See *State ex rel. Sellards v. Indus. Comm.*, 108 Ohio St.3d 306, 2006-Ohio-1058.

The Court distinguished *Sellards*, holding that "*Sellards* does not automatically render premature a doctor's opinion on [MMI] when there is a subsequent request for and approval of a treatment plan." Specifically, the Court noted that *Sellards* involved a delay in treatment (i.e., denial by the MCO/BWC) followed by an approval of treatment by the Industrial Commission on the same day as the MMI exam. By contrast, the epidural injections in Ms. McCormick's claim were approved by the MCO without delay two weeks after the MMI exam. The MMI examiner was unaware of the injections, but was aware of all the other treatment over the 8 years since the injury.

The Court also distinguished Ms. McCormick's situation from *State ex rel. Barnett v. Indus. Comm.*, 10th Dist. No. 13AP-161, 2014-Ohio-311. In *Barnett*, the 10th District Court of Appeals cited *Sellards* and found that the Industrial Commission abused its discretion by finding MMI based on a report that incorrectly stated that proposed treatment was denied. In reality, the treatment was approved and was performed after the MMI exam. The appellate court reasoned that the MMI report was premature because the examiner thought the treatment was denied when it was actually approved. The Court said that Ms. McCormick's situation is different because the MMI examiner in her case did not incorrectly believe that treatment was denied. Rather, the examiner was unaware of subsequently requested treatment.

Note: it is difficult to craft black letter law with respect to MMI. The issues presented are extremely fact-sensitive. For example, in this claim, temporary total had been ongoing for eight years. Given that fact, the likelihood of an MMI finding was very high, even if some additional treatment is approved after the MMI exam. It is likely that the outcome would have been different had claimant only been receiving temporary total for six months at the time of the MMI exam.

Also, *Sellards* has been cited to vacate MMI findings in the following situations: 1) where the MMI examiner incorrectly believed that proposed treatment was denied, but the treatment was actually approved. See *Barnett*; 2) where the MMI examiner had little knowledge of prior treatment or the approval of an increased frequency of treatment after the MMI exam. See *State ex rel. Lloyd v. Indus. Comm.*, 10th Dist. No. 07AP-79, 2007-Ohio-5020.

By contrast, several decisions, including *McCormick*, have distinguished *Sellards* because the facts did not involve a delay in treatment or *State ex rel. Walker v. Indus Comm.*, 10th Dist. No. 08AP-606, 2009-Ohio-3550; *State ex rel. Huffman v. Indus. Comm.*, 10th Dist. No. 10AP-1200, 2012-Ohio-1609*; State ex rel. Gualdoni v. Indus. Comm.*, 10th Dist. No. 14AP-316, 2015-Ohio-1009.

***State ex rel. Hildebrand v. Wingate Transport, Inc.*, 141 Ohio St.3d 533, 2015-Ohio-167** – claimant was injured at work and five days later sought treatment. He returned to work with restrictions, but got into an argument with his boss. The boss apparently asked claimant to return

the keys to the vehicle that the boss had been loaning him for several months. Claimant asked if he was being fired and apparently there was no reply. Claimant became angry and started loading tools and parts into another vehicle. The boss called the police and claimant eventually left the employer's premises.
The Industrial Commission allowed the claim but denied temporary total on the basis that claimant had quit due to reasons unrelated to the injury and had not returned to the workforce. The Industrial Commission also found that the employer offered light-duty work which claimant failed to accept.

Claimant sought a writ of mandamus in the Tenth District Court of Appeals. The appellate court denied the writ, finding that the Industrial Commission properly applied voluntary abandonment to deny temporary total because claimant voluntarily quit for reasons unrelated to the injury. The appellate court rejected claimant's argument that his restrictions/inability to perform the full duties of the former position entitled him total under *State ex rel. Pretty Products, Inc. v. Indus. Comm.*, 77 Ohio St.3d 5 (1996). The appellate court held that *Pretty Products* applies to termination situations only and not voluntary quit situations. The appellate court also found that it was irrelevant whether light duty work was made available because of the voluntary abandonment finding.

Claimant appealed to the Supreme Court as of right. The Court affirmed. The Court noted that the initial question is whether the departure from the former position in injury-related. Here, claimant conceded that his departure was not injury related, but since he was already restricted from performing the job duties of the former position due to the injury, he was incapable of abandoning a job he could no longer perform. The Court agreed that *Pretty Products* can render a termination irrelevant if claimant is receiving temporary total when fired. See *State ex rel. Omnisource Corp. v. Indus. Comm.*, 113 Ohio St.3d 303, 2007-Ohio-1951 (temporary total remains payable where claimant was receiving temporary total and was subsequently fired for not having a valid driving license following criminal charges); *State ex rel. Luther v. Ford Motor Co., Batavia Transmission Plant*, 113 Ohio St.3d 144, 2007-Ohio-1250 (temporary total remains payable where claimant was on and off temporary total and was subsequently fired for not providing additional paperwork to employer); *State ex rel. Reitter Stucco, Inc. v. Indus. Comm.*, 117 Ohio St.3d 71, 2008-Ohio-499 (temporary total payable where claimant was being paid wages in lieu of temporary total and was subsequently fired for personally insulting his boss). The Court noted that these cases involved situations where the initial departure from the former position was injury-related, and only subsequent events were used to challenge entitlement to further temporary total. By contrast, Mr. Hildebrand quit due to reason unrelated to the injury. Thus, the Industrial Commission's voluntary abandonment decision was upheld.

The Court noted that *Pretty Products* has not been applied to the situation before it – that is, where the claimant has restrictions and then quits for reasons unrelated to the injury. The Court noted that it would be unfair to automatically award temporary total in such a circumstance without allowing the employer the chance to accommodate the restrictions.

Note – this case demonstrates the difference between the voluntary abandonment defense and the failure to accept a light duty job offer defense. See *State ex rel. Ellis Super Valu v. Indus. Comm.*, 115 Ohio St.3d 224, 2007-Ohio-4920; *State ex rel. OmniSource Corp. v. Indus. Comm.*,

113 Ohio St.3d 303, 2007-Ohio-1951. Once a claimant accepts the light duty job, the light duty defense is moot. If the claimant is terminated for violation of a written work rule, or quits for reasons other than the injury (before or after accepting light duty), voluntary abandonment is the relevant defense.

Also, the trend emerging from these decisions is that if claimant returns to restricted duty with the employer of record and then is terminated or quits, voluntary abandonment applies and TTD is denied. See, e.g., *State ex rel. Adkins v. Indus. Comm.*, 10th Dist. No. 07AP975, 2008-Ohio-4260 (TTD denied where claimant was released to restricted job he could perform, but did not show up for the light duty and was terminated); *State ex rel. Santiago v. Indus. Comm.*, 10th Dist. No. 09AP419, 2010-Ohio-1020 (TTD denied where claimant returned to employer of record with restrictions, but then quit a few weeks later due to not wanting to work a different shift); *State ex rel. Hildebrand v. Indus. Comm.*, 10th Dist. No. 10AP-625, 2011-Ohio-3787 (claimant was released to light duty with the employer of record and then quit due to reasons unrelated to injury).

By contrast, where the claimant leaves the employer of record and then voluntarily abandons a subsequent job with a different employer, there is no voluntary abandonment and TTD is payable, unless the claimant has abandoned the entire workforce. See, e.g., *State ex rel. Cline v. Abke Trucking, Inc.*, 10th Dist. No.10AP-88, 2012-Ohio-1914; *State ex rel. MedAmerica Health Sys., Corp. v. Brammer*, 10th Dist. No.11AP-904, 2012-Ohio-4416. In these cases, the Tenth District Court of Appeals held that "a voluntary abandonment of subsequent employment does not relate back and transform in an involuntary departure from the original employer into a voluntary departure so as to render the employee ineligible for TTD." See also, *State ex rel. Montanez v. ABM Janitorial Servs., Inc.*, 10th Dist.No.12AP-364, 2013-Ohio-4333.

Another factual variation is where a claimant is on temporary total and is released with restrictions which are not accommodated, and then is terminated. In those situations, TTD remains payable because the claimant is already unable to perform the job duties of the former position of employment due to the allowed conditions and therefore cannot abandon a position s/he cannot perform. See *State ex rel. Pretty Products., Inc. v. Indus. Comm.*, 77 Ohio St.3d 5 (1996); *State ex rel. Nestle USA-Prepared Foods Div., Inc. v. Indus. Comm.*, 101 Ohio St.3d 386, 2004-Ohio-1667; *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.

Confusion has reigned since the courts created voluntary abandonment without legislative authority. See *State ex rel. Baker v. Indus. Comm.*, 87 Ohio St.3d 376, 379 (2000). However, there are a few concepts that remain clear:

1) <u>temporary total is the inability to perform the job duties of the former position as a result of the allowed conditions</u>. The focus is not on the actual job itself. Thus, if a claimant requires restrictions because of the injury, then s/he is eligible for temporary total. The ability to perform other work is irrelevant, unless there is a good faith light duty job offer. As the Supreme Court said in *State ex rel. Baker v. Indus. Comm.*, 89 Ohio S.3d 376, 380 (2000): "the former-position-

of-employment test does not involve any consideration of whether the injured worker returns to his actual job that he held at the time of his injury or whether that job is even available; rather, the test is a physical guideline by which an injured worker's eligibility for TTD is determined." See also, *State ex rel. Rockwell Internatl. v. Indus. Comm.*, 40 Ohio St.3d 44 (1988); *State ex rel. Nestle USA-Prepared Foods Div. v. Indus. Comm.*, 101 Ohio St.3d 386, 2004-Ohio-1667.

2) if there is already medical certification of temporary total prior to the termination, there is no voluntary abandonment. The Supreme Court has repeatedly held that a claimant cannot abandon a job that s/he is already unable to perform due to the industrial injury. See *State ex rel. Pretty Products., Inc. v. Indus. Comm.*, 77 Ohio St.3d 5 (1996); *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. Gross v. Indus. Comm.*, 115 Ohio St.3d 249, 2007-Ohio-4916; *State ex rel. Reitter Stucco, Inc. v. Indus. Comm.*, 117 Ohio St.3d 71, 2008-Ohio-499. This line of cases squarely and unambiguously holds that if the injury is the cause of the inability to work, any subsequent event that would prevent the claimant from working (such as termination) is of no consequence and temporary total is payable.

3) voluntary abandonment can never be based on a pre-injury conduct or conduct that causes the injury. The Supreme Court has repeatedly and consistently held that voluntary abandonment cannot be premised on terminations caused by action/inaction that occurred before the industrial injury. See *State ex rel. Nick Strimbu, Inc. v. Indus. Comm.*, 106 Ohio St.3d 173, 2005-Ohio-4386 (termination due to omission on job application completed prior to injury); *State ex rel. Ohio Welded Bank v. Indus. Comm.*, 10th Dist. No. 08AP-772, 2009-Ohio-4646, ¶ 14 (termination for failing drug test when drugs taken prior to injury and no evidence that drug use caused the injury). The same is true for terminations based on the behavior that caused the injury. See *State ex rel. Gross v. Indus. Comm.*, 115 Ohio St.3d 249, 2007-Ohio-4916, ¶ 19 (claimant was fired for the conduct that caused his injury - pouring water into a deep fryer). See also, *State ex rel. Feick v. Wesley Community Servs.*, 10th Dist. No. 04AP-166, 2005-Ohio-3986 (termination for negligent driving that resulted in injury); *State ex rel. Upton v. Indus. Comm.*, 119 Ohio St.3d 461, 2008-Ohio-4758 (termination for causing the accident in which claimant was injured).

***State ex rel. Penwell v. Indus. Comm.*, ___Ohio St.3d ___, 2015-Ohio-976** – claimant sustained a severe injury to her left hand when it was crushed in a hydraulic press. After the claim was allowed, claimant filed a VSSR application, alleging a violation of Ohio Adm.Code 4123-1-5-11(E). That section applies to "pull guards" – cables that are attached to the employees hands or wrists that pull the hands free from the danger zone during the operating cycle.

There was evidence that the machine and guards in place were working as normal on the date of the injury, at least up until the time of the injury. Moreover, it was uncontroverted that the pull guards on the machine had not malfunctioned previously. Unfortunately, a weld on the guard apparently gave way while claimant was operating the machine and caused the left pull guard to malfunction, resulting in claimant's injury.

The Industrial Commission denied the VSSR on the basis of the "one-time malfunction" defense. Under that defense, if the employer has otherwise complied with the applicable safety rule and a previously unknown defect results in the failure of safety guarding, there is no VSSR liability.

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, citing previous cases involving the "one-time malfunction" defense. See *State ex rel. M.T.D. Prods., Inc. v. Stebbins*, 43 Ohio St.2d 114 (1975); *State ex rel. Taylor v. Indus. Comm.*, 70 Ohio St.3d 445 (1994); *State ex rel. Precision Thermo-Components, Inc. v. Indus. Comm.*, 10th Dist. Franklin No. 09AP-965, 2011-Ohio-1333 (the question is whether the employer "had been forewarned of the malfunction on the date of the injury by a prior malfunction of the safety device.

***State ex rel. Viking Forge Co. v. Perry*, ___Ohio St.3d ___, 2015-Ohio-968** – claimant sustained a significant injury to his thumbs in September of 2008. He needed surgery on both thumbs, including a partial amputation of his left thumb. He received temporary total and then returned to work with restrictions in December 2008 and to full duty in February 2009. In March 2009, claimant was fired for allegedly violating a written work rule. He returned to his surgeon and requested restrictions and additional treatment, but the surgeon refused and referred claimant to the occupational medicine branch of his clinic for further treatment.

In April 2009, claimant switched to a different physician who provided restrictions and indicated that MMI had not been reached. Claimant sought temporary total from the date of his first visit with the new physician in April 2009 and to continue. The Industrial Commission awarded temporary total, finding that claimant's testimony and the new physician's reports credible and that claimant did not actually violate the rule that the employer terminated him for allegedly violating.

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 upheld the award of temporary total. First, the Court noted that medical evidence supporting disability after a return to work and termination must be carefully scrutinized to ensure that the reason claimant is no longer working is the injury. See *State ex rel. Ohio Treatment Alliance v. Paasewe*, 99 Ohio St.3d 18, 2003-Ohio-2449. In *Paasewe*, the Court rejected medical evidence from a physician who released claimant to full duty work and then months later, without explanation, provided restrictions to claimant after his termination. The Court distinguished the evidence in this case from that in *Paasewe*, noting that additional treatment was necessary during the period that claimant returned to work and at the time of his termination, and that there was conflicting evidence from different doctors as to whether claimant was disabled. The Court concluded that the Industrial Commission was within its discretion to find claimant's testimony and the new physician's medical evidence persuasive.

In addition, the Court rejected the employer's voluntary abandonment argument. The Industrial Commission was within its discretion to rely on and find persuasive claimant's testimony that he did not actually violate the written work rule upon which his termination was based.

Note – claimant's testimony is "some evidence" and can be relied on in support of medical and/or legal conclusions.

Also, the Industrial Commission has an affirmative duty in voluntary abandonment situations to scrutinize the facts to determine whether the written work rule in question was actually violated. The Industrial Commission is not bound by the employer's version of the events. See *State ex rel. Brown v. Hoover Universal, Inc.*, 132 Ohio St.3d 520, 2012-Ohio-3895. Because voluntary abandonment is an employer's burden, the rule in question will be scrutinized and any doubts as to whether *Louisiana-Pacific* test has been satisfied should be resolved in the claimant's favor. See *State ex rel. Abbott Foods, Inc. v. Indus. Comm.*, 10th Dist. No. 03AP-1042, 2004-Ohio-4787.

***State ex rel. Baker v. Indus. Comm.*, ___Ohio St.3d___, 2015-Ohio-1191** - claimant was injured and received temporary total for many years. Unfortunately, claimant was working while receiving temporary total and a large fraud overpayment was declared in the claim.

Subsequently, claimant applied for permanent partial disability which resulted in a large permanent partial award. The BWC recouped 100% of the permanent partial award towards the fraud overpayment, pursuant to R.C. 4123.511(K). Claimant's attorney filed a motion with the BWC requesting that the 1/3 fee on the PPD% award be released to the claimant's attorney as opposed to being applied to the fraud overpayment.

The BWC referred the issue to the Industrial Commission as an attorney-client fee dispute pursuant to R.C. 4123.06 and Ohio Adm.Code 4121-3-24. However, the Industrial Commission determined that the issue was actually not an attorney-client fee dispute but rather a request for continuing jurisdiction to revisit the BWC's final determination that 100% of the permanent partial award was to be recouped towards the fraud overpayment. Ultimately, the Industrial Commission concluded that it lacked jurisdiction to settle a fee dispute between the BWC and the claimant's attorney.

Claimant and the law firm representing her sought a writ of mandamus in the Tenth District Court of Appeals seeking to compel the BWC to pay 1/3 of the permanent partial award to the law firm. The appellate court denied the writ. Claimant and the law firm appealed to the Supreme Court as of right.

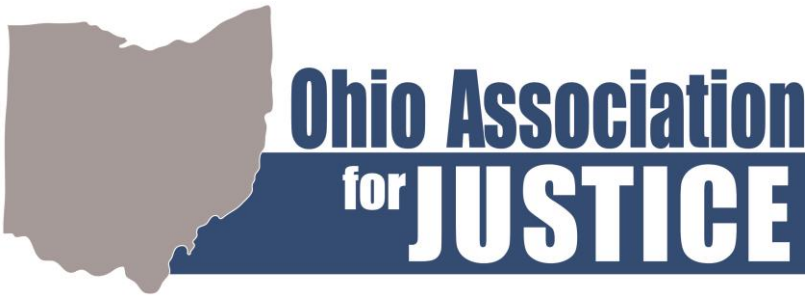
The Court affirmed, finding that claimant had failed to demonstrate a viable mandamus action. The Court noted that mandamus is available only where a governmental entity has a clear duty to act and the relator has a clear legal right to the relief requested. The Court found that no statute or administrative rule requires BWC to pay attorney's fees to claimant's counsel as opposed to recouping 100% of compensation towards a fraud overpayment under R.C. 4123.511(K). In addition, the Court said that the law firm has an adequate remedy in the ordinary course of law by pursuing the fees owed it by the claimant.

Note - the adequate remedy mentioned by the Court would require the law firm to file a fee dispute with the Industrial Commission and then sue in common pleas or municipal court (depending on the amount of the fee set by the Industrial Commission through the fee dispute process). See R.C. 4123.06; Ohio Adm.Code 4121-3-24; Ohio Adm.Code 4123-3-24; *Falk v. Walks*, 116 Ohio App.3d 716 (9th Dist.1993); *Lonas v. Kail*, 139 Ohio App.3d 6 (7th Dist.2000). A law firm cannot sue in common pleas court on a fee dispute with a workers' compensation client unless and until it has gone through the Industrial Commission fee dispute process. See *Lonas v. Kail*, (Jan. 25, 2000), 7th Dist. Harrison No. 491, unreported, 2000 WL 126667.

Ironically, this case started with the BWC referring the issue to the Industrial Commission as a fee dispute. Having gone through the Industrial Commission, the 10th District Court of Appeals, to the Supreme Court, the law firm's only move is to start over back at the Industrial Commission for a fee dispute. The problem there is that Ohio Adm.Code 4121-3-24(B) states that fee disputes must be filed with the Industrial Commission within one year of the date of payment or the request for the fee. It is unclear whether the Industrial Commission would consider the initial filing as being sufficient to process a fee dispute at this point, or whether it would find a fee dispute request to be untimely.

***State ex rel. Romero v. River City Drywall Supply, Inc.*, ___Ohio St.3d ___, 2015-Ohio-1194** – claimant sustained a new injury and was awarded an initial award and later an increase in PPD% under R.C. 4123.57(B). A new condition was added to the claim and claimant sought an increase above the prior award of 10%. In response, the BWC obtained a report from a physician who considered the relevant evidence and the newly allowed condition, but found only 5%. The claimant obtained a 23% report. After hearings, the Industrial Commission awarded a compromise award of 14%, which represented a 4% increase. The Industrial Commission relied on the 5% report and the 23% report.

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 no defect in the 5% report from the BWC and noted that the Industrial Commission has the discretion to award a compromise percentage, as long as the number is within the range supported by the evidence. See *State ex rel. Yellow Freight Sys., Inc. v. Indus. Comm.*, 97 Ohio St.3d 179, 2002-Ohio-5811.



2015 Annual Convention

Workers' Compensation

Ohio Supreme Court Update

Justice William O'Neill, Esq.

Columbus, Ohio