

Bugbee & Conkle, LLP

Workers' Compensation News

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LUCAS COUNTY COMMON PLEAS COURT REINSTATES EMPLOYER APPEALS AFTER VOLUNTARY DISMISSAL; DEFINES CLAIM TO INCLUDE MOTIONS FOR ADDITIONAL CONDITIONS

Senate Bill 7 amended numerous provisions of the workers' compensation law. The effective date appears to be September 26, 2006, although the Commission uses October 11, 2006. Among the amendments was the revision to R.C. 4123.512(D), which provides a claimant must obtain the employer's consent before voluntarily dismissing an employer-initiated case before the trial court. According to the language of the Bill, the new law applies to all claims filed on and after the effective date of the law. The Industrial Commission has taken the position that "claim" is synonymous with the date of injury.

Contrary to the Commission's position, Bugbee & Conkle, LLP has successfully argued to the Lucas County Common Pleas Court that a "claim" encompasses a motion for an additional condition. The court agreed the new law applies to motions for additional conditions filed after the effective date, despite the fact that the date of injury occurred before the effective date.

Therefore, in Lucas County, claimants cannot dismiss an employer appeal without consent in cases where the motion for the additional condition was filed after the effective date.

Currently, the Lucas County Common Pleas Court has reinstated two employer appeals on its docket where the claimant voluntarily dismissed without consent. The court's decision enhances an employer's position in court appeals and increases chances of a favorable resolution by way of settlement. Bugbee & Conkle has motions to reinstate pending in at least two other counties.

Based on the court's definition of "claim," any motion to include an aggravation of a preexisting condition, filed after the effective date of Senate Bill 7, would be subject to the "substantial aggravation" standard under the new law. That is, a substantial aggravation must be shown by objective diagnostic findings, objective clinical findings, or objective test results. The substantial aggravation standard enhances an employer's position in defending such claims in the Commission and trial court.

COMMISSION: "SUBSTANTIAL AGGRAVATION IS A LEGAL DETERMINATION"

In a May 5, 2008 Policy Statement, the Commission announced that the determination of a substantial aggravation claim is a legal determination. In addition, medical evidence establishing a substantial aggravation does not need

to contain an opinion as to substantial aggravation. In other words, the doctor's opinion need not contain any "magic language" or the words "substantial aggravation."

(See Substantial Aggravation, P.2)

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SUBSTANTIAL AGGRAVATION (Continued from Page 1)

The Commission’s Policy Statement Memo A5, ([click here to access IC Web-site](#)) which must be followed by its hearing officers, appears to dilute the language of the statute and contradict the intention of the legislature. In addition,

by making the determination of substantial aggravation “legal,” it appears third party administrators will be prevented from representing employers on substantial aggravation claims before the Commission pursuant to the Commission’s Resolution on the unauthorized practice of law, R04-1-01.

WORKING WAGE LOSS STILL REQUIRES JOB SEARCH FOR COMPARABLE PAY

Recently, the 10th District Court of Appeals has held a job search for comparably paying work is necessary for entitlement to working wage loss compensation.

In [State ex rel. Johnson Controls, Inc. v. Montez, 2008-Ohio-3099](#), the Commission awarded working wage loss compensation to a claimant who obtained a lower paying job after admittedly conducting a substandard job search. The Commission failed to address the job search effort prior to the acquisition of the job. The court found the Commission abused its discretion by failing to address the job search and remanded the matter for further hearing on the efficacy of the

job search.

In [State ex rel. Deluxe Corp. v. Stanley, 2008-Ohio-4066](#), the claimant received working wage loss after obtaining a lower paying job. However, he conducted no job search before acquiring the job. The court reversed the Commission’s award of working wage loss compensation.

The court of appeals’ decisions uphold the principle that wage loss is not a subsidy. To receive this benefit, claimants must conduct a good faith job search for comparably paying work whether applying for working or non-working wage loss compensation.

COURT OF APPEALS FINDS WORKERS’ COMPENSATION DENIAL BINDING IN PRODUCTS LIABILITY CASE

On July 25, 2008, the First District Court of Appeals found that a workers’ compensation determination barred the plaintiff from recovery in a products liability case in [Michell v. International Flowers & Fragrances, Inc. 2008-Ohio-3697](#).

Prior to filing her products liability case, the plaintiff filed a workers’ compensation claim for respiratory problems due to chemical exposure at work. Ulti-

mately, the claim was disallowed. Shortly thereafter, the plaintiff filed the products liability case based on the same exposure to chemicals.

Although the products liability case involved different parties, the court of appeals found the plaintiff had a full and fair opportunity to present her case in the workers’ compensation process. Therefore, the plaintiff was bound by the workers’ compensation determination.

The information contained in this publication is not intended to serve as legal advice, but merely to alert readers to developments in the law. If you have any questions, either call at the address listed above left or email us through our website. The website can be accessed by clicking the link below.

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