

Bugbee & Conkle, LLP

Workers' Compensation News

May, 2009

Volume 09, No. 3



405 Madison Ave., Ste. 1300
Toledo, Ohio 43604
(419) 244-6788

www.Bugbee-Conkle.com

John F. Wetli
Gregory B. Denny
Tybo Alan Wilhelms
Robert L. Solt, III
Robert P. King
Mark S. Barnes
Harvey C. Miller
Andrew J. Wilhelms
Janelle M. Matuszak

COURT OF APPEALS FINDS COMMISSION NOT REQUIRED TO STAY PARTIAL DISABILITY AWARD DURING PENDENCY OF COURT CASE—DECISION IN CONFLICT WITH SUPREME COURT

In *State ex rel. Leto v. Indus. Comm.*, 180 Ohio App.3d 17, 2008-Ohio-7056, the court of appeals of Franklin County examined whether the Commission should hear a widow claimant's motion for a loss of use award while the allowance of the claim and the death allowance remained pending in the court of common pleas.

Under R.C. 4123.60, dependents of injured workers may seek benefits to which the deceased worker would have been "lawfully entitled" at his death. In *Leto*, the decedent sustained fatal injuries in a car accident, which left him comatose before his death and without the functional use of his arms and legs. A FROI was filed on behalf of the decedent before his death, which the Bureau disallowed under the "going and coming" rule. After the decedent's death, his widow filed a death claim. Eventually, both the claim for injury and the death claim progressed through the Commission and were appealed to the common pleas court, where the cases were consolidated.

Nearly two years after the decedent's death, his widow filed a motion requesting a loss of use award based on the decedent's functional loss of his limbs under R.C. 4123.57(B). The Commission denied the motion on the

ground that the motion was not filed within the applicable statute of limitations. The decedent's widow filed a complaint in mandamus, which the court of appeals reviewed.

On mandamus, the Commission argued, among other things, the request for the loss of use award could not be heard because the injury and death claims were pending in court. The court of appeals rejected this argument, holding R.C. 4123.512 does not require the Commission to stay the payment of compensation for partial disability. The court ordered a remand to the Commission to grant the loss of use award.

The court of appeals' decision seems to conflict with the Ohio Supreme Court's decision in *State ex rel. Saunders v. Indus. Comm.*, 101 Ohio St.3d 125, 2004-Ohio-339, which held R.C. 4123.512 authorizes the commission to stay the payment of *partial* disability compensation during pending litigation.

Leto is currently pending in the Supreme Court and has been scheduled for mediation. The outcome of *Leto* is important to employers, who have relied on *Saunders* to avoid payment of compensation of partial disability during court litigation.

www.Bugbee-Conkle.com

CENTER FOR MEDICARE & MEDICAID SERVICES ADDS REGISTRATION LINK TO ITS WEBSITE FOR REPORTING REQUIREMENTS UNDER SCHIP EXTENSION ACT

PAGE 2

The last issue of the *Workers' Compensation News* contained an article providing that the Center for Medicare & Medicaid Services will impose mandatory reporting requirements on employers beginning July 1, 2009, to comply with the Medicare, Medicaid and SCHIP Extension Act of 2007. CMS indicated it will require the sub-

mission of information in an electronic format through a secure website.

CMS's website now contains a link whereby responsible reporting entities may provide notification of their intent to report data to comply with above Act. Click [here](#) to access the link.

BWC BOARD OF DIRECTORS APPROVE VARIOUS COMPONENTS OF THE BUREAU'S COMPREHENSIVE RATE REFORM PLAN

On April 30, 2009, the Bureau's Board of Directors approved several components of its comprehensive rate reform plan, including the creation of a Group Retrospective Rating Program. The Group Retrospective Rating Program is designed to provide employers with a performance based program, which promotes and achieves workplace safety. The Group Retrospective

Rating Program become effective July 1, 2009; program sponsors must enroll members for the upcoming policy year by June 26, 2009.

The Board of Directors also eliminated financial incentives to group rated employers for compliance with the Drug Free Workplace Program. Such discounts will be available to non group rated employers only.

COURT OF APPEALS FINDS CLAIMANT CANNOT DISMISS EMPLOYER APPEAL FOR INJURY OCCURRING AFTER AUGUST 26, 2006

In [Marrero v. Blaze Constr., 8th Dist. No. 91660, 2009-Ohio-965](#), the claimant alleged he was injured August 30, 2006. The Commission allowed the claim and the employer appealed to court. Prior to trial, the claimant voluntarily dismissed his complaint without the employer's consent. The employer moved to strike the dismissal, which the trial court denied.

The employer appealed, which ap-

peal was granted. Following the Supreme Court's decision in [Thorton v. Montville Plastics, 121 Ohio St.3d 124, 2009-Ohio-360](#), the court of appeals held the claimant could not dismiss his complaint without the employer's consent under the amendments to R.C. 4123.512(D). Because the date of injury was after the effective date of the law (August 26, 2006), the amended provisions of the law applied.

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.



405 Madison Ave., Ste. 1300
Toledo, Ohio 43604
(419) 244-6788

www.Bugbee-Conkle.com

John F. Wetli
Gregory B. Denny
Tybo Alan Wilhelms
Robert L. Solt, III
Robert P. King
Mark S. Barnes
Harvey C. Miller
Andrew J. Wilhelms
Janelle M. Matuszak

www.Bugbee-Conkle.com