

# Bugbee & Conkle, LLP

## Workers' Compensation News

January, 2009

Volume 09, No. 1



405 Madison Ave., Ste. 1300  
Toledo, Ohio 43604  
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### BUGBEE & CONKLE SEMINAR TO BE HELD MARCH 12, 2009

Bugbee & Conkle, LLP will host a seminar for its clients March 12, 2009, from 1:00 p.m.– 4:30 pm, at the Holiday Inn French Quarter Hotel, 10630 Fremont Pike, Perrysburg, OH 43551. Please mark this date on your calendar. More detailed information regarding seminar topics will be published in the near future. If you have any questions, please contact us at 419-244-6788, or through our website. As always, our seminar is free of charge to our clients and invitees. We look forward to seeing you in March.

### SUPREME COURT REJECTS CLAIMANT'S REQUEST TO SUBMIT EVIDENCE AFTER SHO HEARING

In *State ex rel. Schlegel v. Styke-main Pontiac Buick GMC, Ltd.*, 120 Ohio St.3d 43, 2008-Ohio-5303, the Commission denied the claimant's request for temporary total disability (TTD) compensation on the ground the claimant had voluntarily abandoned his job.

After the district and staff hearing officers denied compensation, the claimant appealed to the full Commission, submitted additional evidence, and argued he was disabled at the time of his job abandonment. The Commission refused the claimant's appeal, from which the claimant filed for a writ of mandamus. Under *State ex rel. Pretty Products, Inc. v. Indus. Comm.* (1996), 77 Ohio St.3d 5 and *State ex rel. Reitter Stucco v. Indus. Comm.*, 117 Ohio St.3d 71, 2008-Ohio-499, voluntary abandonment does not preclude TTD compensation when the claimant is disabled at the time of the

job abandonment. Although the claimant was in possession of evidence showing he was disabled at the time of his job abandonment, he failed to produce the evidence or argue he was disabled at either the district or staff hearing officer hearings.

The court of appeals upheld the Commission's decision, as did the Supreme Court. The Supreme Court held the Commission did not abuse its discretion in refusing to hear the claimant's appeal even though the appeal was accompanied by additional evidence of disability. The workers' compensation law does not encompass an appeal of right to the full Commission, and therefore, the Commission was not required to hear the claimant's appeal. Moreover, the Court found the claimant waived the *Pretty Products* argument by failing to present evidence and raise the issue at the lower hearing levels.

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## INDUSTRIAL COMMISSION POLICY CHANGES, 4TH QUARTER 2008

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The following Commission policies, which can be found in the Commission's [Hearing Officer Manual](#), were modified in the fourth quarter of 2008: Memo E7, I5, K5, M2, and R6. Copies of these policies are attached to this newsletter. Memos E7 and I5 are most noteworthy for employers.

Memo E7 has been modified to clarify the processing of applications for permanent partial disability when the claim or an additional condition is pending in court on appeal pursuant to R.C. 4123.512. In sum, a PPD application may not be processed when the original claim is pending in court or when the application pertains to an additional condition pending in court. "Pending" in court includes the period when a complaint has been dismissed pursuant to Civil Rule 41(A).

Memo I5 sets forth other forms of compensation, including medical benefits, which may or may not be processed during the pendency of an R.C. 4123.512 appeal. The policy provides TTD compensation, PTD compensation, and medical benefits continue to be paid during a court appeal, which is consistent with the statutory mandate contained in R.C.

4123.512(H). The policy also provides wage loss and living maintenance applications shall be processed although the statute does not specifically provide such compensation shall continue during the appeal.

It is questionable whether the Commission's policy regarding wage loss and living maintenance applications is legally sound. As a practical matter, the Commission developed Memo E7 to hold PPD applications in abeyance during court appeals because R.C.

4123.512(H) authorizes continued payment of compensation for total disability only. Presumably, any claimant applying for wage loss compensation is not totally disabled because entitlement to wage loss compensation generally requires the claimant conduct a job search, implying the ability to work.

This argument may carry some weight considering the Supreme Court strictly construed the language of R.C.

4123.512(H) in finding the Bureau could not charge state fund employers for medical expenses during the pendency of a court appeal. [Arth Brass & Aluminum Castings, Inc. v. Conrad](#), 104 Ohio St.3d 547, 2004-Ohio-6888.

### GROUP RATING CASE PENDING; LAWMAKERS ACT

On November 18, 2008, in *San Allen, Inc. v. Administrator, Ohio Bureau of Workers' Compensation*, the Cuyahoga County Court of Common Pleas issued a preliminary injunction enjoining the Bureau "from enacting its current group-rating plan for the policy year beginning July 1, 2009." On December 15, 2008, the Bureau filed an appeal along with a motion requesting the original complaint be stayed pending the appeal. The court has not yet set a trial date. In response to the court's decision, the legislature enacted House Bill 79, effective January 6, 2009, which amends R.C. 4123.29(A)(4)(c) and replaces "retrospective rating" with "group rating." By doing so, the legislature seeks to maintain a prospective group rating program, as set forth in the Ohio Administrative Code.

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.

[www.Bugbee-Conkle.com](http://www.Bugbee-Conkle.com)

September 29, 2008

Memo E7

**State of Ohio**  
**Industrial Commission**  
**Policy Statements and Guidelines**

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**Processing Applications for Benefits Pursuant to O.R.C. 4123.57 when  
Allowance Question is in Court**

The Industrial Commission shall not process an application for benefits pursuant to ORC 4123.57 during the pendency of the employer's appeal of the original allowance in Court under O.R.C. 4123.512. If a question of an additional allowance is in Court, there is jurisdiction to process an application as it relates to the original conditions allowed in the claim that are not being contested in Court.

The Industrial Commission interprets the term "pending" to include the period of time when an appeal to Court may have been dismissed pursuant to Civil Rule 41(A).

Please see *Hearing Officer Manual* policy I5 regarding the processing of other compensation and medical benefit issues during the pendency of the original allowance or additional allowance in court.

**NOTE:** 1962 O.A.G. No. 2794 and O.R. C. 4123.512(H)

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**State of Ohio  
Industrial Commission  
Policy Statements and Guidelines**

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**Processing Compensation and Medical Benefits Issues in Claims  
When an Original Allowance or Additional Allowance Issue is in Court**

The chart below and on the next page delineates how compensation and medical benefits issues should be handled and processed when an employer's appeal is pending in court. Column one identifies the compensation or medical benefit issue. Column two indicates whether or not the compensation or medical benefit issue can be considered for adjudication when the original allowance issue is on appeal to court pursuant to O.R.C. 4123.512. Column three indicates whether or not the compensation or medical benefit issue can be considered for adjudication when an additional allowance issue is on appeal to court pursuant to O.R.C. 4123.512.

**Note:** Hearing Officer Manual policy E7 also addresses related issues.

Yes indicates – Process and/or adjudicate the request for compensation and/or benefits

No indicates – Do not process and/or adjudicate the request for compensation and/or benefits

<u>Issue in Question</u>	<u>Original Allowance and R.C. 4123.512 Appeals to Court</u>	<u>Additional Allowance and R.C. 4123.512 Appeals to Court</u>
<b>Temporary Total Disability</b>	<b>Yes</b>	<b>Yes</b>
<b>Permanent Total Disability</b>	<b>Yes</b>	<b>Yes</b>
<b>Medical Expenses</b>	<b>Yes</b>	<b>Yes</b>
<b>Permanent Partial Disability</b>	<b>No</b>	<b>No, except if request is based on the original allowance</b>
<b>Scheduled Loss</b>	<b>No</b>	<b>No, except if request is based on the original allowance</b>
<b>Impairment of Earning Capacity</b>	<b>No</b>	<b>No, except if request is based on the original allowance</b>

<b><u>Issue in Question</u></b>	<b><u>Original Allowance and R.C. 4123.512 Appeals to Court</u></b>	<b><u>Additional Allowance and R.C. 4123.512 Appeals to Court</u></b>
<b>Wage Loss Compensation</b>	<b>Yes</b>	<b>Yes</b>
<b>Motion for additional Condition</b>	<b>Yes</b>	<b>Yes</b>
<b>Living Maintenance</b>	<b>Yes</b>	<b>Yes</b>
<b>Living Maintenance Wage Loss</b>	<b>Yes</b>	<b>Yes</b>
<b>Handicap Reimbursement (CHP-4)</b>	<b>Yes</b>	<b>Yes</b>
<b>Violation of a Specific Safety Requirement</b>	<b>Yes</b>	<b>Yes</b>

**State of Ohio  
Industrial Commission  
Policy Statements and Guidelines**

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**Timely Completion of Orders**

Hearing Officers are to complete and issue their orders in a timely fashion. The hearing officer must issue an interlocutory advisement order if he or she will not be able to issue a final order within twenty-four (24) hours of the conclusion of the hearing. The advisement order will indicate why the hearing officer is taking the issue under advisement.

It is recognized that new evidence or arguments may be introduced at hearing requiring the need for more time to evaluate information in the claim file, and that some hearing issues may be complex and require more than twenty-four (24) hours to complete the final order. In those cases, once a hearing officer has issued an interlocutory order taking the matter under advisement, he or she must complete and issue a final "Mitchellized" order within seven (7) calendar days of the hearing. If a final "Mitchellized" order is not expected to be issued within seven (7) calendar days due to extenuating circumstances, the hearing officer is required to meet with their regional manager to discuss a date certain when the order will be issued.

In no case will an order be issued more than fourteen (14) calendar days after the hearing absent consent of the regional manager.

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September 29, 2008

Memo M2

**State of Ohio  
Industrial Commission  
Policy Statements and Guidelines**

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**No Communication with Physician Examining for Industrial  
Commission**

No person or party other than Industrial Commission employees shall communicate with a licensed practitioner examining or reviewing on behalf of the Industrial Commission. This restriction shall also apply to the party being examined other than during the examination itself.

When an injured worker has been scheduled for an examination by an Industrial Commission physician, the injured worker's attorney or the attorney representing the listed employer, or the official representative of the injured worker or employer, shall be prohibited from attending or observing said examination.

This shall not affect the right of any party to proceed under O.A.C. 4121-3-09 (A) (7) or impair the right of parties to file additional medical or other evidence with the Industrial Commission for inclusion in the claim file.

**NOTE:** Industrial Commission Resolution, No. R82-7-3 (January 25, 1982)

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**State of Ohio  
Industrial Commission  
Policy Statements and Guidelines**

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**Interpreters for the Hearing Impaired or for Foreign  
Language**

The service of interpreters will be secured for hearings, pre-hearing conferences, or for medical exams involving individuals who could not communicate otherwise during the hearing or medical exam due to deafness or to a foreign language barrier. Interpreters are scheduled by the Office of Customer Service in those instances where the Industrial Commission finds such services necessary. A separate request must be submitted for each hearing where an interpreter is required.

Injured workers should be informed of their right to have an interpreter present. When a hearing officer or medical examiner does not know in advance of the need for interpretive services, the matter shall be reset and an interpreter shall be scheduled to enable the person to effectively communicate.

Roles of the interpreter in hearings:

- To facilitate the hearing process and to place the individual for whom services are provided in a position as close as linguistically possible to that of a similarly situated individual in the same legal setting
- Interpreters should only attend the hearing that they were notified to attend by the IC
- Render complete and accurate interpretation
- Avoid any conflict of interest, financial or otherwise
- Refrain from dispensing legal advice, communicating conclusions or expressing personal opinions to those for whom they are interpreting
- Maintain an impartial and neutral attitude
- Refrain from providing services if he or she has a stake in the outcome

Outside the hearing room:

- The interpreter may initially acknowledge the individual for whom services are provided to ensure successful communication
- Communication with the individual for whom interpretive services is provided is permissible by parties, through the interpreter, to clarify information prior to commencement of the hearing
- Interpreters should otherwise refrain from independent conversations with the parties or witness(es) prior to commencement of the hearing

The interpreters will submit a C-19 form for payment to the Office of Customer Service. The interpreting coordinator shall then submit the C-19 form to Provider Affairs for payment from the Surplus Fund. Approval signature from the requestor is required for proper processing.

**NOTE:** Industrial Commission/BWC Joint Resolution, No. R88-1-200  
(September 28, 1988)

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