

# Bugbee & Conkle, LLP

## Workers' Compensation News

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### SUPREME COURT FINDS NO VOLUNTARY ABANDONMENT WHERE EMPLOYER FAILS TO SHOW EMPLOYEE HAD KNOWLEDGE OF WORK RULE

In *State ex rel. Saunders v. Cornerstone*, 123 Ohio St.3d 40, 2009-Ohio-4083, the employer terminated the claimant for insubordination pursuant to an amendment to its work rules. Subsequently, the claimant sought TTD compensation for disability due to a knee surgery. Although upon hire the claimant had signed an acknowledgment of receipt of the work rules, the employer failed to provide the claimant with a copy of the amended rule on insubordination. The Commission denied TTD compensation on the ground the claimant voluntarily abandoned his employment. However, the Court found the Commission's decision was based on the erroneous assumption the claimant had received a copy of the insubordination amendment.

The Court's holding illustrates the voluntary abandonment doctrine requires strict compliance with the *Lou-*

*isiana-Pacific* criteria. For a discharge to constitute a voluntary abandonment, the employer has the burden of showing the claimant violated a written work rule; the claimant knew or should have known the conduct was prohibited; and the claimant knew or should have known termination would result from engaging in the prohibited conduct.

Insubordination is often poorly defined in employee handbooks. Employers should review their work rules to ensure insubordination clauses define specific prohibited conduct. Moreover, employers must provide copies of the work rules to employees and obtain written acknowledgements each time the work rules and amendments thereto are updated. Otherwise, the voluntary abandonment defense may not withstand the scrutiny of the Commission or the courts.

### BUREAU AMENDS RULE FOR MEDICAL PROOF REQUIRED TO SUPPORT TTD COMPENSATION

Effective November 5, 2009, Ohio Admin.Code 4123-5-18(D) requires claimants to submit signed C-84s or their equivalent to receive continued TTD compensation. The C-84 is a two-part form, encompassing the necessary elements for payment of TTD compensation under well settled Ohio

law. The Supreme Court has held TTD compensation is payable when the allowed conditions prevent the claimant from returning to his/her former position of employment. See *State ex rel. Waddle v. Indus. Comm.* 67 Ohio St.3d 452. (See "Rule" p. 2)

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**RULE  
 (Cont. from p. 1)**

Page 2 of the C-84 provides the medical criteria to support compensation under *Waddle*.

Self-insured employers must comply with both Ohio law and Commission and Bureau rules regarding payment of compensation. Accordingly, self-insured employers should pay compensation based on the medical evidence contained in C-84s and MEDCO-14s to the extent the *Waddle* criteria are met. Generally, “off work” slips and C-30s do not satisfy *Waddle*.

Page 1 of the C-84 contains information about the claimant, including a certification that the claimant is not permitted to work while receiving TTD compensation. The amended rule does

not clearly require the claimant complete Page 1 of the C-84 to receive continued compensation. Because the rule itself concerns “medical proof required for payment of compensation,” it does not appear the claimant’s certification would be necessary to ensure continued compensation. However, a Bureau representative advised the Workers’ Compensation Committee of the Toledo Bar Association that the Bureau will require the claimant’s certification under the amended rule.

As of the date of the publication of this newsletter, the Bureau has not issued an official policy statement on its interpretation and enforcement of the new rule.

A copy of the rule is attached to this newsletter.

**COURT OF APPEALS HOLDS EMPLOYER SUBROGATION CLAIMS SUBJECT TO 6-YEAR STATUTE OF LIMITATIONS ON**

In *Corn v. Whitmere, 2009-Ohio-2737*, the 2nd District Court of Appeals held subrogation claims under R.C. 4123.931 are subject to a 6-year statute of limitations.

*Corn* involved a typical subrogation scenario in which the claimant sustained injuries in an automobile accident while performing his job. The self-insured employer sought reimbursement for workers’ compensation benefits from Whitmere and/or his insurance company. The trial court dismissed the employer’s subrogation claim because the claim was filed more than two years after the accident. The court of appeals reversed the decision.

Under general principles of subro-

gation, a subrogee stands in the shoes of the injured person and succeeds to the injured person’s rights. The subrogee’s rights derive from and depend on the rights of the injured person.

The court found R.C. 4123.931, as amended in 2003, creates an independent cause of action for self-insured employers to seek reimbursement. Accordingly, statutory subrogees (i.e. self-insured employers) are not subject to the two-year personal-injury statute of limitations because their rights do not derive from the claimant’s rights. The applicable statute of limitations is contained in R.C. 2305.07, which is six years for liabilities created by statute.

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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4123-5-18

**Medical proof required for payment of compensation.**

- (A) Except as provided in paragraph (B)(1)(b) of rule 4123-3-09 of the Administrative Code, no payment of compensation shall be approved by the bureau in a claim unless supported by a report of a physician duly licensed to render the treatment.
- (B) In evaluation of sufficiency of medical proof the following criteria shall be considered:
- (1) The nature and type of injury or occupational disease;
  - (2) Is the diagnosis consistent with the description of events resulting in the injury or occupational disease, as shown by proof of record;
  - (3) Is the disability rating based solely on condition or conditions for which the claim is recognized;
  - (4) Is the disability rating based on objective symptoms of disability as a direct result of the injury or occupational disease in the respective claim; "objective symptoms" means those signs and indications which a physician discovers from an examination of ~~his~~ the patient, as distinguished from subjective symptoms which ~~he~~ the physician learns from ~~what his~~ the patient ~~tells him~~;
  - (5) Did the physician state reason or reasons for his opinion?
- (C) Whenever payment of compensation cannot be made due to lack of medical proof, the claimant shall be immediately advised of the necessity to submit appropriate medical proof, as specified in paragraph (A) of this rule.
- (D) In cases of continued temporary disability as a result of the allowed injury or occupational disease it shall be the duty of the claimant to submit periodic medical reports ~~of~~ and the signed request for temporary total disability compensation (form C-84) or an equivalent form or document containing the information on the C-84 form to support disability to assure regular payment of compensation. The frequency of filing such reports depends on the type and nature of the injury or occupational disease and the degree of disability. ~~As a general rule, monthly reports of temporary total disability are required.~~