

Bugbee & Conkle, LLP

Workers' Compensation News

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BUGBEE & CONKLE FIRM SEMINAR

Bugbee & Conkle, LLP hosted a seminar for its clients and other invitees Thursday, March 11, 2010. Over 75 people attended the event, which covered a range of topics from workplace harassment and hiring/firing decisions to claim management and compensation issues.

The firm will host another seminar for its clients the afternoon of September 22, 2010. Please mark this date on your calendar. More specific information regarding the seminar will be distributed over the coming months.

COURT OF APPEALS HOLDS "AGGRAVATION" IS A THEORY OF CAUSATION AND MAY BE ADDRESSED ON APPEAL UNDER R.C. 4123.512 EVEN IF THE COMMISSION DOES NOT ALLOW OR DISALLOW THE CLAIM FOR AN AGGRAVATION CONDITION

In [Starkey v. Builders Firstsource Ohio Valley, LLC, Hamilton App. No. C-081279, 2010-Ohio-1571](#), the court of appeals examined whether a claimant could pursue *aggravation* of degenerative osteoarthritis on appeal under R.C. 4123.512, when the Commission determined the claimant's right to participate for degenerative osteoarthritis.

The claimant, who had an allowed claim, moved the Commission to additionally allow the claim for degenerative osteoarthritis, which condition the Commission allowed throughout the agency proceedings. The employer appealed to the trial court, where the case proceeded to trial.

At trial, the claimant's doctor testified the osteoarthritis pre-existed the injury, but such condition was aggravated by the injury. The employer

moved for directed verdict on the ground the claimant failed to prove the injury proximately caused degenerative osteoarthritis. Although the claimant set forth evidence to support aggravation of pre-existing osteoarthritis, the employer argued the trial court lacked jurisdiction over aggravation of pre-existing degenerative osteoarthritis.

The trial court granted the employer's motion, entering judgment in favor of the employer. The court of appeals, however, reversed the trial court, holding "aggravation" of pre-existing degenerative osteoarthritis is not a separate and distinct condition from pre-existing degenerative osteoarthritis. The court reasoned pursuing the condition on an "aggravation" basis is merely a different "theory of causation." (See *Starkey*, page 2)



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Starkey
(Cont. from p. 1)

The court's decision is in direct conflict with [Davidson v. Bur. Of Work. Comp., Montgomery App. No. 21731, 2007-Ohio-792](#), which held lumbar sprain and aggravation of lumbar sprain are separate and distinct conditions and the trial court's jurisdiction was limited to lumbar sprain, which was decided by the Commission. The *Starkey* court, recognizing its decision conflicted with *Davidson*, announced it would certify a conflict to the Ohio Supreme Court, although the employer did not timely move to certify a conflict. Nevertheless, the employer will appeal the decision to the

Ohio Supreme Court.

The *Starkey* court's decision appears inconsistent with the Ohio Supreme Court's decision in [Ward v. Kroger, 106 Ohio St.3d 35, 2005-Ohio-3560](#), which held the trial court's jurisdiction is limited to the specific condition adjudicated by the Commission. The *Davidson* and *Starkey* courts both cited *Ward* as authoritative, but reached different conclusion's as to *Ward's* application. Considering the conflict between the courts of appeals, the *Starkey* holding seems ripe for review by the Supreme Court. Any significant developments in this case will be reported in future newsletters.

**BUREAU PROPOSES AMENDMENTS TO 4123-3-15
FOR LOSS OF USE AWARDS**

On June 11, 2010, the Bureau of Workers' Compensation will hold a public hearing to consider amendments to Ohio Admin.Code 4123-3-15 (Claims procedures subsequent to allowance). This rule is being amended to change the timeframe in which a state fund claim becomes inactive (13 months to 24 months) and to add new payment procedures for permanent partial disability awards.

Under the new rule, the bureau or the self-insured employer will make the initial determination for loss by amputation or loss of use claims. Addition-

ally, the amendments provide payment of the loss award shall be paid in weekly installments after the DHO order and in full at the conclusion of the administrative proceedings. The amendment seems to conflict with Ohio Admin.Code 4121-3-18, which provides no payment shall be made until the SHO decides the application for the loss award upon reconsideration.

A copy of the proposed amendments can be found at the Register of Ohio by following this [link](#).

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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