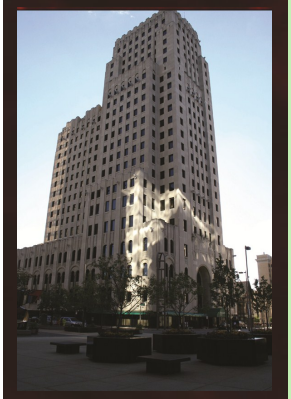
Bugbee & Conkle, LLP

Workers' Compensation News

September, 2012 Volume 12, No.4



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

www.Bugbee-Conkle.com

Gregory B. Denny
Tybo Alan Wilhelms
Robert L. Solt, III
Robert P. King
Mark S. Barnes
Janelle M. Matuszak
Carl E. Habekost
Carolyn A. Davis

REMINDER!

Bugbee & Conkle, LLP will host its annual Labor and Employment Law seminar September 27, 2012 at the Holiday Inn French Quarter Hotel in Perrysburg, Ohio. Registration begins at 12:30 p.m. If you would like to attend the seminar please contact us at 419-244-6788.

Court of Appeals Holds Injury Incurred By Over-the-road Tucker while in Hotel Bathroom is NOT Compensable

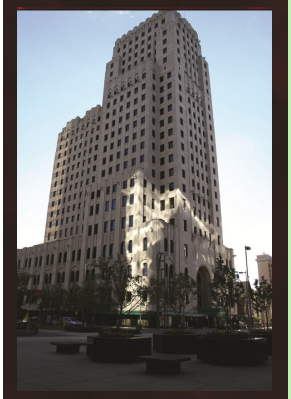
In *Woodard v. Cassens Transport Co.*, 2012-Ohio-4015, the Third District Court of Appeals held an injury incurred by an over-the-road trucker while in a hotel bathroom is NOT compensable under Ohio law.

The employer required the claimant to spend the night in a hotel near the terminal where he would pick up a load of automobiles the next morning. The claimant stayed at a hotel using a company credit card. In the middle of the night, the claimant awoke to use the bathroom and slipped and fell on the bathroom floor, injuring his knee.

Administratively, a district hearing officer and staff hearing officer allowed the claim. The employer appealed to court pursuant to R.C. 4123.512. The parties waived a jury and the case was tried to the court, which entered judgment in favor of the claimant. The employer appealed to the court of appeals.

The court of appeals reversed the trial court and disallowed the claim. The court noted R.C. 4123.01 requires that injuries occur "in the course of" employment and "arise out of " employment. Citing several analogous cases involving "traveling" employees, the court reasoned the claimant was neither in the course of his employment at the time of the injury nor did his injury arise out of employment. The court found the claimant was off-duty at the time of the injury, and therefore, was not in the course of his employment. More importantly, the court found using the restroom in the middle of the night is a "personal mission" disconnected from employment. Because the employer could not control the hazards in a hotel restroom, the injury was not causally connected to work.

While the court was guided by analogous case law, the court noted that compensability issues often depend on the facts of each case. Employers should be mindful to consult an attorney regarding compensability issues, especially where traveling employees are concerned.



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

www.Bugbee-Conkle.com

Gregory B. Denny
Tybo Alan Wilhelms
Robert L. Solt, III
Robert P. King
Mark S. Barnes
Janelle M. Matuszak
Carl E. Habekost
Carolyn A. Davis

Court of Appeals Finds Medical Reports Do Not Support Denial of TTD Compensation Where the Reports Fail to State the Medical Conditions Preclude Return to Former Position of Employment

In *Wright v. Industrial Commission of Ohio*, 2012–Ohio–3918 , the claimant sought temporary total disability compensation based on psychological allowances in the claim. Two psychologists found the claimant's psychological condition was not "work prohibitive." The district and staff hearing officers denied compensation based on the psychologists' reports. Additionally, the staff hearing officer found the claimant abandoned the workforce because she had not worked since the inception of the claim and had applied for Social Security Disability benefits.

The claimant filed a petition for writ of mandamus in the 10th District Court of Appeals, requesting the Commission's order be vacated. The court's magistrate recommend the court grant the writ. The court of appeals agreed with the magistrate, ordering the Commission to reconsider its decision.

The court reasoned the psychologists' finding that the psychological conditions were not "work prohibitive" was ambiguous. Under Ohio law, TTD compensation is payable if the claimant is precluded from returning to the former position of employment. The fact that the claimant's condition was not "work prohibitive" did not necessarily mean she could perform the tasks of her former position of employment. Additionally, the court found the mere filing of an SSDI application did not signal an abandonment from all employment.

The court of appeals' decision illustrates the importance of obtaining medical evidence containing language that comports with the required legal standards. Employers should consult their attorney to ensure IME doctors address the relevant issues using language that conforms with the proper legal standard.

Hearing Officer manual Changes; Proposed Industrial Commission Rule Changes

Effective September 10, 2012, the Commission modified Hearing Officer Manual Memos C3 (Jurisdiction over MMI), C4 (Salary Continuation), M5 (Documentation provided by PAs, APNs, CNPs, and CNSs), R2 (use of Court Reporters), and R7 (Use of Audiovisual Evidence). The revised policies are attached to this newsletter for your convenience.

Several Commission rules are currently under review and proposed changes are being considered for the rules governing TTD compensation, disputed self-insured claims, and permanent partial disability. As a practical matter, the proposed changes are procedural in nature or reflective of current Ohio workers' compensation law. Please contact our office with questions about the amendments to the Commission's policies or rules.

September 10, 2012 Memo C3

State of Ohio
Industrial Commission
Policy Statements and Guidelines

Jurisdiction over the Issue of Maximum Medical Improvement

In order for a Hearing Officer to proceed on the issue of Maximum Medical Improvement (MMI), it is necessary that Temporary Total Disability be an issue in the claim.

A Hearing Officer has the ability to proceed on the issue of MMI when the injured worker is: (1) on TTD compensation, or is requesting TTD compensation, at the time a party files a request that the claimant be found to have reached MMI, and/or (2) when the claimant is on TTD compensation, or is requesting TTD compensation, at the time of the hearing. A hearing notice that lists Temporary Total and/or Termination of Temporary Total as issues to be heard is sufficient to allow a hearing officer to address MMI.

When terminating ongoing TTD compensation due to the issue of MMI, TTD compensation should be paid through the date of the hearing at which the compensation is being terminated.

September 10, 2012 Memo C4

State of Ohio
Industrial Commission
Policy Statements and Guidelines

Salary Continuation

Numerous questions and concerns have been raised as to how hearing officers should handle Salary Continuation and what impact salary continuation has on the payment of temporary total disability compensation. Following is a variety of circumstances with a discussion of how hearing officers should handle those circumstances:

1. **Wage Agreements.** Salary Continuation is not the same thing as a wage agreement. Wage agreements are provided for in OAC 4123-5-20.

2. **Finding of Temporary Total Disability and Rate of Payment.** Generally, when hearing officers are aware that an injured worker received wages over a period of temporary total disability, the hearing officer should state that TTD is paid less wages received. Also, hearing officers should include in their orders a statement that the injured worker was temporarily and totally disabled despite the fact that salary continuation may have been paid by the employer. However, to the extent that temporary total disability compensation would exceed the after tax amount received by the injured worker through salary continuation, that excess amount should be paid in temporary total disability to the injured worker, so that the injured worker receives the same net amount of money as they would if they had been paid only temporary total disability compensation. The after tax amount should be measured against 72% of the

FWW for the first 12 weeks of disability, and 66 2/3% of the AWW thereafter. For example, if the injured worker is disabled from the time of injury, and the employer pays salary continuation for six weeks, the after tax amount of salary continuation should be measured against 72% of the FWW, and six weeks of TTD should then be paid at 72% of the FWW.

3. **Termination of Benefits/MMI.** Hearing officers do not have jurisdiction to terminate salary continuation benefits. In addition, hearing officers do not have jurisdiction to make a declaration of maximum medical improvement in claims where temporary total disability compensation is not being paid or requested. However, salary continuation benefits may be discontinued by either the employer or the injured worker at any time without any regard to the requirements of ORC Section 4123.56.

4. **Waiting Period for Permanent Partial Disability.** Prior to June 30, 2006, ORC 4123.57 requires that an injured worker wait forty-weeks from the last payment of compensation under ORC 4123.56, or forty weeks from the date of injury. If the injury occurred on or after June 30, 2006 or the occupational disease was contracted on or after June 30, 2006, ORC 4123.57 requires that the injured worker wait twenty-six weeks from the last payment of compensation under ORC 4123.56, or twenty-six weeks from the date of injury or date the occupational disease was contracted. If the employer pays salary continuation at a rate high enough to prevent BWC from paying temporary total disability benefits, then no benefits under ORC 4123.56 would have been paid. The injured worker would need only wait the applicable waiting period from the date of injury or date of contraction of the occupational disease to apply for permanent partial disability benefits.

5. **Application of *Crabtree/Russell* to Salary Continuation.** As earlier stated, hearing officers do not have jurisdiction to terminate salary continuation benefits. However, where ongoing temporary total disability benefits are not being paid due to salary continuation benefits being paid by the employer, and the salary continuation benefits cease, temporary total disability benefits shall commence or be ordered to commence. If a request is filed to declare the injured worker MMI, *Russell* applies, and that period of disability shall be deemed continuous and not a new period of disability. Thus, a termination due to MMI should take place at the date of hearing.

6. **VSSR Awards.** If a VSSR award is made in a claim where salary continuation was paid for some period of time, the VSSR award should be applied to the amount of TTD compensation that would have been paid had salary continuation not been paid.

September 10, 2012 Memo M5

State of Ohio
Industrial Commission
Policy Statements and Guidelines

Documentation Submitted by Physician Assistants, Advanced Practice Nurses, Certified Nurse Practitioners, and Clinical Nurse Specialists

Medical documentation submitted by an Advanced Practice Nurse **(**APN), a Certified Nurse Practitioner (CNP) or a Clinical Nurse Specialist (CNS) operating within the scope of his or her standard care arrangement (SCA) or by a Physician Assistant (PA) who is practicing under an approved supervision agreement is evidence to be considered by a hearing officer. An APN, CNP or CNS, depending upon his or her area of specialization, may submit documentation regarding the evaluation of the injured worker's (IW) wellness; regarding preventive or primary care services required by IW; and regarding care for the IW's complex health problems. Under an approved supervision agreement, a PA may submit documentation assessing injured workers and developing and implementing treatment plans for injured workers which are within the supervising physician's normal course of practice and expertise, and which are consistent with the approved physician supervisory plan or the policies of the health care facility in which the PA is practicing. Such medical evidence is not sufficient to justify the payment or non-payment of compensation under the provisions of Revised Code Section 4123.56 through Revised Code Section 4123.60.

Prescription drug and therapeutic device documentation submitted by a PA, APN, CNS, and CNP, who has been granted prescriptive

authority under the provisions of Chapter 4723 or 4730 of the Revised Code or Chapter 4723 or 4730 of the Administrative Code, is evidence to be considered by a hearing officer.

Documentation may be submitted by a PA, APN, CNP or CNS on office letterhead, appropriate BWC forms and other similar evidence. Documentation must be signed by the APN, CNP or CNS authorized to treat in the SCA, or by the PA practicing under an approved supervision agreement.

NOTE: Chapters 4730 and 4723 ORC and Chapters 4730 and 4723 OAC.

September 10, 2012 Memo R2

State of Ohio
Industrial Commission
Policy Statements and Guidelines

Commission Hearings – Court Reporters

Parties wishing to have a court reporter present for any Industrial Commission (IC) hearing shall notify the Hearing Administrator at least seven (7) days prior to hearing. Such party shall indicate the amount of extra time, if any, that the party expects the hearing to take.

If a party brings a court reporter to a hearing without prior notice to the IC, the Hearing Officer shall inquire as to the amount of extra time which may be necessary to complete the hearing. The Hearing Officer must decide whether to proceed as scheduled, hold the hearing at the end of the hour or at the end of the docket, or reset the hearing with appropriate hearing time. A Hearing Officer should not delay other scheduled hearings in order to proceed with a lengthy surprise court reporter hearing.

If a party brings a court reporter to an IC hearing, that party shall submit a copy of the transcript to the claim file. Such party is not obligated to provide a certified copy to the other side. If the other side requests a copy of the transcript, such copy shall be made by the submitting party from the transcript submitted to the file.

September 10, 2012 Memo R7

State of Ohio
Industrial Commission
Policy Statements and Guidelines

Use of Audiovisual Evidence

The use of audiovisual evidence is permitted in Industrial Commission hearings.

A written synopsis of the audiovisual evidence shall accompany the audiovisual evidence that is filed with the Commission. At the time that a party files audiovisual evidence with the Commission, said party shall provide a copy of the synopsis to the opposing party except in cases where the opposing party is represented. In the latter cases, the party shall provide a copy of the synopsis to the representative of the opposing party. A party that intends to present audiovisual evidence at hearing must request additional time, in writing, if additional time will be required. The request for additional time must accompany the appeal or motion that is creating the issue at hearing, or be filed when it is evident that the contested matter will come to hearing.

The Industrial Commission will make every effort to ensure that audiovisual evidence that is filed will be made available as a document in ICON and be viewable at hearing on the hearing officer's computer. It is the obligation of the party filing audiovisual evidence to ensure that the Industrial Commission has been able to format the evidence for viewing. If the Industrial Commission is unable to make the audiovisual evidence available, it is the obligation of the party offering audiovisual evidence to bring to the hearing the equipment required for presentation of the audiovisual evidence. It is also the

obligation of the party that introduces such audiovisual evidence to submit a complete copy of the evidence for the file.

The date and time of the recording of the audiovisual evidence should be incorporated into the audiovisual medium that will be clear during the presentation of the audiovisual evidence.

Any time a Hearing Officer encounters a situation where it appears a hearing will disrupt a docket due to length or otherwise, the Hearing Officer shall take available steps to minimize the disruption. Such steps may include moving the hearing to the end of the hour or the end of a docket. The Hearing Officer may also seek assistance of other Hearing Officers not scheduled for hearings that day. Only in extraordinary circumstances should a hearing be reset to another day.