

Getaway CLE, Ltd.

Advanced Ohio Workers' Compensation Seminar

October 9, 2021

Las Vegas

WORKERS COMPENSATION COURT PROCEEDINGS

10:15 a.m. – 11:45 a.m.

I. Introduction: In this section there will be a discussion of a workers' compensation R.C. 4123.512 Court Appeal given new parameters by various Common Pleas Courts. An analysis of how to evaluate whether to pursue a .512 court appeal. Preparation for and eventual trial proceedings, including: Interrogatories, depositions, expert testimony, exhibits, dispositive motions, jury instructions, and actual trial strategies will be explored. Additional discussion of other issues relevant to .512 court actions will be reviewed including voir dire, jury selection, and jury versus bench trials. Settlement issues will also be examined.

II. Governing Law

- A. Ohio Revised Code Section 4123.512
- B. Formerly ORC 4123.519 (anybody remember this?? Then you're old!)
- C. Ohio Rules of Civil Procedure (Rule 41A, and the new Rule 26F)
- D. Mandamus Actions (extent of disability)

III. Whether to pursue a Court Action

A. First, What kind of "appeal" are we talking about? Are we "appealing" or filing a *Mandamus* action. Huge difference. Some issues are addressed in an appeal under Ohio Revised Code Section 4123.512, while others area addressed via a Mandamus. So it depends on the issue. Is there a list somewhere telling us which is which ? Yes, kind of. And if you file in the wrong court, watch out !

So which is which ?

1. The .512 Appeal

- a. Jury Trial
- b. Lay and expert witness testimony
- c. Costs
- d. Timing/delays

2. Mandamus Action

- a. Petition/action in mandamus
- b. Stipulation of the record
- c. Briefs
- d. Oral Argument

B. Preparation for Trial proceedings

- 1. New representation agreement ?
 - litigation acknowledgement????
 - anything else???
- 2. Petition/Complaint
- 3. Interrogatories
- 4. Depositions
 - client preparation
- 5. Expert testimony
- 6. Exhibits
- 7. Dispositive Motions
- 8. Jury instructions

9. The Trial
10. The Verdict and its aftermath
11. Appeals

C. Trial strategies/Selected Topics

1. Your client (the claimant) is a saint
2. Your client (the employer) is a saint
3. The “Bad Man” theory
4. Their doctor is a whore
 - Scorched earth approach to doctors?
 - Get them the hell off the stage as soon as you can ?

D. Other issues

1. Viore dire/jury selection
2. Jury vs. bench trials
3. Settlement
 - a. Getting the right amount
 - b. The dreaded MSA !!!
 - c. The health insurance carrier
 - d. Other entities with their hand out
 - e. Social Security Off-sets
4. Employer Appeals

5. Jurisdiction & Venue (what county do we file in?)
6. Ohio Rules of Evidence
 - a. The *Valentine* Decision/Admissibility
 - b. Authenticity of Medical Records/Charts (Reports?)
 - c. Motions *in Limine*
 - d. Hearsay!!!! Not in the w/c hearings, but very much alive at trial
7. Ohio Rules of Appellate Procedure
 - a. Rule 9, Docketing statement, Scheduling
 - b. Mandamus Actions
8. Local Rules/Local Customs
 - a. How each county deals with the new Rule 26F
 - Questionnaire
 - Pre-Trial Statement-style pleading
 - b. other norms/customs:
 - Miami County: Must come to settlement conference with settlement report & pre-trial statements (or face certain death, literally, and DON'T BE LATE)
 - Mercer County: In-chambers pre-trial status conference often
 - Montgomery: electronic filing
 - Shelby County: no continuances! Period !!!
 - Miami County: Rules of Superintendence for the Courts of Ohio (I'm sorry, what was that?) It's in your rule book
 - Clark County: file complaint NOTHING HAPPENS For three

years. Then trial is scheduled in a week! This is what Rule 26F may be addressing.

-Trial Court Judges who HATE workers' compensation cases (or worse)

9. The New Rule 26F:

a. The Rule itself:

“(F)Conference of the Parties; Planning for Discovery. (1) Conference Timing. Except those matters excepted under Civ. R. 1(C), or when the court orders otherwise, the attorneys and unrepresented parties shall confer as soon as practicable - and in any event no later than 21 days before a scheduling conference is to be held. (2) Conference Content; Parties’ Responsibilities. In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Civ. R. 26(B)(3); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for filing with the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person. (3) Discovery Plan. A discovery plan shall state the parties’ views and proposals on: (a) what changes should be made in the timing, form, or requirement for disclosures under Civ. R. 26(B), including a statement of when initial disclosures were made or will be made; (b) agreed-upon deadlines for discovery and other items that may be included in a case schedule to be issued under Civ. R. 16, any proposed modifications to a schedule already issued under Civ. R. 16, and compliance with Sup. R 39 and 42. (c) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues; (d) any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced; (e) disclosure and the exchange of documents obtained through public records requests; (f) any issues about claims of

privilege or of protection as trial-preparation materials; (g) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; (h) any other orders that the court should issue under Civ. R. 26(C) or under Civ. R. 16(B) and (C); and any modifications required or to be requested under any scheduling order issued under Civ. R. 16.” [Effective: July 1, 1970; amended effective July 1, 1994; amended effective July 1, 2008; July 1, 2012; July 1, 2020; July 1, 2021.]

b. Effect on Workers’ Comp Trials

VI Discussion/Questions

Thank you !

/jeg

About the Presenter: Joseph Gibson. Joe is an attorney with a private practice focusing on Workers' Compensation law representing both employers and injured workers. He is the owner of Gibson Law Offices, a law firm with locations in Fairborn and Tipp City Middletown. He was born in Dayton and raised in Middletown where he graduated in 1983 from Madison High School. In 1987 he graduated from the University of Dayton with Bachelor of Arts in Political Science. He went on to attend the University of Dayton School of Law, and where he earned his Juris Doctor degree in 1990. In the late 1980's and early 1990's, he worked for the Department of Defense at Wright-Patterson Air Force Base Air Force Logistics Command. His time there was mainly in the Air Force Contract Law Center where he reviewed Contracting Officer's Decisions for legal sufficiency. He also worked for the Legal Department at DAP, Inc. focusing of corporate matters, EPA and consumer products law. He was then appointed by the Ohio Bureau of Workers Compensation to be the local district attorney for Dayton and Springfield service offices where he represented the BWC at all levels of administrative hearing. He advised claim and risk staff on claim questions, premium issues, and agency policy. He has instructed at Sinclair Community College and Edison State Community College in the Political Science and Business Law Fields. In 2009 he was elected to City Council in his home town of Tipp City, Ohio earning the highest number of votes a candidate has ever won in the City's history. He was re-elected 4 years later and again in 2019. In 2014 he was selected to be Council President serving two terms. In 2018 he was elected Mayor of Tipp City. He also serves on the Tipp City-Monroe Township Cable Access Commission and the Miami County Council.

In his law practice he has attended thousands of workers' compensation hearings, and has tried many cases before judges and juries. He has argued before the Court of Appeals, the Supreme Court of Ohio and the Federal District Court. He was a member of the Dayton Bar Association Certified Grievance (Ethics) Committee and past Chairman the Dayton Bar Association Workers' Compensation/Social Security Committee. He is a member of the Dayton Bar Association, the Miami County Bar Association, the Phi Delta Phi Legal Fraternity, and the Sons of the American Legion. He is licensed to practice law in the State of Ohio and in the Federal District Court for the Southern District of Ohio.

/mk