CASE LAW UPDATE

Getaway CLE
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Supreme Court of Ohio Opinions

***State ex rel. TS Trim v. Indus. Comm.*, 166 Ohio St.3d 297, 2021-Ohio-2709** - claimant's medications, Norco and Skelaxin, were covered under his claim. Pursuant to Ohio Adm.Code 4123-6-21.1, the self-insured employer obtained a medical review from a physician who opined that the medications should be tapered and then discontinued. The employer then notified claimant of its decision to taper then terminate his medications and claimant filed a motion to compel continued coverage of the medications. A SHO granted the motion, ordering continued coverage of the medications. The employer sought reconsideration, arguing that the Industrial Commission erred by failing to apply Ohio Adm.Code 4123-6-21.3 and 4123-6-21.7. The first rule is the BWC medication formulary which, for purposes of this case, limits the number of days in a calendar year of coverage for certain muscle relaxers. It was in effect in 2016 when the employer obtained its opinion and tapered/terminated the medications in question. By contrast, Ohio Adm.Code 4123-6-21.7, which limits coverage of opioid medications in certain situations, did not become effective until January 1, 2017. The Industrial Commission denied reconsideration, finding that the request failed to meet the requirements of Industrial Commission Resolution R08-1-01 (must file for reconsideration within 14 days of receipt of the order in question and a showing a new and changed circumstances, clear mistake of law, clear mistake of fact, fraud, and/or error of an inferior tribunal).

The employer sought a writ of mandamus in the Tenth District Court of Appeals. The appellate court granted a limited writ, finding that the Industrial Commission's order granting continued coverage of the medications did not adequately address the impact of Ohio Adm.Code 4123-6-21.3 and 4123-6-21.7.

The Industrial Commission appealed to the Supreme Court as of right. The Court vacated the appellate court decision and returned the matter to the Industrial Commission with instructions to apply Ohio Adm.Code 4123-6-21.3, which was in effect when the employer obtained its opinion

and tapered/terminated medications, and when claimant filed his motion to continue coverage of the medications. The Court went on to determine that Ohio Adm.Code 4123-6-21.7 was inapplicable because it did not become effective until after the employer obtained its opinion and claimant filed his motion.

Note - the Court stated that administrative rules are subject to rules of statutory construction, just like statutes. Accordingly, the legal principles are the same as those that apply to statutes when it comes to retroactive application of rules. In order to apply a rule retroactively, the rule must expressly state that it can be so applied. R.C. 1.48 states that laws are presumed to apply prospectively only because of the general rule against ex post facto legislation. See Art. II, Section 28 of the Ohio Constitution. See also, *Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St.3d 100 (1988).

***State ex rel. Ryan Alternative Staffing v. Moss*, 166 Ohio St.3d 467, 2021-Ohio-3539** - claimant worked a 4:00 p.m.-to-midnight shift prior to her injury. Following the injury, she was unable to return to full duty, but was released with restrictions. The employer offered her a light duty job, but on the day shift. Claimant declined because she had to watch her granddaughter during the day. Claimant sought temporary total, alleging that the employer had not offered the job in good faith because it knew she was unavailable during the day. The matter proceeded to hearing. The DHO denied temporary total, finding that the employer did not "consciously craft" a job that claimant could not accept. Claimant appealed and the SHO reversed, finding that although the job offer was made in good faith by the employer, it was declined by the claimant in good faith and therefore temporary total was payable. The employer's third level appeal and request for reconsideration were denied.

The employer sought a writ of mandamus in the Tenth District Court of Appeals. The appellate court granted the writ. The Industrial Commission appealed to the Supreme Court as of right. The Court held that the Industrial Commission abused its discretion, finding that R.C. 4123.56(A) does not allow consideration of whether the claimant has a good faith reason for rejecting a good faith job offer made by the employer. The plain language of R.C. 4123.56(A) that says temporary total can be terminated "when work within the physical capabilities is made available by the employer or another employer." Moreover, nothing in Ohio Adm.Code 4121-3-32 permits consideration of the claimant's reasons for rejecting a good faith job offer. The rule defines "job offer" as follows: "a proposal, made in good faith, of suitable employment within a reasonable proximity of the injured worker's residence. If the injured worker refuses an oral job offer and the employer intends to initiate proceedings to terminate temporary total disability compensation, the employer must give the injured worker a written job offer at least forty-eight hours prior to initiating proceedings. The written job offer shall identify the position offered and shall include a description of the duties required of the position and clearly specify the physical demands of the job. If the employer files a motion with the industrial commission to terminate payment of compensation, a copy of the written offer must accompany the employer's initial filing."

The Court then reviewed its decision in *State ex rel. Ellis v. Super Valu, Inc. v. Indus. Comm.*, 115 Ohio St.3d 224, 2007-Ohio-4920. In that case, the Court distinguished voluntary

abandonment from the good faith job offer defense and noted that whether the employer made a good faith offer is a fact issue that must be decided by the Industrial Commission. If the employer "consciously crafts" a job it knows the claimant cannot perform, that is one way to show that the offer was not made in good faith, but there could be other ways to prove a lack of good faith. In this case, the Court felt that there was confusion in the DHO and SHO orders on this issue, because the only reasoning provided was that the job offer was not "consciously crafted" to prevent claimant from accepting it. The Court therefore granted a limited writ returning the issue to the Industrial Commission to reconsider the issue of whether the employer's job offer was made in good faith.

Note: the job offer must be in writing, sufficiently specific as to the job being offered and the physical demands thereof, and within a reasonable proximity of claimant's residence. But what about issues such as the hours offered or claimant's availability given his/her family obligations? This case confirms that whether a job offer is made in good faith by the employer is a fact issue for the Industrial Commission to determine on a case-by-case basis. See, e.g., *State ex rel. Coxson v. Dairy Mart Stores of Ohio,* Inc., 90 Ohio St.3d 428, 2000-Ohio-188; *State ex rel. Professional Restaffing of Ohio, Inc. v. Indus. Comm.*, 152 Ohio App.3d 245, 2003-Ohio-1453 (10th Dist).; *State ex rel. Ganu v. Willow Brook Christian Communities*, 108 Ohio St.3d 296, 2006-Ohio-907; *State ex rel. Sebring v. Indus. Comm.*, 123 Ohio St.3d 241, 2009-Ohio-5258.

***State ex rel. Zarbana Industries, Inc. v. Indus. Comm.*, 166 Ohio St.3d 216, 2021-Ohio-3669** - claimant was injured and filed a VSSR. The matter proceeded to hearing, but before the SHO issued a decision on the merits of the VSSR, claimant and the employer filed a VSSR settlement agreement in the amount of $2,000. The SHO who heard the VSSR held a separate hearing to consider the appropriateness of the settlement agreement and the next day issued two orders: one finding that the settlement was inappropriate and unjust; and a second order granting the VSSR at 30%, which amounted to approximately $40,000.

The employer sought a writ of mandamus in the Tenth District Court of Appeals. The appellate court denied the writ and the employer appealed to the Supreme Court as of right. The Court affirmed, finding that Ohio Adm.Code 4121-3-20(F) is unambiguous and that the Industrial Commission was within its discretion to find that a $2,000 settlement was not appropriate because that is exactly what the rule permits the Industrial Commission to find. The Court noted that the employer argued that Ohio Adm.Code 4121-3-20(F) is void as not being consistent with any statute, but because the employer did not raise this issue prior to its brief in the Supreme Court, it waived the argument. Finally, the employer argued that the Industrial Commission's decision infringed on its right to contract, but the Court noted that freedom to contact, for VSSR purposes, is subject to the approval of the Industrial Commission, even if both parties are represented.

***State ex rel. Bowman v. Indus. Comm.*, ___ Ohio St.3d ___, 2022-Ohio-233** - claimant suffered vision loss after food poisoning incident in the employer's cafeteria. She was initially awarded 67% partial loss of vision under R.C. 4123.57(B) for her right eye. As time went on, her vision worsened and she applied for an increase in the percentage of right eye vision loss and an award for partial loss of vision of her left eye. In support of her motion, claimant submitted a report from a physician who stated that the AMA Guides did not account for her type of vision

impairment and therefore were unhelpful in determining her impairment. The physician's own impairment estimate was 70% loss of uncorrected vision for each eye. BWC obtained a report from a physician who agreed with claimant's doctor that the AMA Guides did not adequately address the claimant's situation. Nonetheless, he stated that under the AMA Guides, she had 65% loss of uncorrected vision in her right eye and 45% for the left eye. The Industrial Commission relied on the BWC's report and awarded 45% for the left eye only.

Claimant sought a writ of mandamus in the Tenth District Court of Appeals. The appellate court granted the writ, ordered the IC to vacate its orders, and awarded bilateral partial vision loss of 70% (an increase of 3% for her right eye and an award of 70% for her left eye). The IC appealed to the Supreme Court as of right. The Supreme Court affirmed, finding that the IC abused its discretion by relying on the report of a physician who applied the AMA Guides despite saying they were inadequate to address claimant's unusual vision loss. The Court cited *State ex rel. Eberhardt v. Flxible Corp.*, 70 Ohio St.3d 649, 657, for the proposition that repudiated medical opinions are not "some evidence". The Court also reiterated that the IC is not bound by the AMA Guides and that medical evidence, not hearing officer opinion, must be the basis for partial loss of vision awards under R.C. 4123.57(B). See *State ex rel. Beyer v. Autoneum N. Am.*, 157 Ohio St.3d 316, 2019-Ohio-3714.

***State ex rel. Target Auto Repair v. Morales*, ___ Ohio St.3d. ___, 20022-Ohio-2062 –** claimant prevailed on a VSSR application and employer's request for reconsideration was denied. Employer sought a writ of mandamus in the Tenth District Court of Appeals. The magistrate recommended denial of the writ. Employer filed objections but submitted them in the wrong case and so the appellate court proceeded as though no objections were filed, adopted the magistrate's decision as its own, and issued a decision denying the writ.

Employer's counsel realized the error after receiving the appellate court's decision and filed a motion under Civ.R. 60(B), citing excusable neglect with respect to filing objections in the wrong case and requesting relief from judgment. However, before the appellate court ruled on its Civ.R. 60(B) motion, the employer appealed the appellate court's decision denying the writ of mandamus to the Supreme Court of Ohio. The appellate court was not informed of the appeal and granted the employer's Civ.R. 60(B) motion. The employer re-filed its objections and the appellate court considered them, overruled them, and issued another decision denying the requested writ.

The Supreme Court, after reviewing the procedural quagmire described above, issued a decision finding that it only had jurisdiction to review the employer's appeal from the first appellate decision that denied the writ without consideration of the employer's objections. Because the employer did not file objections properly, Civ.R. 53(D)(3) applied. That rule states that a party cannot raise issues, absent plain error, that it did not object to following a magistrate's decision. The Court found no existence of plain error and refused to address the employer's objections because they were not filed properly in response to the magistrate's decision.

As to the Civ.R.60(B) motion, the Court found that the employer divested the appellate court of jurisdiction to rule on the motion when it appealed to the Supreme Court and therefore the appellate court's decision on the Civ.R. 60(B) motion and subsequent decision overruling the objections were void as it lacked jurisdiction to issue those decisions. A court loses jurisdiction to

rule on a Civ.R. 60(B) motion once an appeal to the next level has been filed and the lower court can rule on the Civ.R 60(B) motion only if the reviewing court directs it to do so. See *Howard v. Catholic Social Servs. Of Cuyahoga Cty., Inc.,* 70 Ohio St.3d 141 (1994); *State ex rel. Cotton v. Ghee*, 84 Ohio St.3d 54 (1998).

Appellate District Opinions

***State ex rel. Chatfield v. Whirlpool Corp.*, 3rd Dist. Marion No. 9-21-20, 2021-Ohio-4365** - claimant was injured in 2014. The last payment of compensation was in August 2015 and the last payment of treatment was in September 2015. There was then a gap of nearly four years with no activity in the claim. In June 2019, claimant filed a motion requesting three additional conditions. All three were disallowed administratively and claimant appealed to common pleas court pursuant to R.C. 4123.512. In February 2021, the employer filed for summary judgment on the basis that the entire claim was dead under R.C. 4123.52 since more than five years had passed since the last payment of compensation and treatment. Claimant fought the motion, arguing that the motion she filed to add conditions in 2019 and/or the court appeal tolled the five-year statute. The trial court disagreed and granted the employer's motion, finding that the entire claim was statutorily dead.

Claimant appealed to the Third District Court of Appeals. The appellate court affirmed and noted that R.C. 4123.52 sets forth a five-year statute of limitations from the date of last payment of compensation or treatment. Because the last payment of any kind occurred in September 2015, the claim was dead by 2021. The appellate court noted that R.C. 4123.52 says nothing about motions for additional allowances when it comes to tolling the five-year statute.

Note: if a claim is approaching the five-year statute of limitations under R.C. 4123.52, the only certain method for keeping the claim open is to file an application for compensation. R.C. 4123.52(D) ensures that the claim will stay open: "[t]his section does not affect the right of a claimant to compensation accruing subsequent to the filing of any such application, provided the application is filed within the applicable time limit as provided in this section." See *Olech v. ABB Raymond Cast Equip. Co.*, 90 Ohio App.3d 266 (8th Dist.1993). Requests for additional allowances and court appeals do not. There must be an application for compensation. Keep in mind that the FROI-1 itself is an application for compensation. See IC Policy Memo I2.
It is unclear whether simply filing a request for payment of a bill I(as opposed to the actual payment of a bill) will toll the statute. See the following cases:

- *Rowland v. White Castle Sys., Inc.*, 10th Dist. Franklin No. 86AP-188, 1986 WL 9525 (Aug., 26, 1986) - an application for payment of bills was filed within the old ten year statute of limitations, but BWC never acted. After the 10-year statute had run, claimant filed a motion seeking payment of the bills that were previously filed within the 10 year statute. The court held that the application for payment of the bills tolled the statute of limitations;

- *Stephenson v. Buckeye Steel Castings Co.*, 10th Dist. Franklin No 95APE04-445, 1995 WL 614086 (Oct. 17, 1995) - an application was filed for payment of treatment prior to the expiration of the old 10-year statute of limitations. The court held that the filing of the application for payment of bills tolled the statute of limitations; and

• *Copeland v. Ohio Bur. of Workers' Comp.*, 123 Ohio App.3d 586, 2011-Ohio-813 (5th Dist.) - a C-9 was submitted for treatment prior to the expiration of the old 10-year statute of limitations and BWC failed to act on it. After the 10-year statute had run, a motion was filed requesting that the previously filed C-9 be processed. The court held that the C-9 tolled the statute of limitations;

But see *Barron v. St. Charles Hosp.*, 6th Dist. Lucas No. L-11-1213, 2012-Ohio-1771 - an IC order granted approval for treatment while the claim was still open under the old ten-year statute but the bills were never submitted for the treatment in question. After the ten-year statute had run, claimant filed a motion for additional allowances "and their benefit payments". The court held that an order granting approval of payment does not toll the statute if the bills are not submitted for payment. The court distinguished the cases above on the basis that it was the BWC that failed to act in those cases whereas it was the claimant that failed to act (i.e., submit the bills for payment while the claim was still open) in the case before it.

The foregoing cases appear to hold that filing an application for payment of treatment while the claim is still open will toll the statute of limitations, but an order granting payment of treatment will not if the bills that were ordered paid are not submitted while the claim is still open. What is clear is that an application for compensation or actual payment of treatment and/or compensation will toll the five-year statute.

It is also important to note the change in R.C. 4123.52 which was effective September 15, 2020. Prior to that date, the five-year statute of limitations ran from the date of payment of last treatment/compensation. The change is that it is no longer the date of payment of the last medical bill, but "the date of the last medical services being rendered." In other words, it is the date of service itself that matters, not the date of payment for the last date of service. Determining the date of last payment of compensation can be somewhat confusing - see IC Policy Memo I1. At least for treatment, it has now been simplified: it is the date of service itself from which the five-year statute runs.

***State ex rel. McDonald v. Indus. Comm.*, 10th Dist. Franklin No. 20AP-386, 2021-Ohio-386** - worker was killed in a trench collapse. At the time of his death, he was engaged to a woman with whom he had two minor children. They had been together for 11 years, lived together with their kids, paid bills jointly, were the sole beneficiaries of each other's life insurance, etc. The fiancee worked part-time, but the worker who was killed was the primary wage earner. Death benefits were awarded to the minor children but denied to the fiancee by the Industrial Commission because she was not a dependent under R.C. 4123.59(D). She sought a writ of mandamus in the Tenth District Court of Appeals.

The appellate court analyzed R.C. 4123.59(D), which states:

> The following persons are presumed to be wholly dependent for their support upon a deceased employee:
>
> (1) A surviving spouse who was living with the employee at the time of death or a surviving spouse who was separated from the employee at the time of death because of the aggression of the employee;

> (2) A child under the age of eighteen years, or twenty-five years if pursuing a full-time educational program while enrolled in an accredited educational institution and program, or over said age if physically or mentally incapacitated from earning, upon only the one parent who is contributing more than one-half of the support for such child and with whom the child is living at the time of the death of such parent, or for whose maintenance such parent was legally liable at the time of the parent's death.
>
> It is presumed that there is sufficient dependency to entitle a surviving natural parent or surviving natural parents, share and share alike, with whom the decedent was living at the time of the decedent's death, to a total minimum award of three thousand dollars.
>
> The administrator may take into consideration any circumstances which, at the time of the death of the decedent, clearly indicate prospective dependency on the part of the claimant and potential support on the part of the decedent. *No person shall be considered a prospective dependent unless such person is a member of the family of the deceased employee and bears to the deceased employee the relation of surviving spouse, lineal descendant, ancestor, or brother or sister.* The total award for any or all prospective dependency to all such claimants, except to a natural parent or natural parents of the deceased, shall not exceed three thousand dollars to be apportioned among them as the administrator orders.
>
> *In all other cases*, the question of dependency, in whole or in part, *shall be determined in accordance with the facts in each particular case* existing at the time of the injury resulting in the death of such employee, *but no person shall be considered as dependent unless such person is a member of the family of the deceased employee, or bears to the deceased employee the relation of surviving spouse, lineal descendant, ancestor, or brother or sister*.

Emphasis added.

The court noted that the Industrial Commission believes there are only three ways to establish dependency: 1) as a surviving spouse (legally married to the decedent at time of death or separated due to the decedent's aggression) - wholly dependent; 2) a natural or adopted child of the deceased - wholly dependent); or 3) a prospective dependent that is a member of the family of the deceased employee and is a surviving spouse, lineal descendant, ancestor, or brother or sister of the deceased (total of $3,000 total). Because the fiancée did not fit into any of those categories, the IC found that she was not a dependent.

The court noted claimant's argument that the last paragraph of R.C. 4123.59(D) says "in "all other cases" and that a case-by-case determination is to be made. That language indicates that the last paragraph contemplates other types of dependency besides those addressed in the preceding paragraphs of R.C. 4123.59. Moreover, in the last paragraph, the word "or" separates the phrases "member of the family" from "surviving spouse, lineal descendant, ancestor or brother or sister". By contrast, in the penultimate paragraph, those two phrases are separated by the word "and".

The appellate court then engaged in a lengthy review of the rules of statutory construction. The following points are noteworthy:

1) statutes are to be read and interpreted as they are written. No words should be read into or out of the statutory text. All words used are to have meaning; none are to be ignored or found redundant. Words are to be construed using their normal usage and based on the rules of grammar. See R.C. 1.42; *Boley v. Goodyear Tire & Rubber Co.*, 125 Ohio St.3d 510, 2010-Ohio-2550; *State ex rel. Steele v. Morrissey, Aud.*, 103 Ohio St.3d 355, 2004-Ohio-4960;
2) unambiguous statutes are to be read as they are written. Only if the text is ambiguous (capable of more than one reasonable interpretation) should the rules of statutory construction be applied. See R.C. 1.47;
3) administrative interpretations of statutes and rules should be given due deference, unless they conflict with the words of an unambiguous law. See *Swallow v. Indus. Comm.*, 36 Ohio St.3d 55, 57 (1988); *Lang v. Dir., Ohio Dept. of Job & Family Servs.*, 134 Ohio St.3d 296, 2012-Ohio-5366;
4) the term "or" in a statute is disjunctive and generally confers options. The opposite is true of "and". Therefore, when a list of criteria is set forth in a statute and separated by "or", only one criterion needs to be established. If the criteria are separated by "and", all must be established. See *Penn v. A-Best Prods. Co.*, 10th Dist. No. 07AP-404, 2007-Ohio-7145; *Weaver v. Edwin Shaw Hosp.*, 104 Ohio St.3d 390, 2004-Ohio-6549, ¶ 13. In this case, the last paragraph of R.C. 4123.59(D) says a dependent must be (1) "is a member of the family of the deceased employee"; *or* (2) "bears to the deceased employee the relation of surviving spouse, lineal descendant, ancestor, or brother or sister." Because "or" is used, satisfying either criterion is sufficient; and
5) if a workers' compensation statute is ambiguous, the law must be construed liberally in favor of the claimant, consistent with the Legislature's mandate. See R.C. 4123.95.

Applying these principles, the appellate court found that it is unambiguous that the phrase "member of the family" in the last paragraph of R.C. 4123.59(D) can mean something other than the spouse, child, parent, brother/sister, lineal descendant, or ancestor of the deceased. The court reasoned that the last paragraph uses "or" to separate "member of the family" from the second clause. By contrast, the second-to-last paragraph uses "and" to join both phrases. Because all words must be given effect, the Legislature must have intended there to be a difference. Moreover, if "member of the family" meant only a surviving spouse, lineal descendant, ancestor, or brother or sister, it would be \redundant and useless in the last paragraph of R.C. 4123.59(D). The court also cited *Blair v. Keller*, 16 Ohio Misc. 157 (June 10, 1968) (Wood County Common Pleas Court), in which unadopted stepchildren of the deceased's widow were found to be dependent for death

benefit purposes because they all lived together under the same roof and were taken care of by the deceased and his widow.

The appellate court then held that "member of the family" itself is ambiguous as it is not defined in R.C. 4123.59, or in any general workers' compensation law. The court noted that there are various definitions in other areas of the law. but no consistent consensus. Thus, the phrase must be liberally construed pursuant to R.C. 4123.95. Because the Industrial Commission had not decided whether the fiancée were a "member of the family" using a different definition than spouse, , the appellate court granted a limited writ of mandamus, vacated the IC's orders, and remanded the claim to the IC with explicit instructions to consider the many ties between the deceased and the fiancée in determining whether she was a "member of the family" for death benefit purposes under the last paragraph of R.C. 4123.59(D).

***Owens v. Giant Eagle, Inc.*, 8th Dist. Cuyahoga No. 110666, 2022-Ohio-192** - claimant was on the clock, on his employer's premises, performing his regular job duties as a deli clerk. He placed a try of cheese on a counter and was walking around it to speak to co-workers when he Achilles tendon ruptured. There was a video of the event. Claimant did not slip or trip over anything and the floor was not wet. The employer did not argue that the injury was idiopathic. Instead, the employer asserted that claimant was "merely walking" and there was no increased hazard from work that caused the injury compared to walking in general.

The Industrial Commission denied the claim. Claimant appealed pursuant to R.C. 4123.512, and the trial court granted the employer's motion for summary judgment. Claimant appealed to the Eighth District Court of Appeals. The appellate court reversed and found summary judgment was improper. The appellate court noted that the issue is whether the injury is sustained "in the course of" and "arising out of" employment. The time, place, and circumstances are the relevant issues for the "in the course of" prong. The non-exhaustive criteria for "arising out of" are the proximity between the injury site and the employer's premises; the control the employer exercises over the site of the injury; and the benefit the employer receives from the employee's presence at the site of the injury. The appellate court found all of the necessary criteria to be met and so reversed and remanded the case to the trial court.

In so holding, the appellate court rejected the trial court's reliance on *Dailey v. Autozone, Inc.*, 11th Dist. Trumbull No. 00-T-0146, 2000 WL 1459708 (Sept. 29, 2000). In *Dailey*, the claimant turned to a co-worker to ask him about a receipt and experienced pain in his low back. In denying the claim, the court cited no legal authority, but instead noted that the claimant failed to provide any medical evidence of a causal relationship between the injury and his employment. In fact, the claimant's own doctor explicitly stated that the injury was not work-related. The appellate court found that a "coincidental to employment" defense based on *Dailey* "does not exist in law".

Note: "coincidental to employment" is not legitimate defense to a workers' compensation claim. Consider the following:

R.C. 4123.01(C) defines what constitutes an "injury" for workers' compensation purposes:

> "Injury" includes any injury, whether caused by external accidental means

> or accidental in character and result, received in the course of, and arising out of, the injured employee's employment.

The statutory language is intentionally broad – "any" injury received in the course of and arising out of employment is compensable, except that "injury" does not include:

(1) Psychiatric conditions except where the claimant's psychiatric conditions have arisen from an injury or occupational disease sustained by that claimant or where the claimant's psychiatric conditions have arisen from sexual conduct in which the claimant was forced by threat of physical harm to engage or participate;

(2) Injury or disability caused primarily by the natural deterioration of tissue, an organ, or part of the body;

(3) Injury or disability incurred in voluntary participation in an employer-sponsored recreation or fitness activity if the employee signs a waiver of the employee's right to compensation or benefits under this chapter prior to engaging in the recreation or fitness activity;

(4) A condition that pre-existed an injury unless that pre-existing condition is substantially aggravated by the injury. Such a substantial aggravation must be documented by objective diagnostic findings, objective clinical findings, or objective test results. Subjective complaints may be evidence of such a substantial aggravation. However, subjective complaints without objective diagnostic findings, objective clinical findings, or objective test results are insufficient to substantiate a substantial aggravation.

R.C. 4123.01(C) lists what is compensable and what is not compensable. The list of what is not compensable is finite – only four non-compensable situations are enumerated. Absent from that list is a "coincidental to employment" defense. It is *the* basic maxim of statutory interpretation that words not found in the statutory text are not to be inserted into that text. To read a "coincidental to employment" defense into the statute is clearly improper.

The *only* case that purports to create a "coincidental to employment" defense is *Dailey v. Autozone, Inc.*, 11th Dist. Trumbull No. 00-T-0146, 2000 WL 1459708 (Sept. 29, 2000). In that case, the claimant turned to a co-worker to ask him about a receipt and experienced pain in his low back. In denying the claim, the court cited no legal authority, but instead noted that the claimant failed to provide any medical evidence of a causal relationship between the injury and his employment. In fact, the claimant's own doctor explicitly stated that the injury was not work-related.

It is important to note that no court has relied on *Dailey* since it was decided in 2000. By contrast, the following decisions, both before and after *Dailey*, have rejected the "coincidental to employment" defense, either implicitly or explicitly:

a) *Czarnecki v. Jones & Laughlin Steel Corp.*, 58 Ohio St.2d 413 (1979) – the Supreme Court held, in syllabus law, that "it is not necessary to prove that unusual circumstances preceded an injury for that injury to be compensable under R.C. 4123.01(C)". The claimant lifted a drum and experienced pain in his low back. The employer argued that this type of event was not unusual and

that it could have happened anywhere. The Supreme Court rejected that defense because the injury occurred at work while the claimant was performing his job duties;

b) *Shaw v. Connor*, 4th Dist. Ross No. 1119, unreported (Nov. 19, 1985), 1985 WL 17380 – claimant was descending a flight of stairs towards a locker room on the employer's premises to change into his work clothes when he experienced pain in his left knee. The claim was allowed because the injury was sustained in the course of and arising out of his employment. The court explicitly rejected the argument that the injury was "coincidental to employment" and not due to any unusual circumstance or event;

c) *Griffin v. Hydra-Matic Div., Gen. Motors Corp.*, 39 Ohio St.3d 79 (1988) – in syllabus law, the Supreme Court of Ohio held: "[a]n injury sustained by an employee upon the premises of her employer arising during the course of employment is compensable pursuant to R.C. Chapter 4123 irrespective of the presence or absence of a special hazard thereon which is distinctive in nature or qualitatively greater than hazards encountered by the public at large". In other words, there is no need to prove the existence of a special hazard for on-premises injuries. The Court also explicitly stated "it would be pure conjecture for a court to assume that an employee would have nevertheless encountered a similar hazard had she not been at work. Courts don't decide hypothetical questions. It doesn't matter if the injury might have happened somewhere else. If it occurred at work, you apply the "in the course of" and "arising out of" tests and if they are met, the claim is compensable;

d) *Cummings v. Thriftway Food & Drug*, 1st Dist. Hamilton No. C-960160, unreported (Sept. 18, 1996), 1996 WL 526686 – claimant was kneeling on employer's floor showing a co-worker how to operate a machine. When he stood up, he experienced pain in his low back. The court explicitly rejected the defense that the injury was "purely personal and coincidental to employment" because the injury was sustained in the course of and arising out of the claimant's employment;

e) *Wyatt v. Autozone, Inc.*, 3rd Dist. Van Wert No. 15-03-05, 2003-Ohio-6706 – claimant was kneeling down to inspect a taillight on a customer's car and experienced pain in his right knee when he stood up. The court rejected the defense that the injury was "idiopathic and could have occurred anytime, anywhere" because the injury was sustained in the course of and arising out of claimant's employment;

f) *Emmert v. Mabe*, 1st Dist. Hamilton No. C-070315, 2008-Ohio-1844 – claimant sat down in a chair to pick up a piece of litter and experienced pain in her knee when she stood up. The court upheld the allowance of the claim because the claimant was on the employer's premises, on the clock, and performing her job duties when she was injured;

g) *Bahr v. Progressive Cas., Ins. Co.*, 8th Dist. Cuyahoga No 92620, 2009-Ohio-6641 – claimant was participating in a water balloon toss as part of a "team building exercise" on the employer's premises. She threw a water balloon and then turned to walk away and experienced pain in her knee. The court found the claim compensable and distinguished the situation before it from an idiopathic case because there was an explanation for her knee pain (turning to walk away). The court noted that the claimant was actively participating in a work-related activity when she injured her knee;

h) *Luettke v. Autoneum N. Am., Inc.*, 6th Dist. Lucas No. L-14-1236, 2015-Ohio-3210 – claim was compensable because the claimant was engaged in her actual job duties when she injured her knee;

i) *Aho v. RTI Internatl. Metals, Inc.*, 11th Dist. Trumbull Nos. 2016-T-0080 and 2016-T-0082, 2017-Ohio-2803 – claimant injured his knee while going up a flight of stairs to obtain a card that he needed for business purposes. The court found the claim to be compensable because the injury was sustained in the course or and arising out of the claimant's employment. The claimant was performing his actual employment duties when was injured; and

j) *Owens v. Giant Eagle, Inc.*, 8th Dist. Cuyahoga No. 110666, 2022-Ohio-192 - claimant was on the clock, on his employer's premises, performing his regular job duties as a deli clerk. He placed a try of cheese on a counter and was walking around it to speak to co-workers when he Achilles tendon ruptured. The IC denied the claim and the common pleas court granted the employer's motion for summary judgment. The appellate court reversed and found summary judgment was improper. The court explicitly stated that coincidental to employment as a defense based on *Dailey* "does not exist in law".

As noted above, no court has ever followed the 11th District's decision in *Dailey*. *Dailey* cites no authority whatsoever in support of a "coincidental to employment" defense. *Dailey* is incorrect as a matter of law - the 11th District itself has refused to follow it. See *Aho* (that *Dailey* involved a situation where the claimant's own expert found no relationship between the alleged injury and the claimant's work activities).

The law is whether the "in the course of" and "arising out of" prongs are met. If they are and the injury occurs on the employer's premises, the claim is compensable. See R.C. 4123.01(C); *Fisher*; *Lord*; *Czarnecki*; *Shaw*; *Cummings, Griffin*; *Wyatt*; *Emmert*; *Bahr*; *Aho*; R.C. 4123.95. There is no such defense as "coincidental to employment." Acceptance of "coincidental to employment" as a defense represents the creation of new law. The creation of a defense without a basis in the law is improper.

***State ex rel. Knight Trans. v. Indus. Comm.*, 10th Dist. Franklin No. 20AP-296, 2021-Ohio-4574** - claimant sustained a low back injury in May 2018 and had surgery in June 2018. His claim was additionally allowed for a number of conditions, including substantial aggravation of arachnoid cyst. Claimant improved following surgery and was able to return to work with restrictions. He continued to have some weakness and numbness which his treating physician documented in office notes.

Approximately 14 months after surgery, the employer obtained a defense report that alleged the substantially aggravated arachnoid cyst had abated. The employer moved for a finding of abatement under R.C. 4123.54(G). The Industrial Commission denied the employer's motion relying on notes and a report from the treating physician as well as the claimant's testimony.

The employer sought a writ of mandamus in the Tenth District Court of Appeals. The appellate court reviewed R.C. 4123.54(G) and the substantial aggravation standard under R.C. 4123.01(C)(4) and found that the evidence relied on by the Industrial Commission objectively provided "some evidence" that the allowed substantial aggravation of arachnoid cyst had not

returned to baseline. The court noted that a claimant's testimony can be "some evidence" supporting the Industrial Commission's decision. Even though the testimony was subjective, it corroborated the objective clinical exam findings in the treating doctor's notes. R.C. 4123.01(C)(4) explicitly states that subjective evidence can be considered for purposes of substantial aggravation, as long as there is also objective evidence supporting a worsening.

Note: as a matter of law, a claimant's testimony can be "some evidence". See State *ex rel. Ford Motor Co. v. Indus. Comm.*, 10th Dist. No. 08AP-218, 2008-Ohio-6517; *State ex rel. Williams v. Coca-Cola Ent., Inc.*, Franklin App. No. 04AP-1270, 2005-Ohio-5085, at ¶ 9; *State ex rel. Mid-Ohio Wood Products, Inc. v. Indus. Comm.*, Franklin App. No. 07AP-478, 2008-Ohio-2453, at ¶ 18; *State ex rel. Restaurant Mgt., Inc. v. Indus. Comm.*, 10th Dist. No. 09AP-1121, 2010-Ohio-5626; *State ex rel. Viking Forge Corp. v. Perry*, 10th Dist. No. 11AP-226; 2012-Ohio-2738.

Also, note that abatement issues under R.C. 4123.54(G) are not right to participate issues. They are extent of disability issues and can be challenged in mandamus only. See *Clendenin v. Girl Scouts of W. Ohio*, 150 Ohio St.3d 300, 2017-Ohio-2830, ¶ 15, 17-18.

***Fowler v. Indian River Juvenile Cor. Facility*, 5th Dist. Stark No. 2021CA00021, 2021-Ohio-4422** - claimant injured her right knee breaking up a fight in 2013. In 2018, she sought to have her claimant additionally allowed for substantial aggravation of major depression. Claimant had received mental health treatment in 2008 after her mother passed away and had been on psychotropic medications since that time. After the injury, her psychotropic medications were changed and she testified that her depression was worse. Claimant's psychologist stated that the 2008 treatment showed a pre-existing major depression, but she felt the pre-existing condition had worsened because of the right knee injury The condition was denied administratively and claimant appealed pursuant to R.C. 4123.512. The trial court granted BWC's motion for summary judgment, finding that claimant had failed to provide objective evidence of a pre-injury reference point from which to determine whether there was a substantial aggravation.

Claimant appealed to the Fifth District Court of Appeals. The appellate court reversed the trial court, holding, consistent with a number of the cafes cited above, that R.C. 4123.01(C)(4) does not require a claimant to produce objective evidence of a pre-existing condition. Nothing in the statute requires such a showing. Similarly, there is nothing that requires pre-injury documentation of the pre-existing condition. However, the appellate court stated that it is necessary to show a "pre-injury reference point" to prove that the condition pre-existed the injury and this can be satisfied through the testimony of an expert and/or post-injury records that discuss the pre-existing condition.

Note: here is a history of "substantial aggravation":

Effective August 25, 2006, the provisions of SB 7 amending R.C. 4123.01 and R.C. 4123.54 became effective. The law requires a showing of "substantial aggravation" which is defined as follows:

> "a substantial aggravation must be documented by objective diagnostic findings, objective clinical findings, or objective test results. Subjective complaints may be evidence of such a substantial aggravation. However, subjective complaints without

> objective diagnostic findings, objective clinical findings, or objective test results are insufficient to substantiate a substantial aggravation."

R.C. 4123.01(C)(4).

For claims with injuries occurring before August 25, 2006, there is no provision for abatement of a condition allowed by aggravation. However, for injuries that occur on or after August 25, 2006, R.C. 4123.54(G) states:

> "If a condition that pre-existed an injury is substantially aggravated by the injury, and that substantial aggravation is documented by objective diagnostic findings, objective clinical findings, or objective test results, no compensation or benefits are payable because of the pre-existing condition once that condition has returned to a level that would have existed without the injury."

R.C. 4123.01(C)(4) and R.C. 4123.54(G) changed the legal landscape considerably with respect to aggravation injuries. Here are the majority of the following cases have been decided regarding "substantial aggravation":

***Smith v. Lucas County*, 6th Dist. No. L-10-1200, 2011-Ohio-1548 -** claimant sought additional allowance for aggravation of a pre-existing cervical disc condition, The condition was disallowed by the Industrial Commission and claimant appealed to court pursuant to R.C. 4123.512. The trial court granted the employer's motion for summary judgment, finding that there was no pre-injury diagnostic evidence to compare to the post-injury MRI and therefore the claimant failed to prove a "substantial aggravation" under R.C. 4123.01(C).

Claimant appealed to the Sixth District Court of Appeals. The court affirmed the trial court's decision, but noted that if appellant had provided sufficient documentation of her symptoms preceding the injury, substantial aggravation could have been established. Such evidence would not necessarily require objective "before" and "after" findings or results. In this case, appellant provided only Dr. Healy's affidavit and chart notes which he specifically stated were based on "the history which she related to me." Appellant failed to provide any information such as records or a statement from her prior physician. The [post-injury] MRI revealed only the existence of [the condition] and provided an explanation for appellant's current symptoms. The testing did not establish that the condition was substantially aggravated by the injury.

Note - this case is a poor beginning to the interpretation of "substantial aggravation" - it is unclear exactly what evidence was adduced in support of the claimant's position. Did the affidavit state that there were no pre-injury symptoms (asymptomatic pre-injury condition) or was it that the pain was greater after the injury as compared to before the injury? What exactly was the "history which she related to me"?

The encouraging aspect of this decision is the court's finding that objective "before" evidence is not necessary, but rather any evidence showing the pre-injury status of the condition in question. Based on the language of the opinion, this could take the form of medical records or a physician's opinion. However, silence on the issue will not work.

Keep in mind that the statute identifies three types of evidence which can provide the objective support for a substantial aggravation: 1) diagnostic findings; 2) clinical findings; **or** 3) test results. The statute does not say "and" - it says "or". Thus, any of these three can provide the required proof. Moreover, nothing in the statute requires pre and post injury comparisons. However, as the court noted, there must be some evidence to describe the pre-injury status of the condition because there is no other way to determine whether a substantial aggravation occurred without knowing the pre-injury, baseline status of that condition;

***Plfanz v. Pilkington LOF*, 1st Dist. No. C-100574, 2011-Ohio-2670** – claimant sustained several injuries to his low back. He had surgery in 1989 and a 2001 MRI showed disc displacement at L4-5 and facet arthropathy. Claimant treated with a chiropractor off and on after his surgery and at the time of the 2001 MRI.

In 2007, claimant re-injured his low back when lifting a heavy pane of glass. He returned to the chiropractor who requested an MRI which, in his opinion, demonstrated a substantial worsening of the ore-existing disc displacement and facet arthropathy as a result of the injury. The chiropractor also stated that his clinical range of motion findings and other test results supported a substantial aggravation.

The Industrial Commission allowed the claim for the substantial aggravation conditions and the employer appealed to the Hamilton County common pleas court under R.C. 4123.512. The trial court found for claimant and the employer appealed to the First District Court of Appeals. The appellate court affirmed, finding that the claimant's evidence supported the substantial aggravation. The court focused on the meaning of the word "substantial" and said that the aggravation itself must be "considerable" and there must be objective medical evidence to confirm the worsening. In this case, there was objective evidence (MRI and clinical findings) and subjective proof as well. The court noted that objective evidence is needed to satisfy the requirements of R.C. 4123.01(C)(4), but subjective evidence can also help prove a substantial aggravation.

***Cassens Transport v. Bohl, 3rd* Dist. No. 13-11-36, 2012-Ohio-2248** – claimant had some prior neck problems, but nothing requiring significant treatment. He injured his neck again at work while working with a chain that was hooked onto a vehicle. He had several months of treatment, including trigger point injections and cervical nerve block injections. He had decreased ranges of motion and neck pain, along with pain radiating into his left upper extremity. An x-ray and MRI confirmed the existence of cervical arthritis. Based on the diagnostic findings, the mechanism of injury, and claimant's ongoing symptoms which persisted longer than it would typically take a sprain to resolve, claimant's physician opined that the injury caused a substantial aggravation of cervical degenerative disc disease.

The Industrial Commission granted claimant's motion. The employer appealed to the Seneca County common pleas court under R.C. 4123.512. The jury found in claimant's favor. The employer appealed to the Third District Court of Appeals, arguing that claimant failed to present objective evidence of a substantial aggravation as required by R.C. 4123.01(C)(4). The appellate court disagreed. The court cited *Pflanz*, and noted that the aggravation itself had to be

"considerable" and supported by objective evidence. Considering the claimant's evidence as a whole (the court focused specifically on the decreased ranges of motion from clinical examinations), the court found that objective evidence was submitted to support the substantial aggravation claim, even though the claimant's physician did not use "magic words", the court found that the doctor's opinions and the test results/clinical findings were sufficient to uphold the trial court's decision.

***Brate v. Rolls-Royce Energy Sys., Inc.*, 5th Dist. No. 12CA000001, 2012-Ohio-4577** – claimant injured his knee and had surgery. His physician opined that he substantially aggravated pre-existing arthritis as a result of the work injury. The Industrial Commission denied the condition and claimant appealed to the Knox County court of common pleas under R.C. 4123.512. The trial court granted the employer's motion for summary judgment, finding that there was insufficient evidence showing that the injury objectively worsened the arthritis.

Claimant appealed to the Fifth District Court of Appeals. The appellate court reversed, finding that claimant had submitted enough objective evidence supporting his claim of substantial aggravation. Specifically, claimant's expert stated that he visualized arthritis at the time he performed surgery. He thought the arthritis was pre-existing, but made worse by the injury (there were loose bodies in the knee joint and a meniscus tear). Also, the mechanism of injury involved a twisting which the physician stated could aggravate arthritis. The court found that these clinical observations were objective clinical findings that satisfied the requirement of R.C. 4123.01(C)(4). The court looked at the dictionary definitions of the words "clinical" and "objective" and said that clinical pertains to information obtained from personal observation and objective means that the observations are identifiable and capable of being described (such as limping or swelling). Thus, the court held that the trial court erred by granting summary judgment to the employer and remanded the case back to the trial court.

Gardi v. Bd. Of Ed. of Lakewood School Dist., 8th Dist. No. 99414, 2013-Ohio-3436 – the Industrial Commission denied claimant's motion to additionally allow his claim for "substantial aggravation of pre-existing osteoarthritis of the left knee". Claimant appealed to the Cuyahoga County Court of Common Pleas pursuant to R.C. 4123.512. The trial court granted the employer's motion for summary judgment, finding that claimant had not documented that arthritis existed prior to the injury. The trial court read R.C. 4123.01(C)(4) to require such pre-injury proof of the condition in question.

Claimant appealed to the Eighth District Court of Appeals. The appellate court reversed, finding that R.C. 4123.01(C)(4) is clear and unambiguous and says nothing about documenting the existence of the condition in question prior to the injury. "Accordingly, any requirement that a claimant must present pre-injury documentation of the pre-existing condition before the claimant may recover under R.C. 4123.01(C)(4) for substantial aggravation of the condition adds a requirement that is not in the statute." In reaching this conclusion, the court stated that its opinion was consistent with the decisions in *Smith, Bohl, Pflanz,* and *Brate*.

Note – in many instances, pre-existing conditions are asymptomatic prior to the injury. Only after the injury is the existence of the condition revealed. This decision takes reality into account, rather than requiring people who have no problems to go out and get diagnostic testing just to be sure

that all conceivable medical conditions are identified so that they are covered in the event of a subsequent work injury.

Also, when SB 7 was being negotiated, an early draft of the bill required both pre and post-injury diagnostic testing to prove substantial aggravation. The fact that such a requirement did not make it into the actual statute proves that pre-injury evidence of the existence of the condition in question is unnecessary to prove substantial aggravation.

***Lake v. Anne Grady Corp.*, 6th Dist. No. L-12-1330, 2013-Ohio-4740 –** claim was allowed administratively for substantial aggravation of left knee arthritis and the employer appealed to the Lucas County court of common pleas. The employer filed for summary judgment, arguing that claimant did not meet her burden of objectively proving that left knee arthritis pre-existed the injury and that she failed to prove that the allegedly pre-existing condition was substantially aggravated for purposes of R.C. 4123.01(C)(4). In response, claimant filed an affidavit from her treating physician that stated the arthritis was pre-existing but asymptomatic prior to the work injury. The doctor further stated that there was proof of substantial aggravation based on x-ray findings and clinical exam findings. Apparently, however, the doctor did not indicate which x-rays/clinical findings showed objective proof of worsening and he did not explain how such proof demonstrated a substantial aggravation. The trial court granted summary judgment for the employer.

Claimant appealed to the Sixth District Court of Appeals. First, the appellate court agreed with claimant that the statute does not require objective proof that the condition pre-existed the injury: "We agree that [*Smith v. Lucas County*, 6th Dist. No. L-10-1200, 2011-Ohio-1548] does not hold that an injured worker is required to produce pre-injury *objective* medical evidence documenting a pre-existing condition to support a substantial aggravation claim. We also clarify that while pre-injury evidence of a pre-existing condition—whether objective or subjective—is helpful, it is not necessary so long as the worker can demonstrate through "objective diagnostic findings, objective clinical findings, or objective test results" that the preexisting condition was substantially aggravated by the injury … to determine that a condition has been substantially aggravated, there must be a pre-injury reference point from which to compare the post-injury condition. In cases where the pre-injury condition is asymptomatic, providing an initial reference point becomes difficult, especially where the pre-existing condition has never been diagnosed. This does not mean, however, that proving substantial aggravation of a pre-existing condition is impossible in these situations. In fact, Ohio courts have found that sufficient evidence existed to support a substantial aggravation claim under R.C. 4123.01(C)(4) where the condition had not been diagnosed pre-injury."

The appellate court compared and contrasted the proof in the case before it with the evidence adduced in *Bohl* and *Brate*. In those cases, the claimants' physicians identified specific test results and clinical findings in explaining how the injuries made the pre-existing condition worse. The appellate court found no such evidence before it – only a reference to unidentified x-rays and clinical findings and no explanation of how the evidence objectively shows that a substantial aggravation occurred. Accordingly, the appellate court affirmed the trial court's granting of summary judgment to the employer.

***Harrison v. Panera, L.L.C.*, 2nd Dist. No. 25626, 2013-Ohio-5338 –** claimant's request to additionally allowed substantial aggravation of pre-existing right shoulder arthritis was denied administratively and he appealed to the Montgomery County court of common pleas. A bench trial was held and the trial court rule in the claimant's favor. The trial judge did not provide a detailed explanation of his findings, but the record showed that claimant's physician relied on x-ray findings from before and after the injury, as well as range of motion/distraction clinical findings. He found that claimant lacked movement in his shoulder whereas claimant informed the doctor that he had no such limitations prior to the injury.

The employer appealed to the Second District Court of Appeals and argued that the trial judge's findings did not comply with R.C. 4123.01(C)(4) and constituted an abuse of discretion. The appellate court rejected the employer's argument and affirmed, finding that there was sufficient proof in the record of both objective and subjective proof of worsening due to the allowed conditions based on the comparison of the pre/post injury x-rays, the range of motion/distraction testing, and the claimant's history of no problems prior to the injury.

***Strickler v. Columbus*, 10th Dist. No. 13AP-464, 2014-Ohio-1380 –** claim was allowed for some conditions and denied for others, including substantial aggravation of pre-existing right knee arthritis. Claimant appealed to the Franklin County court of common pleas. After a bench trial, the judge ruled in claimant's favor on some conditions, but disallowed substantial aggravation of pre-existing right knee arthritis. Claimant appealed the Tenth District Court of Appeals. The appellate court affirmed. In its analysis, the appellate court stated that there is no burden to prove objectively that a condition pre-existed the injury. However, there must be some explanation as to how the post-injury objective evidence proves a substantial aggravation. In this case, the appellate court stated that claimant's physician stated that there was a substantial aggravation of right knee arthritis, but no explanation as to how the injury objectively worsened the pre-existing condition. The appellate court cited the *Bohl* and *Brates* decisions as examples of cases in which adequate explanations were provided.

***Haynik v. Sherwin-Williams Co.*, 8th Dist. No. 100064, 2014-Ohio-1620 –** claimant tripped over paint cans and fell directly on to his left knee. He underwent x-rays that showed significant, pre-existing arthritis. Claimant's physician clinically was able to palpate a moveable mass under the skin in claimant's left knee. Eventually, surgery was performed and the mass, which was found to be a piece of fractured cartilage, removed. The claim was administratively allowed for substantial aggravation of pre-existing left knee arthritis. The employer appealed to the Cuyahoga County court of common pleas and a jury trial was held. After claimant rested his case, the employer moved for a directed verdict. The trial court denied the employer's motion and the case proceeded. The jury returned a verdict in claimant's favor. The employer then appealed to the Eighth District Court of Appeals.

The appellate court affirmed, noting that there was objective evidence of worsening due to the injury. The appellate court noted the testimony of claimant's physician that the moveable mass which was present after the injury was not present prior to the injury. He further stated that the claimant's history, the mechanism of the injury, the post-injury x-rays, and the surgical findings showed that the injury resulted in a substantial aggravation of the pre-existing left knee arthritis. The appellate court found this proof to be sufficient under R.C. 4123.01(C)(4). The appellate court

also stated that there is no statutory requirement to objectively prove that the condition pre-existed the injury: "such proof would be available only in the most limited and fortuitous circumstances wherein imaging studies had been conducted of the afflicted body part before the workplace accident occurred. Such a requirement is not present in the statute, and we decline to make it so in the present case."

See also, *Briggs v. Franklin Pre-Release Ctr., 12th Dist. No. CA2013–10–035, 2014-Ohio-2477, and Coler v. Anchor Acquisition, L.L.C., 5th Dist. No. 14–CA–12 2014-Ohio-4049; Fabro v. OhioHealth Corp., 10th Dist. No. 13AP-755, 2014-Ohio-5161* (again noting that nothing in R.C. 4123.01(C) requires objective evidence that a condition pre-existed the industrial injury). *Rowland v. Buehrer*, 2d Dist. No. 27412, 2017-Ohio-7096, ¶ 35; *Woods v. Bur. of Workers' Comp.*, 2d Dist. No. 26561, 2016-Ohio-237.*Schaefer v. Lake Hosp. Sys.*, Inc., 11th Dist. No. 2017-L-102, 2018-Ohio-3970, 120 N.E.3d 366, ¶ 19; *Houlihan v. Morrison*, 1st Dist. Hamilton No. C-200379, 2021-Ohio-3087, ¶ 14.

***Johnson v. Conitech USA, Inc.*, 3rd Dist. Union No. 14-21-23, 2002-Ohio-1552 –** claimant sustained a crushing injury to her left forearm and subsequently filed a motion seeking additional allowances for depressive disorder and PTSD. The Industrial Commission allowed depressive disorder, but disallowed PTSD, finding that the incident itself and not the allowed physical conditions caused the PTSD. The Industrial Commission based its decision on *Armstrong v. John R. Jurgensen Co.*, 136 Ohio St.3d 58, 2013-Ohio-2237.

Claimant appealed to Union County Common Pleas court. The employer filed for summary judgment and the trial court granted the motion. Claimant appealed the to the Third District Court of Appeals and argued that the evidence from her psychologist found that the incident and the physical conditions both caused PTSSD, in the sense that any time claimant looked at her disfigured forearm or had symptoms from the injury, she had disturbing memories of the incident itself. Thus, both the incident and allowed physical conditions caused PTSD. The appellate court agreed, sustained claimant's assignments of error, and remanded the matter to the trial court.

Note – if the psychologist will support it, argue dual causation. Pain, limitations, the need for treatment, etc., related to the allowed physical injury conditions can trigger thoughts of the incident. Thoughts of the incident trigger thoughts of the physical injury. They are interconnected and thus both causes.

Armstrong is distinguishable because no dual causation argument was raised or addressed in that case. See also, *Jones v. Catholic Healthcare Partners, Inc.*, 7th Dist. Mahoning No. 11 MA 23, 2013-Ohio-3990; IC Policy Memo S9 regarding dual causation.

***State ex rel. Keck v. Indus. Comm.*, 10th District Franklin No. 20AP-314, 2022-Ohio-2782** - claimant, a police officer, sustained a head injury in 2010. The injury eventually forced him to take a disability retirement from the Ohio Police & Fire Pension Fund. Claimant was receiving ongoing temporary total and BWC moved to terminate compensation based on a report that found the allowed conditions had reached MMI. The BWC's physician failed to consider an extensive amount of relevant evidence and based his opinion solely on the fact that claimant had retired from the police force.

The Industrial Commission terminated temporary total based on the BWC's MMI report. In so finding, the hearing officers cited the fact that the physician referenced the definition of MMI in addition to relying on claimant's retirement to support its MMI finding. In addition, the hearing officers cited medical evidence which the physician did not mention, in support of MMI, even though the reports in question said nothing about MMI.

Claimant sought a writ of mandamus in the Tenth District court of appeals. The appellate court granted the writ. The court found that a reference to MMI is not adequate if the medical evidence relied on does not constitute some evidence as a matter of law. Because the only basis cited by the BWC's physician for his MMI finding was claimant's retirement, the court found that the report was not "some evidence". See *State ex rel. Daimler-Chrysler Corp. v. Indus. Comm.*, 121 Ohio St.3d 341, 2009-Ohio-1219 (the permanent inability to return to the former position of employment is not, ipso facto, evidence supporting MMI). The court also noted that the Industrial Commission cannot fashion its own MMI opinion from the evidence if that opinion is not supported by the medical report upon which it relies to find MMI. In this case, the Industrial Commission cited several reports which indicated that claimant had already received certain treatment for the allowed conditions. However, BWC's physician did not mention those reports and the reports themselves said nothing about MMI.

Note - the Industrial Commission lacks the expertise to "play doctor" and cannot cite medical evidence in support of a conclusion if that conclusion is not reached by a medical expert. See *State ex rel. Moore v. Indus. Comm.*, 10th Dist. Franklin 04AP-974, 2005-Ohio-4927, ¶ 42-43, citing *State ex rel. Yellow Freight Sys., Inc. v. Indus. Comm.*, 81 Ohio St.3d 56 (1998). See also, *State ex rel. Valentine v. Indus. Comm.*, 10th Dist. Franklin No. 02AP-579, 2003-Ohio-1784; *State ex rel. Barnett v. Indus. Comm.*, 10th Dist. Franklin No. 13AP-161, 2014-Ohio-311.

Also, a medical report is ambiguous if the physician finds MMI, but also states that the restrictions from the allowed conditions are temporary. See *State ex rel. Shelton-Collins v. U.S. Playing Card Co.*, 10th Dist. Franklin No. 03AP-1049, 2004-Ohio-6600. And a medical report is not "some evidence" if the physician applies an incorrect legal standard to the issue in question. See *State ex rel. Morris v. Indus. Comm.*, 14 Ohio St.3d 38 (1994); *State ex rel. Wyrick v. Indus. Comm.*, 138 Ohio St.3d 465, 2014-Ohio-541.