LEGAL UPDATE

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CASE LAW UPDATE

Injury allowance:

Owens v. Giant Eagle, Inc., (2022-Ohio-192)

Owens was employed by Giant Eagle. He filed a claim which was disallowed by the IC. The trial court granted summary judgment. The 8th District Court of Appeals reversed. On the date of the injury, Owens was transporting pallets of deli products from a delivery truck to the lunch meat cart in the store's deli department. He claims he was "hustling" to get the task done. At one point, he walked to the department and placed a box of cheese on the counter. He then rounded the deli counter to speak with his manager and co-workers and "socialize" in addition to talk about a few things about the job. He felt a "pop" at the back of his foot and initially thought he hit something, but there was nothing there. He hopped forward a few times and fell to the floor. He was ultimately diagnosed with an Achilles rupture. He admitted there was nothing on the floor that posed a hazard or contributed to his injury. Giant Eagle contested the claim as not in the course of employment since Owens was merely walking and that was not a result of a greater hazard related to his employment. Giant Eagle did not argue that the injury was idiopathic but also argued that Owens was not injured in the course and scope of employment once he went to "socialize" with co-workers. The appellate court rejected Giant Eagle's argument that *Ashbrook v. Indus. Comm.* stands for the premise that Owens had to show a causal connection between the injury sustained and the employment of the injured worker either through the activities, the conditions or the environments of the employment. The Court noted that the *Ashbrook* case involved the coming and going rule. In this case Owens was not on a break or otherwise away from the work premises. The Court also stated that Owens was performing some required duty and doing things usually and reasonable incidental to the work environment. The Court reviewed the totality of the circumstances test and found that Giant Eagle clearly had control over the scene of the incident. The Court found there was a genuine issue of material fact as to whether the injury was compensable.

King v. Emergency Med. Transport, Inc., (2022-Ohio-123)

Plaintiff filed an action against EMT claiming EMT was vicariously liable for the negligent actions of its employees which she claims caused permanent hearing loss. Plaintiff was an employee of a McDonalds restaurant and was outside sitting on a retaining wall facing the restaurant parking lot. An EMT ambulance pulled into the parking lot. The driver got out and spoke with King while the passenger went into the restaurant. When he returned, both

he and the driver got back into the ambulance and inadvertently the horn was activated. King went to the ER where she was told her hearing would return, but it did not. She ended up with over 70% hearing loss in both ears. The issue presented was whether the employees were in the course and scope of their employment at the time the horn sounded. The two employees were paramedics who were required to work 24-hour shifts. They kept their own weekly time sheets. They were permitted to have breakfast, lunch and dinner but the time sheets did not have spaces to show when those breaks were taken. They were permitted to drive either their personal vehicles or the ambulance to a restaurant during their lunch break but both employees assigned to that ambulance had to be in the ambulance at that time. They were also required to stay relatively close to the station. The trial court granted summary judgment to EMT, finding that the employees were on a personal errand of picking up lunch and therefore not in the course and scope of employment. The Fifth District Court of Appeals reversed, finding there were genuine issues of material fact as to whether the employees were outside the course and scope of employment.

Fowler v. Indian River Juv. Corr, Facility, 2021-Ohio-4422

Injured worker intervened in a physical conflict and sustained injuries which were allowed in her claim. She filed a motion to further allow her claim for substantial aggravation of pre-existing major depressive disorder, single episode, moderate. She presented evidence of having been treated previously for anxiety and for depression following her mother's death but she had never been aware of a diagnosis of major depression until after her injury. She had no documentation of her prior treatment. She did claim that her psychological symptoms had worsened over the three years since her injury.

The employer moved for summary judgment because injured worker did not produce objective clinical findings or test results to establish the extent of her psychological condition prior to the injury. The trial court granted the motion for summary judgment stating that the plaintiff had only produced subjective complaints rather than objective findings, citing 4123.01(C)(4). The Fifth District Court reversed stating that there is no requirement for the plaintiff to produce objective evidence of the pre-existing condition is not required by the statute and that the objective findings and clinical findings are only required to substantiate the aggravation. The court went on to state that the trial court erred in concluding that plaintiff's failure to provide objective evidence of a pre-injury reference point was a fatal flaw and that summary judgment should not have been granted. Court cited *Houlihan v. Morrison* (2021-Ohio-3087) which did require some evidence of a reference point. The key here was that the employer did not dispute the fact that plaintiff had a pre-existing psychological condition.

NOTE: Initially plaintiff argued that the order she was appealing was not a final appealable order because her workers' compensation claim was still pending. The court of appeals rejected that argument. The court also went on to discuss plaintiff's potential right and request to amend her complaint to include the alternate theory of direct causation if the trial court planned to grant the motion for summary judgment

Continuing Jurisdiction:

Chatfield v. Whirlpool Corp., (2021-Ohio-4365)

Plaintiff had an allowed workers' compensation claim. The records reflect that the last compensation was paid on August 24, 2015 and the last medical bill was paid September 28, 2015. On June 19, 2019, plaintiff filed a motion for additional allowance of her claim for the condition right shoulder sprain, right shoulder superior labral tear and substantial aggravation of pre-existing AC joint arthropathy. The DHO denied the motion on November 22, 2019 and the SHO affirmed. Further appeal was refused by the IC on March 24, 2020. Plaintiff then filed an appeal pursuant to RC 4123.512. Employer filed a motion for summary judgment on the ground that plaintiff's claim had expired pursuant to RC 4123.52. The trial court granted the motion. Claimant appealed to the Third District Court – Marion County and argued that the 5-year limitation period was tolled because she filed the motion for additional allowance which she claimed should be construed as a C-9. The court disagreed, rejecting several cases cited by plaintiff because they concerned the 2-year statute for payment of temporary total compensation and affirmed the grant of summary judgment for the employer.

State ex rel. Casey v. Indus. Comm., 2022-Ohio-532

Injured worker sustained an injury in 2003 which became allowed for, among other conditions, RSD. She filed for compensation for functional loss of use of her left lower extremity which was denied, noting that injured worker was able to walk using her left leg. This proceeded though mandamus and the IC decision was affirmed. In 2007 she filed for and received 150 weeks of compensation for 100 percent loss of use of her left ankle due to ankylosis. In 2010 the IC granted her request for motorized wheelchair and car lift, noting the allowed conditions had greatly affected her ability to ambulate. In 2011 she filed a motion requesting the remaining 50 weeks for loss of use of her left leg. The IC determined it had continuing jurisdiction due to new and changed circumstances, including her need for a wheelchair, but denied her request in a 2012 order because there was medical indicating that the was able to walk with a walker. In 2019 she again filed a request for the 50 additional weeks. The medical records indicated that she was able to self-propel the wheelchair with her hands but not her legs. The BWC doctor indicated she could stand on her leg and transfer from the bed to a chair and between different chairs. The IC stated it did not have continuing jurisdiction and erroneously referred to the 2006 order rather than the 2012 order. The Court stated that was harmless error and affirmed the IC decision. The Court also stated that the injured worker's medical did not describe any deterioration in the leg or indicate her condition was any different. It noted that the use of the wheelchair had already been noted in 2012 and there was no medical indicating she could no longer ambulate with a walker.

Temporary Total Compensation:

State ex rel. Ryan Alternative Staffing, Inc. v. Moss, 2020-Ohio-5197 – 2021-Ohio-3539

Injured worker sustained an injury while working for a client of the employer – a temporary staffing agency. At the time she was working an afternoon shift. Following the injury, restrictions were set which the client could/would not accommodate. Employer offered injured worker light duty work at its office which is only open during the daytime. Injured worker refused to accept the light duty job offer stating she could not work those hours as she cared for her disabled granddaughter while her daughter worked during the day. Injured worker filed a motion for TTD alleging that the job offer made by employer was not made in good faith. DHO found that the offer was made in good faith and that injured worker was not eligible for TTD. SHO also found that the light duty job offer was made in good faith, but ruled that the injured worker had a good faith reason for declining the job offer. Accordingly, the SHO awarded TTD.

In mandamus, the magistrate recommended denial of employer's request for mandamus. Tenth District Court disagreed with magistrate and granted writ of mandamus. Court reviewed *Ellis Super Valu v. Indus. Comm.*, 115 Ohio St.3^{d} 224 (2007-Ohio-4920). In that case the IC had determined that injured worker had a good reason to decline light duty work without having made a determination of whether the offer had been made in good faith. Court held that the *Ellis* case only permits the IC to consider the claimant's reason for refusing suitable alternative employment only in the context of deciding whether the employer's offer was made in good faith.

The Ohio Supreme Court agreed that its prior decisions did not create an exception in *Ellis* for situations in which familial obligations prevent an injured worker from accepting a legitimate, good-faith offer of suitable alternative employment. The Court, however, granted a limited writ due to its determination that the order of the hearing officers exhibited confusion about the correct standard under which good faith is to be determined. The Court noted that if an employer consciously crafts a job offer with work shifts that it knows the injured worker cannot cover, good faith may not exist. But simply because the offer made was the only one available does not mean the offer was in good faith.

THE REST OF THE STORY – Industrial Commission hearing. Upon remand to the IC, the SHO ultimately denied TTD, finding that the employer was not aware of any restrictions against working the day shift and had attempted to re-place the injured worker at the site where she was injured. The injured worker's application did not contain any information regarding inability to work day shift. The SHO then went on to discuss the potential impact of RC 4123.56 as revised. He ultimately determined that "the Injured Worker's familial obligations were not an independent reason that could justify an award of temporary total disability compensation in spite of a job offer complying with R.C. 4123.56(A)."

State ex rel. Quest Diagnostics, Inc. v Indus. Comm. (2022-Ohio-1093)

Tenth District Court of Appeals applied the *Klein* holding to the facts in this case. Injured worker moved to California since her husband was starting a new job there. She originally intended to remain working for the employer at one of its California locations until she found out she needed a California certification which she did not have. Accordingly, she resigned her position rather than remaining in Ohio. Court found that it was clear injured worker did not leave the workforce because of her injury and therefore she was not eligible to receive temporary total compensation.

State ex rel. Walmart, Inc. v. Hixon, (2021Ohio-3802)

SHO denied temporary total compensation after the date of injured worker's retirement. The IC vacated that order and found injured worker was entitled to TTD based upon *Pretty Products* since injured worker was disabled at the time of her retirement. This order was issued June 26, 2018. The *Klein* decision was decided September 27, 2018. The Court of Appeals ultimately determined that *Klein* could be applied retroactively. The Court held that the injured worker did not have a vested right to TTD compensation and that there is a difference between a substantive right and a vested right. The right to TTD is a substantive right, not a vested right. A right does not vest unless is constitutes more than a "mere expectation or interest based upon an anticipated continuance of existing law." Court also held it was highly unlikely that an injured worker would choose to retire based upon the hope that they would continue to receive TT benefits under *Reitter Stucco, Omni Source* and *Pretty Products.* Court found injured worker chose to retire for age related reasons due to her stated reason of turning 65. Accordingly, the Court granted the writ.

State ex rel. Foster v. Indus. Comm., (2021-Ohio-4221)

Injured worker filed mandamus action following IC decision terminating TTD when treatment had been suspended due to her pregnancy. Court noted that injured worker was not able to return to work when her treatment was suspended and that inability to work was not caused by her pregnancy. Her physician noted that treatment would need to resume treatment postpartum including orthopedic consults to consider surgical intervention. The contrary medical report simply noted that the treatment was "on hold."

NOTE: Employer did not file objections to the magistrate's decision.

<u>Employment relationship:</u>

Wilson v. Rose Metals Industries, Inc. (2021-Ohio-4518)

Plaintiff challenged trial court's grant of summary judgment in favor of Rose Metals, arguing that Rose Metals was not plaintiff's employer and was not entitled to statutory immunity under RC 4123.74. Plaintiff was hired by Target Technical, an agency which provides temporary workers to employers. Target had a written agreement with Rose Metals under which Target would pay workers' compensation premiums as well as taxes and unemployment compensation. Rose Metals paid a 50% markup on compensation. Wilson sustained an injury working at Rose Metals' facility as a welder. Wilson filed a workers' compensation claim and was paid compensation and benefits. Wilson then filed a personal injury claim against Rose Metals, claiming that he was not an employee of Rose

Metals and that Rose Metals was not in compliance with the workers' compensation statutes because Rose Metals did not pay workers' compensation premiums for Wilson.

The 8th District Court of Appeals found that Rose Metals controlled the means and manner of Wilson's work activity. No one from Target was present at Rose Metals or involved in his daily assignments. Wilson argued that he provided his own welding equipment but admitted that a Rose Metals employee instructed him what to do and how to weld Rose Metals products. The Court noted that an employee can have two employers and that Rose Metals was an employer of Wilson.

The Court also found that Rose Metals was in compliance with workers' compensation because Wilson actually was covered and received workers' compensation benefits. The markup of 50%, although not spelled out, clearly covered the costs of coverage. In addition, in any event it did not matter who paid the premiums.

State ex rel. Friendship Supported Living, Inc. v. Ohio Bur. Of Workers' Comp. (2-21-Ohio-4490)

Friendship Supported Living filed a mandamus action following a BWC determination that individuals it engaged to provide in-home care for individuals with developmental disabilities were employees rather than independent contractors. Friendship requested a writ be issued requiring the BWC to reclassify these direct care workers as independent contractors. There were some W-2 employees of Friendship whose classification was not in dispute. The Court reviewed the standard to be applied in determining that individuals are employees or independent contractors, citing *Bostic v. Connor* and *Gillum v Indus. Comm*. The facts were as follows: Friendship is certified as an agency provider of in-home care by the Ohio Department of Developmental Disabilities. It maintains state-required liability insurance and holds itself out as able to furnish care for these individuals. Services are provided according to an ISP (individual service plan) developed by a state or county agency. The ISP, controlled by the State, establishes the number of hours and timing of services for the client. Friendship then contracts with 1099 workers to provide the actual in-home care and assistance. These contractors do not work on Friendship premises but provide all services at the client's homes. The contractors determine and decide how many hours, which days and what times they want to work. They communicate their availability to Friendship and Friendship tries to match them with a client. The contractor can choose whether or not to work with a particular client. Once the contractor is at the client's home, they mutually decide what they will do – consistent with the ISP. Most of these contractors work for short periods of time and are able to take extended breaks from receiving assignments. Friendship does not guarantee any work or a certain number of hours per week. The contractors are free to decline work when they do not want to work. They are paid only for the hours they work. Friendship does not provide any training, tools or reimbursement for expenses and Friendship does not supervise the work of the contractor while it is being performed. Friendship does meet with clients regularly to ensure that the client is receiving appropriate services. The BWC found this to be sufficient control to determine that the contractors were employees of Friendship. The Court disagreed, noting that Friendship's follow up with the clients was simply controlling the "result" not the means or manner of accomplishment, which results in a finding that the

contractors are not employees but are instead independent contractors. The Court rejected the assertion that the "interchangeability" of the direct care contractors (in order to fill gaps in assignments) creates an employment relationship, noting this underscores that the contractors are free to pick and choose hours and assignments. The Court noted also that the State of Ohio considers its own direct care workers to be independent contractors. Court ordered BWC to vacate its order and repay any premiums paid to Friendship.

Substantial Aggravation:

State ex rel. Knight Transp., Inc. v. Indus. Comm. (2021-Ohio-4574)

Employer filed mandamus seeking to vacate the IC order which denied its motion to find that the allowed condition (substantial aggravation of pre-existing arachnoid cyst) had abated. Employer's medical report was specific in stating that the allowed condition had returned to the level that would have existed without the injury. Injured worker's medical report disagreed with that opinion stating that the allowed conditions, not solely the arachnoid cyst, would continue to be an issue for the injured worker as he continues to perform heavy labor activities. The injured worker testified that his symptoms had never completely resolved. Court denied mandamus and held there was some evidence to support the IC decision. It noted that the injured worker's medical did not have to specifically reference the cyst and because that report constitutes objective medical evidence, the IC could also consider the injured worker's subjective complaints in reaching its decision. Employer asserted that the magistrate's decision constitutes weighing of the medical evidence and that the magistrate mischaracterized its medical report. The Court disagreed, stating that any misstatement or mischaracterization was of no import since the IC did not rely upon the employer's medical report.

Death Benefits – Dependency:

State ex rel. McDonald v. Indus. Comm. (2021-Ohio-4494)

Tenth District Court granted mandamus to surviving fiancé of injured worker, interpreting RC 4123.59. At the time of his death, injured worker was survived by his fiancé and two small minor children. Injured worker and his fiancé had been in a committed relationship for 11 years. The two minor children were their children. They jointly owned property, joint tenants with right of survivorship and both signed on the note and mortgage. They were jointly responsible for five credit cards and payments on two vehicles. They were each other's life insurance beneficiaries. The injured worker worked full time, while his fiancé worked only part time, averaging 8 hours per week.

The IC awarded benefits to the two minor children but denied benefits to the surviving fiancé, interpreting RC 4123.49(D) which states:

IC interpreted this statute to mean that in order to be considered a member of the family one needed to have the relation of surviving spouse, lineal descendant, ancestor or brother/sister. The 10th District Court disagreed noting the use of "or" rather than "and." The decision contains references to various definitions of "family members" in other statutes and therefore finds the statute to be ambiguous. Based upon the principle of liberal

interpretation, the Court ruled that the injured worker's fiancé could be a member of the family when considering the facts of this case. The Court remanded the case to the IC to determine whether the fiancé is a dependent, based upon the facts of the case, and whether she was wholly or partially dependent upon the injured worker.

Calculation of AWW:

Huntington Bancshares, Inc. v. Berry (2022-Ohio-531)

Injured worker sustained an injury 6 weeks after starting employment. Employer paid wage continuation for one week and then temporary total compensation for approximately 8 weeks. FWW was calculated at approximately $690 and the AWW was calculated at approximately $70. Injured worker requested re-calculation. She claimed that she had provided caregiving services to her mother-in-law at $3,000 per month and that she sold $4,665 worth of crafts. The DHO set the AWW at $742 including the 6 weeks of employment and the amount she claimed to have provided caregiving services. The DHO rejected the profit from her craft sales. The SHO set the AWW at $597, denying the request to include the $3,000 because there was no evidence to confirm this arrangement. The SHO did exclude 46 weeks from the AWW calculation, stating the injured worker was unemployed because she was caring for an ill family member but continued to look for full-time employment. Huntington filed a mandamus action arguing that there was no evidence that the injured worker was seeking full time employment or that the period of unemployment was out of her control so there was no proof of unemployment.

Tenth District Court contrasted the "special circumstances" exception with the "unemployment beyond the employee's control" exception. The Court found that because the SHO rejected the "evidence" from the injured worker regarding her caregiving wages, the SHO could reasonably characterize that situation as unemployment. However, the SHO used the "special circumstances" exception which was reasonable in this case. Court affirmed the IC decision reiterating the IC's broad discretion in choosing a method for calculating AWW. Court noted injured worker was earning $600 per week at Huntington.

Permanent Partial Awards:

State, ex rel. Bowman v. Indus. Comm. (2022-Ohio-233)

REPORTED LAST YEAR AS A COURT OF APPEALS DECISION: OSC AFFIRMED THAT ORDER. Injured worker contracted a strain of E. Coli at a work holiday party which led to unprecedented injuries which included loss of vision in both eyes. She filed a motion for uncorrected loss of vision bilaterally in the amount of 70%. The IC granted an award of 45% for the left eye and declined to increase a prior award of 67% for the right eye. Two reports were considered. Both examiners, when required to strictly use the AMA Guidelines, agreed that the injured worker had a 65% loss in her right eye and 45% loss in her left eye. Both examiners, however, also stated that use of the AMA Guidelines was an insufficient method whereby to measure injured worker's actual visual impairment. Both examiners also agreed that her loss of vision was 70%. The 10th District Court had affirmed the Magistrate's Decision which ordered the IC to find a 70% bilateral loss of vision. The Supreme Court stated that the IC could not "carve up the opinion of a single physician and

base its opinion on a portion of the opinion that the physician has expressly disclaimed or repudiated." The IC had argued that it followed standard procedure by applying the AMA Guidelines and that it did not "go rogue" and sacrifice the "uniformity of the system" in order to "accommodate Bowman's rather unusual combination of conditions." Court stated accounting for those unusual conditions is exactly what RC 4123.57(B) required the IC to do – the award must be based upon the percentage of vision actually lost.

Trial Practice:

Bender v. Summa Rehab Hosp., LLC (2021-Ohio-3809

Parties reached a settlement through court-ordered mediation. The trial court issued an entry that the case was "settled and dismissed" and retained jurisdiction for the purpose of enforcing settlement. Three weeks later the parties submitted a dismissal entry approved by all counsel. This entry did not contain language retaining jurisdiction to enforce settlement. Three months later, employer filed a motion to enforce settlement. At the non-evidentiary hearing, it was noted that plaintiff refused to execute the settlement agreement which included a global settlement of all claims. Counsel for plaintiff claimed the settlement only included the workers' compensation claim because plaintiff wanted to pursue a separate personal injury claim against the employer. The trial court vacated its initial entry, stayed the case and ordered plaintiff to file a personal injury complaint within 14 days, conditionally granting employer's motion to enforce settlement if plaintiff did not do so.

Court of appeals held that in order to retain jurisdiction to enforce settlement the trial court must either incorporate the terms of the settlement into the dismissal entry or expressly state in the dismissal entry that it retains jurisdiction. That retention must occur in the final order dismissing the case and not in an earlier order. Court went on to determine which order was the "final order" by looking at the language of the initial order. That order did affect plaintiff's substantial right to pursue a civil action regarding her right to participate. Court noted that the initial order anticipated the possibility of the parties filing of a second order but did not require that the parties do so. Court determined that the initial order was a final order dispute language that is was a "final order, with costs to Plaintiff, unless another order is filed within 30 days by the attorneys…" The court found that language superfluous. The court found that since a court loses jurisdiction over a case after issuing the final order, the subsequent order filed by the parties was null and void and had to be vacated.

Court went on to address the employer's argument that the trial court had no jurisdiction to vacate the judgment entries since no Rule 60(B) motion filed. The court agreed that the trial court had no jurisdiction to vacate the settlement and remanded the matter to the trial court.

Permanent Total Disability:

State ex rel. Altercare of Hartville, Ctr., Inc. v Ford (2021-Ohio-4088)

Tenth District Court held that IC was within its discretion to grant PTD. PTD was granted solely on the basis of the psychological conditions allowed in the claim. Employer argued that IC could not rely upon a report stating injured worker was PTD when that same report had previously been rejected as to an issue of treatment. Just because the specific treatment was denied does not negate the report. It was clear that there were non-allowed and allowed conditions which the injured worker was being treated for but the ruling denying a specific treatment request did not indicate that all of the treatment provided by the doctor was unrelated to the allowed conditions. The Court ruled that the reports had sufficiently limited their consideration of the injured worker's ability to work to the allowed psychological conditions. The Court also noted that the IC was not required to comment on surveillance video since it did not rely upon the video and ruled that the IC could find the video unpersuasive. The video showed the injured worker going to medical appointments, ordering fast food, shopping at Target and Cracker Barrell on 3 separate days but also showed she did not leave her home on two other days.

State ex rel. Kidd v. Indus. Comm. (2022-Ohio-450)

Industrial Commission denied relator's PTD application and she filed mandamus. The medical from injured worker stated she could drive 1 hour, sit 30 minutes, stand 30 minutes and walk one-half mile at a time. That medical report stated she was not capable of sustained remunerative employment. The IC medical report stated she could stand 20 minutes, sit 20-30 minutes and walk one-half mile. It also stated she would require rest periods every 15-20 minutes for 1 – 2 minutes during each of these activities. She reported that she could walk 30 minutes on her treadmill 4 times per week. This indicated she was capable of sedentary work. A voc reported supported PTD. The IC denied PTD based upon a review of non-medical disability factors and also noted the advancements and innovations in sit/stand desks, wireless phones and remote work from home situations which allow an employee flexibility in taking breaks and changing positions. The Tenth District Court granted mandamus noting that, innovations and advancements do not change the fact that the definition of sedentary work has not changed and still requires the ability to sit most of the time. It noted that the restrictions suggest that she has to stop working for 1 – 2 minutes every 15 – 20 minutes, not simply change positions and that was inconsistent with sedentary work.

VSSR:

State, ex rel. Zarbana Industries, Inc. v. Indus. Comm., (2021-Ohio-3669)

Ohio Supreme Court affirmed 2020-Ohio-5200. (reported last year) Injured worker filed application for VSSR award. The IC issued its estimate noting the value of the award could be $20,866 to $69,554. The matter went to hearing. After the hearing but before the order had been issued the parties reached a proposed settlement of $2,000 which was submitted for approval. The SHO did not approve the settlement stating it was neither fair nor equitable in light of what he determined from the hearing. The SHO issued an order finding a violation and awarded 30%. The IC determined it did not have authority to exercise

continuing jurisdiction. The 10th District Court ruled that the magistrate was correct in denying a request for mandamus relief because the IC did not have a clear legal duty to approve the proffered settlement.

On appeal to the Supreme Court, Zarbana argued that the General Assembly did not grant the IC the authority to approve or disapprove VSSR settlements. Court noted that this argument was not raised in the 10th District and therefore the issue was waived. Secondly, Zarbana argued that if the OAC provisions apply it permits the IC to approve or disapprove settlements only as to "form" and not on the basis of fairness – i.e. was there a valid contract. The Court looked at the language which requires the SHO to determine if the settlement is "appropriate." The Court noted that "appropriate" is not limited in the language of the section and that would require the IC to approve any settlement submitted on the IC form. Court rejected that this ruling infringes upon the employer's freedom to contract.

State ex rel. Jenkins v. Ohio Valley Stave, Inc. (2021-Ohio-3684)

Injured worker was operating a series of machines which converted larger pieces of wood into smaller wood chips and deposited the wood chips into a trailer. The larger pieces of wood were initially converted to wood chips in a "chipper." The "chipper" deposited the wood chips into a "shaker" which then deposited the wood chips onto a conveyor belt. The conveyor belt carried the wood chips to a chute leading to a trailer and a blower located underneath the end of the conveyor belt blew air onto the wood chips to direct them into the chute. Injured worker was clearing the wood chips from around the sides of the blower when a belt on the blower's motor broke, resulting in partial amputation of his thumb.

The injured worker alleged a violation of 4123:1-5-09(L)(1)(a) and (b) which applies to "combination or universal woodworking machines" and requires guarding at each point of operation and stopping and starting devices for each separate operation. The SHO found that a "combination machine" was a machine which combines the functions of two ore more separate machines into a single unit such as a table saw with a sander. The SHO found that the blower was not attached to the chipper and the sole function of the blower was to help move the wood chips from the conveyor belt to the chute. The Court held that the IC did not abuse its discretion by finding this was not a combination woodworking machine, noting that if injured worker's interpretation was correct, a machine with a single function which merely operates alongside other machines could be called a combination woodworking machine. The blower did not alter the wood chips and its sole function was to transport the wood chips. The IC decision was affirmed by the 10th District.

<u>Miscellaneous:</u>

State ex rel. Byk v. Indus. Comm. (2022-Ohio-136)

Relator in this mandamus action is the surviving spouse of the injured worker who was injured in 2012 and eventually left in a persistent and permanent vegetive state. He filed for scheduled loss of use compensation which was denied by the IC. Injured worker filed a complaint in mandamus in March 2015. Two months later, injured worker died and the

complaint was voluntarily dismissed. The present mandamus action was commenced in the name of the injured worker in October 2015. Counsel filed a suggestion of death and moved to substitute his surviving spouse, executrix of his estate. The Court granted that motion. At the same time, the surviving spouse pursued a claim to obtain unpaid benefits accrued during injured worker's lifetime under RC 4123.60. That claim resulted in another mandamus action.

The surviving spouse attempted to get around the abatement of the claim by arguing that that rule does not apply to these particular circumstances. She argued that abatement only occurs if the application is pending before the BWC or IC at the time of the injured worker's death. The Court ruled that the two circumstances where a deceased injured worker's claim does not abate are: (1) where the IC has allowed the claim; and (2) where the injured worker has successfully prevailed in court on a challenge to the commission's denial of the claim before the injured worker dies. Accordingly, a surviving spouse or an estate cannot pursue a claim for the injured worker. The Court notes that the surviving spouse has a remedy in the 4123.60 action.

State ex rel. Group Mgt. Servs., Inc v. Indus. Comm., (2022-Ohio-906)

Employer filed mandamus objecting to the IC's determination to afford a new hearing to injured worker on the basis that he did not receive notice of the first hearing. Injured worker was a truck driver and was injured in December 2018 when he fell from the back of a dump trailer. He provided his address at the time of his injury on the FROI-1 and on the injury report. This address was an extended stay hotel where he lived in January and February 2019. The IC sent the hearing notice to that address. IC also sent a continuance notice and new hearing notice to that address. Injured worker did not appear for the hearing and the claim was denied. In April 2019, the IC recorded a notice that the ROP had been returned "undeliverable." Three days later the IC noted that the continuance notice had been returned also. A month later the IC noted that the notice of hearing (at which the claim was denied) had also been returned as undeliverable. In October, injured worker filed a request for relief claiming he never received the notice of hearing. An R2 was also filed. Injured worker filed an affidavit stating he was unable to process a forwarding order because the original address was a business. He claimed at the hearing that he verbally told a supervisor of his new address but GMS provided affidavits stating they had never been advised of a new address. Injured worker did not file a change of address with BWC until March 2020 – a month after the hearing on his request for relief. SHO granted relief stating his failure to receive notice was without the fault or neglect of the injured worker. Employer filed mandamus action which was denied. The evidence was clear that the notice of the hearing was not delivered. Because the injured worker was not represented at the time, his failure to notify the BWC/IC of his change of address was excused.

Pulaski v. Bur. Of Workers' Comp. (2022-Ohio-1344)

Plaintiff had an allowed claim for right shoulder strain and right labrum tear. Treatment included surgery and he was still on TTD when, approximately one month later, he slipped down stairs at home. As he was falling, he reached out with his injured arm, grabbed the handrail and heard a pop and experienced an immediate onset of pain. He was diagnosed with a new tear in his right shoulder. Employer filed a motion requesting (1) termination

of TTD based upon MMI; (2) declaration that the TTD and medical expenses paid after the new injury were overpaid and (3) a declaration that the new injury was an intervening injury and that no further compensation and/or medical benefits would be paid in the claim. The DHO found that injured worker suffered an intervening injury. TTD was terminated as of the date of the incident at home (based upon MMI) and the medical bills and TTD paid after the event were considered an overpayment. The DHO denied employer's request that no further compensation or treatment be paid in the claim. The SHO affirmed the DHO order and stated that the event constituted an intervening injury sufficient to break the causal connection between the allowed conditions and the injured worker's symptoms and problems after the event. The order further stated that any compensation and medical benefits paid after the home incident were due to that event and not due to the allowed conditions. SHO did not specifically rule on employer's request that no further compensation and/or treatment be payable in the claim.

Plaintiff filed a 512 appeal to common pleas court. Trial court granted employer's motion to dismiss for lack of subject matter jurisdiction and failure to state a claim. Plaintiff appealed, claiming that his appeal was a right to participate issue rather than an extent of disability issue which would require a mandamus action. The Second District Court of Appeals affirmed the decision of the trial court, rejecting injured worker's assertion that the trial court could not rely upon the language of the DHO order since the SHO order is the order appealed from. The injured worker also argued that the finding that the intervening injury broke the chain of causation amounted to a final determination of the allowed claim. The court noted that the SHO order affirmed the DHO order in all material respects even though it did not specifically reference that portion of the employer's motion that requested cessation of all future payments. The Court disagreed, noting that the DHO order expressly refused to terminate injured worker's ability to receive future benefits and did not forever foreclose plaintiff from collecting on the claim at a later time.

LEGISLATIVE UPDATE:

Am. H. B. No. 447 – Proposed Amendments

1. R.C. 4123.01(C)

"Injury" does not include:

(4) Injury or disability sustained by an employee who performs the employee's duties in a work area that is located within the employee's home and that is separate and distinct from the location of the employer, unless all of the following apply:

(a) The employee's injury or disability arises out of the employee's employment.

(b) The employee's injury or disability was caused by a special hazard of the employee's employment activity.

(c) The employee's injury or disability is sustained in the course of an activity undertaken by the employee for the exclusive benefit of the employer.

After two hundred weeks of temporary total disability benefits, the bureau of workers' compensation may schedule the claimant for an examination for an evaluation to determine whether or not the temporary disability has become permanent. A self-insuring employer shall notify the bureau immediately after payment of two hundred weeks of temporary total disability. The self-insuring employer may request that the bureau schedule the claimant for an examination to determine whether the temporary disability has become permanent.

2. 4123.56

After 200 weeks of TTD benefits, the BWC *may* schedule the claimant for an exam to determine whether the temporary disability has become permanent. An SI employer shall notify the BWC immediately after payment of 200 weeks of TTD and the SI employer *may* request that the BWC schedule such an exam.

3. 4123.64

Changes "his" to "the injured or disabled employee's"

Removes requirement for a notary and seal to the application to have BWC commute payments of compensation to one or more lump-sum payments.