# LEGAL UPDATE

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## CASE LAW UPDATE

Injury allowance:

*Day v. Rochling-Glastic Composites, L.P.,* 2020-Ohio-1027

Court cited case law that claimant must present evidence that the alleged injury was directly and proximately caused by repetitive motions performed during the course of his/her work-related duties, taking place over a "discernable period of time" and a "relatively narrow time frame." However, the court noted that "discernable period of time" has not been defined. Plaintiff's doctor testified that her condition developed "in a period of time, maybe weeks, months prior to the date of injury…" Court found this to be a discernable period of time and a relatively narrow time frame and refused to grant employer's motion for directed verdict or judgment NOV. Court found the evidence supported the "recent development" or her condition rather than a long-standing chronic condition of unspecified duration.

*Houlihan v. Morrison,* 2021-Ohio-3087

Injured worker started experiencing pain in 2013 while employed as a maintenance repair worker and part-time landscaper He filed a claim for "unknown damage to both shoulders" and lower back to a lesser degree. His claim was allowed for right shoulder rotator cuff sprain; right shoulder labral tear; right shoulder rotator cuff tendonitis; left shoulder sprain; left shoulder labral tear; left shoulder rotator cuff tendinopathy; and lumbar sprain. He received no further treatment until October 2016 when he injured his back unloading a dishwasher. He hurt his back one month later lifting a box mattress. His claim was allowed for lumbar sprain/strain. In early 2017 an MRI of the lumbar back was performed which showed one disc herniation and two protrusions. He requested further allowance of his 2013 claim for the herniation at L2-3 and the displacements at L3-4 and L4-5. His doctor stated these back abnormalities pre-existed the landscaping duties and had that those duties substantially aggravated these conditions. IC denied the conditions. Following a bench trial, the court denied participation for all of these conditions, finding there was insufficient evidence to show a causal relationship between the conditions and injured worker's employment. On appeal, the First District Court noted that it was unable to find any other cases which combined repetitive trauma with substantial aggravation. The court found that the trial court did not err in requiring injured worker to satisfy the usual substantial aggravation standard. Court of appeals held that while a claimant is not required to present pre-injury documentation of the pre-existing condition, there must be a pre-injury reference point from which to compare the post-injury condition. The trial court properly found as

a matter of fact that injured worker's expert did not demonstrate that injured worker had the requested conditions at the time of his 2013 injury and therefore did not provide evidence of a pre-injury reference point. The defense medical argued that the conditions were more likely related to the incidents in 2016. Trial court's decision was affirmed.

*Hicks v. Safelite Group, Inc.,* 2021-Ohio-3044

Injured worker was employed as an insurance adjuster. She was a fixed situs employee working at a leased office building. Safelite used approximately 98% of the rentable area of the building. The adjacent parking lot was "common area" which Safelite had the right to use free of charge other than 8 specific spaces. Safelite had also designated 5 – 6 specific spaces which were reserved for third trimester expectant mothers. Injured worker was in her third trimester and parked in one of those designated spaces. She had also been instructed by Safelite upon hire to park in the adjacent lot and not to park in a lot for the next-door building. While walking into work, she slipped and fell. IC denied her claim. Decision discusses "coming and going," the "totality of circumstances" and "zone of employment." While the landlord had the responsibility to maintain the parking lot, Safelite did exercise some control over the lot by requiring its employees to park in that lot and restricting usage of certain parking spaces in the lot. It also collected license plate information from its employees and issued a special permit to injured worker for her use of the "maternity" spaces. It also utilized the vast majority of the lot. Court held injured worker was in the zone of employment and the claim was compensable.

<u>Statute of Limitations:</u>

*Santarelli v General Motors CLCO-Mansfield*, 2020-Ohio-5341

In this case the injured worker sustained an injury on October 23, 2007. On the FROI-1 he described the injury stating that three doors fell off of a rack in the press room where he was working, hitting him on top of the head and bending his thumb backwards. In noting the type of injury and body parts affected, he only listed was his right thumb. His claim was allowed for sprain of right hand and sprain of right thumb. The claim was medical only. On October 16, 2017 he filed a C-86 motion to include the additional allowance of closed head injury which was denied by the IC. On appeal to common pleas court, employer's motion for summary judgment was granted. The Fifth District Court of Appeals agreed stating that merely including a body part in the description of the incident was not provide sufficient notice of any claimed injuries to that body part and therefore the statute of limitations as to the head had expired pursuant to RC 4123.84. Merely mentioning a body part in the description of the incident is not notice of an injury to that body part.

*Greco, et al., v. Cleveland Browns Football Co. LLC*, 2020-Ohio-4745

Three Cleveland Browns football players filed claims against the Browns who asserted that the claims were time-barred because they were not timely filed. The players argued that the statute of limitations was tolled by the treatment provided by physicians in the employ of the Browns. The IC allowed the claims. The Browns appealed to common pleas court and both parties filed for summary judgment. The trial court denied the employer's motion and granted the players' motion. The Browns argued that the doctors who treated the

players were independent contractors who were paid by University Hospitals which gave the hospital the benefit of promoting itself as the "hospital/doctors to the Cleveland Browns". Neither the doctors nor UH signed an independent contractor agreement. The court of appeals looked to the NFL's Collective Bargaining Agreement with the NFL Players' Association that required clubs to have board certified doctors and refer to doctors as being "retained" by the clubs. The Agreement also requires the clubs to pay the physicians and for the cost of the players' medical services. The court then found that the physicians in question were in fact employees of the Browns and affirmed the decision of the common pleas court, holding that the statute of limitations was tolled due to the treatment rendered to players by the team physicians.

Temporary Total Compensation:

*State ex rel. Merritt v. Indus. Comm.,* 161 Ohio St.3d 380

This was a voluntary abandonment case but is still potentially relevant to a determination of the reason an injured worker is unable to work. The injured worker's request for temporary total compensation was denied by IC based upon the fact that he had violated the employer's drug-free workplace policy and had been terminated. (voluntary abandonment under prior case law) The SHO stated that he "was terminated on 08/24/2015 for violation of the Employer's drug-free workplace policy after testing positive for marijuana from his random drug screen on 08/12/2015" and went on to outline the requirements of *Louisiana Pacific.* The Ohio Supreme Court (4 – 3) held that the SHO order did not specifically state what evidence had been "relied upon to reach the conclusion that Merritt was terminated for violating his employer's drug-free workplace policy, thereby voluntarily abandoning his employment." The dissent noted that the SHO order was perfectly clear on the basis for the decision as the injured worker himself pointed to the positive drug test, the drug-free workplace policy and the termination notice. In addition, the dissent points that the sufficiency of the SHO order was not raised until injured worker filed his reply brief and did not raise this issue before the court of appeals.

*State ex rel. Burns v. Indus. Comm.,* 2020-Ohio-588

Injured worker requested mandamus relief from IC order denying him TTD. His claim was allowed for physical conditions as well as the condition of anxiety disorder. He was found to be MMI for the anxiety disorder and subsequently filed a motion to add the condition of unspecified depressive disorder to the claim. When that condition was allowed, he requested TTD for that condition. Injured worker was examined by another psychologist who noted injured worker's reported activities and found him to be MMI as to the additional condition. The examining psychologist did not review all of the records. IC denied all TTD for the new condition. The 10th District agreed that the examining psychologist did not review all of the records, but noted that the IC based the decision not to grant TTD on other factors, including that the treatment regimen remained relatively consistent both before and after the additional allowance and no medications were prescribed before or after the additional allowance. Furthermore, the examining psychologist noted many activities the injured work reported engaging in which suggested he was functioning appropriately. Mandamus was denied.

*State ex rel. Pacheco v. Indus. Comm,* 157 Ohio St.3d 126 (2019-Ohio-2954)

Employer offered injured worker a light duty position which was accepted. He began working April 1, 2013 and worked for 3 weeks. He claimed that Alcoa required him to sit in the cafeteria and gave him almost no work to do. Injured worker then saw a new doctor who did not release him to work but issued work restrictions similar to those under which he had accepted the light duty job – including the ability to sit for up to 8 hours and use a computer. Injured worker filed for TT which the employer denied. IC denied the request for TT based upon a lack of persuasive medical documentation that he could not perform the light duty job he had been doing. Court of appeals found that the record supported the IC finding that the light duty job was within the medical restrictions but also determined that the job had not been offered in good faith.

Ohio Supreme Court agreed that the light duty job offer was within the medical restrictions of the injured worker based upon reported from several doctors and the fact that injured worker had performed the job and never told anyone he was unable to do the job. Court rejected the argument that the decision meant a treating physician could never change his or her mind about a claimant's fitness for a light duty job and that injured workers can never try a light duty job to test their ability to perform it without being locked into that position. Court held that the IC found that his capabilities were the same before and after the date he changed doctors. The IC would have been free to determine that injured worker was no longer capable of performing that position.

But the Court also held that the court of appeals should not have determined whether the job had been offered in good faith as that is a matter of fact for the IC to decide. Mandamus was granted to require the IC to make that determination. Dissenting opinion – by 3 judges – argued that the majority should not require any finding of good faith because the injured worker actually accepted the position, citing prior case law that found it unnecessary to consider whether an offer was made in good faith after the injured worker has accepted the offer.

*State ex rel. Ryan Alternative Staffing, Inc. v. Moss,* 2020-Ohio-5197

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 work 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.3d 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.

Medical treatment:

*State ex rel. Omni Manor, Inc. v Indus. Comm.*, 162 Ohio St. 3d 264

Injured worker had claim allowed for right shoulder sprain and rotator cuff tear. She also had conditions diagnosed as right shoulder degenerative joint disease and right shoulder rotator cuff arthropathy. Her physician stated that a primary repair of the rotator cuff is unlikely secondary to the degree of involvement. Her best option would be reverse total shoulder arthroplasty which he stated was reasonably necessary for treatment of the allowed conditions. Employer's doctor agreed that the rotator cuff tear was deemed to be irreparable with the arthritis of the glenohumeral joint and that the surgery was not for the rotator cuff but rather due to the pre-existing degenerative conditions. The Industrial Commission approved the surgery. The Ohio Supreme Court rejected the employer's argument that prior case law required that the injured worker prove the reverse total shoulder arthroplasty was "independently required" for the allowed condition and that the *Miller* test was insufficient when there are co-existing allowed and non-allowed conditions. The Ohio Supreme Court disagreed, stating the *Miller* test is the appropriate test, distinguishing other decisions cited by the employer. The Court also rejected a request for oral argument which employer had requested, arguing that this was of great public importance due to the aging of Ohio's workforce and the increasing likelihood that self-insured employers would be required to increasingly pay for joint replacements. The Court stated this is not a factor under *Miller*.

Permanent Partial Awards:

*State, ex rel. Bowman v. Indus. Comm.*, 2020-Ohio-5343

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 affirmed the Magistrate's Decision which ordered the IC to find a 70% bilateral loss of vision.

*State ex rel. Beyer v. Autoneum N. Am.,* 157 Ohio St. 3d 316 (2019-Ohio-3714)

Injured worker developed cataracts in both eyes from long-term use of corticosteroids to treat his injury. He filed a motion for partial loss of vision and submitted evidence of 20/20 vision prior to the accident and 20/100 visual acuity after the accident without any expert opinion. DHO found a 35% partial loss of vision based upon the AMA Guides. The SHO reversed and denied the motion, holding that the evidence to support a partial loss of vision must also include an expert opinion as to the actual percentage of uncorrected vision loss. Claimant filed a Mandamus action and the 10th District Court of Appeals held that a hearing officer can make the determination and an opinion by an expert is unnecessary. The IC filed to the Supreme Court. The Supreme Court, noting the IC's lack medical expertise, found the hearing officers cannot make their own medical findings in this instance. NOTE: the Court did hold that, when there is evidence of uncorrected vision at 20/200 or more, an expert opinion is not necessary as that qualifies as "legal blindness".

*State ex rel. Hart v. Indus. Comm.,* 2020-Ohio-1396

IC declined to award any PPD award. Injured worker filed mandamus arguing that the report on which the IC relied was equivocal and there was no explanation in the report for relator's complaints of pain in his right chest wall. Although injured worker reported he had restrictions in his activity to other examiners, he reported he did not have any restrictions to the doctor upon whose report the IC relied. Court noted an examining doctor does not have to consider complaints made to other examiners and can base an opinion on what is stated by the injured worker in the exam process.

<u>Trial Practice:</u>

*Towles v. MillerCoors, L.L.C.,* 2021-Ohio-34

Employer appealed jury verdict for injured worker arguing that there was no basis to give the jury the "eggshell rule" instruction since there was no expert testimony from any expert that a pre-existing condition made the injured worker more susceptible to the type of injury he sustained. The 12th District Court of Appeals affirmed the verdict, noting that the jury also received an instruction regarding natural deterioration. The Court ruled that the two instructions together accurately stated the law and properly notified the jury that the eggshell rule should only be applied only if it found the injury was not the result of natural deterioration. The Court also ruled that the injured worker was not require to prove that his injuries did not develop gradually over time. In addition, the Court found no error with the trial court's decision to allow the injured worker's wife and sons to testify as to his activities prior to the injury.

*Jacovetty v. Browning Ferris Indus.,* 2021-Ohio-1400

Injured worker had an allowed claim for bilateral CTS. He filed a request to additionally allow his claim for osteoarthritis of the first carpometacarpal joint of the right thumb. The IC denied his motion and he appealed to court, proposing both the theories of direct causation and substantial aggravation of a pre-existing condition. The trial court provided the jury with two verdict forms. One asked if injured worker was entitled to participate due to substantial aggravation. The second asked if injured worker was entitled to

participate due to the osteoarthritis. It did not mention direct causation. The jury found in his favor on both verdict forms. The trial court granted a new trial, finding that the verdicts were contrary to law and inconsistent. The 8th District Court of Appeals reversed finding that the employer had agreed to jury instructions which made reference to both theories of causation. Neither party objected to the verdict forms or the verdicts while the jury was still empaneled. Accordingly, the employer did not timely raise the issue of the conflicting verdicts because the jury had already been dismissed. The jury instructions reflected the intention to have the jury determine if the osteoarthritis was directly caused by the workplace or whether it was a pre-existing condition aggravated by the workplace, the verdict forms did not. The court stated that the sole issue to be determined was whether injured worker had a right to participate in the workers' compensation fund. The jury verdicts answered that question. A new trial would simply be to correct an error of law.

*Webster v. Altenloh Brinck & Co., U.S., Inc.,* 2021-Ohio-1072

Injured worker fell and struck her head and back while mopping up coolant. As she slipped, she grabbed a tray of screws to stop her fall. She was struck by the tray and the screws as she landed on the floor. Hospital records contained ICD codes for "closed head injury" and "sprain of joints and ligaments of unspecified parts of neck." Webster began treating with a chiropractor. The IC ultimately disallowed the claim for the alleged conditions of closed head injury and sprain of joints and ligaments of [unspecified] parts of neck. The case proceeded to jury trial. Injured worker presented testimony from the treating chiropractor who admitted that she could not diagnose a brain injury and her only mention of the head in her treatment was that she adjusted the head "as it sits in relationship to the neck." Counsel for injured worker tried to introduce the ICD10 codes but the trial court sustained the employer's objections to such evidence. Ultimately the trial court granted employer's motion for directed verdict as to the closed head injury. The decision contains an analysis of dictionary definitions of head injury and the treating chiropractor's statement that head injury did not mean there was a concussion or any kind of brain trauma but merely an indication that she hit her head. Medically, however, a closed head injury generally connotes the potential for injury to the brain. The 6th District Court of Appeals upheld the granting of the motion for directed verdict, finding that the injured worker did not satisfy her burden of producing sufficient medical evidence to support the ultimate conclusion of the chiropractor.

*Browning v. Zoological Soc. of Cincinnati,* 2020-Ohio-4042

Injured worker's appeal from IC decision regarding additional conditions was tried to court in a single day. The court took a day to review the evidence and the following day the court announced its decision stating: "I've listened to the testimony. I've reviewed the medical opinions and some of the records. I can't say I've reviewed each and every one of the 500 pages or so." The court then emphasized specific portions of the evidence and found in favor of the injured worker. Employer appealed, assigning error to the court's failure to review the entire record prior to entering its judgment. 1st District Court of Appeals affirming the trial court's decision finding that the court did not skirt its obligations or refuse to consider record evidence. Thus, this was not a case where the trial court failed to consider all of the evidence prior to its ruling.

*Haynes v. RGF Staffing USA,* 2021-Ohio-1927

Injured worker filed two separate 512 appeals. Employer submitted multiple discovery requests in both cases which were not responded to. Employer then filed a motion to dismiss each case with prejudice since injured work did not respond to discovery. Injured worker did not respond to the motion to dismiss. Just over one month after the motions were filed the trial court granted employer's motions and dismissed both cases with prejudice. The Third District Court of Appeals upheld the dismissal since injured worker had never responded to discovery or employer's motions. Court held that since the motion requested dismissal with prejudice, injured worker was on notice that dismissal with prejudice was under consideration. Court also rejected injured worker's argument that the responses to discovery would have produced the same information which had been provided administratively.

*Somerick v. YRC Worldwide, Inc.,* 2020-Ohio-2916

Court affirmed judgment for injured worker following trial and jury verdict. Ninth District Court of Appeals upheld trial court's admission of medical records which contained diagnoses and medical opinions of non-testifying physicians. Court held that there was no clear indication that the seven factors listed in *Hytha v. Schwendeman,* 40 Ohio App.2d 478 (10th Dist. 1074) had not been met and questioned whether the third factor of "evidence must not have rested solely upon the subjective complaints of the patient" in the syllabus is accurate since that factor was not specifically enumerated in the opinion itself.

*Manning v. FCA US, L.L.C.,* 2020-Ohio-706

Industrial Commission denied additional condition of "herniated disc at L3-4" finding that the herniated disc was the result of the degenerative process. The decision cited a report submitted by the employer. The decision of the SHO stated that the motion was disallowed "on the direct and proximate and substantial aggravation basis." And also cited the employer's report. Injured worker did not appeal this decision. A year and a half later, injured worker filed a motion to additionally allow "disc protrusion, disc herniation and central canal stenosis at L3-4" to the claim. The DHO denied the motion, finding that the requested conditions pre-existed the injury and therefore were not allowable on a flow-through basis. The SHO ruled that the second motion was not barred because the first motion only addressed direct causation and substantial aggravation and allowed the requested conditions. Employer appealed to court and trial court granted summary judgment for employer. Court ruled that the 512 appeal was the appropriate avenue of appeal. Court also held that the conditions requested the second motion were essentially the same conditions and that they were barred by res judicata since the IC had already determined that these conditions did not arise from the injury, regardless of what theory was being asserted. The SHO order did not exclude the flow through theory of causation just because of the language used in the order.

*Meredith v. Alliance Castings Co., LLC,* 2021-Ohio-2565

Fifth District Court of Appeals affirmed JNOV granted by trial court where injured worked did not present sufficient evidence of a pre-existing condition which was alleged to have been substantially aggravated. Injured worker's expert opined that injured worker has a

"depressive disorder in 2004" apparently based upon one office visit in 2018 and the fact that injured worker was prescribed Zoloft in 2004. The expert did not, however, diagnose injured worker with "major depressive disorder, single episode, moderate course with anxiety features" in 2004. There was no documentation of the prescription and injured worker could not recall who prescribed the medication.

*Hotz v. City of Cleveland*, 2020-Ohio-1383

Eighth Appellate District Court of Appeals held that the reference by employer's expert to the BWC reviewing physician's opinion was harmless error even though the BWC physician was not called to testify. Court held that his opinions were cumulative and did not change the outcome of the trial. In addition, the reference to opinions of other physicians who provided treatment to injured worker were admissible pursuant to Evid.R. 803(6) and their records were exhibits which were admitted into evidence.

*Seigel v. Morrison*, 2021-Ohio-2663

Bench trial was held on issue of additional allowance of claim for substantial aggravation of four pre-existing degenerative conditions in the neck which had been denied by the IC. Trial court found for employer stating that injured worker "failed to satisfy his burden of proof, through competent medical testimony, to a reasonable degree of medical certainty, that each of the alleged conditions pre-existed his date of accident and that each was substantially aggravated by the accident." Court had sustained an objection to lack of foundation for injured worker's expert's medical opinion because the expert first saw the injured worker nine months after the injury and testified he did not know the condition of injured worker's neck prior to the injury. Court stated injured worker did not present any medical evidence supporting any condition that pre-existed the injury. Court of appeals reversed, noting that x-rays taken the day after the accident showed the degenerative conditions and that even employer's expert admitted that the degenerative changes pre-existed the injury.

<u>Mandamus:</u>

*State ex rel. Northern v. Indus. Comm.*, 2021-Ohio-1940

Dependents of injured worker requested mandamus relief. Industrial Commission granted employer's motion for continuing jurisdiction and denial of claim which employer had certified as a death claim and had begun paying benefits. On the day the claim was certified a toxicology report was completed by the coroner's office which showed the presence of cocaine and marijuana in decedent's system. The coroner's report was not released until approximately one month later. It listed the drugs as contributing causes of death. The employer did not become aware of the report until almost two months later. The IC granted continuing jurisdiction and denied the claim. The IC found that employer had exercised due diligence in attempting to determine if a drug test had been performed on decedent and discovered no evidence that any test had been performed. The SHO order contained an error in the date of certification of the claim due in part to the fact that a certification letter had not actually been printed. The employer, however, had started paying benefits prior to the date employer learned of the coroner's report. The Magistrate determined that the error in the date of certification was of no consequence. The Court rejected relator's argument

that the magistrate should not have proceeded to review the exercise of continuing jurisdiction after it determined that the SHO order contained an error. The Court held that the date of the certification was not material to the determination of the issues.

*State ex rel. Neitzelt v. Indus. Comm.,* 160 Ohio St.3d 175 (2020-Ohio-1453)

Injured worker's claim was initially allowed for three conditions. She subsequently filed to additionally allow the claim for L4-5 disc herniation which was allowed by the IC. No 512 appeal was filed by the employer. Injured worker then had surgery. The operative report did not mention a herniated disc at L4-5. She filed a request to additionally allow the claim for failed back surgery syndrome and was examined by another physician at the request of the employer. The report from that exam stated that the surgery was performed for non-allowed conditions since the operative report did not reference the allowed L4-5 herniated disc. The employer then requested that the IC invoke its continuing jurisdiction to vacate the allowance of the L4-5 disc herniation based upon the operative report and the IME report. The IC did exercise continuing jurisdiction and disallowed the L4-5 disc herniation. Injured worker's request for mandamus was granted by the Tenth Appellate District which concluded that the IC ceased to have continuing jurisdiction after the 60 day appeal period had lapsed.

Ohio Supreme Court reversed, holding that the 4123.52(A) contains a clear and broad grant of continuing jurisdiction to the IC regardless of the availability of 4123.512. Whenever the five criteria justifying that continuing jurisdiction are met, the IC can exercise continuing jurisdiction subject to the temporal limitations in 4123.52(A) and the rule that the filing of an appeal or action in mandamus terminate the IC's continuing jurisdiction. Accordingly, the appellate court erred in finding IC abused its discretion because it exercised its continuing jurisdiction more than 60 days after it had allowed the additional condition. The Court also found some evidence to support the IC's decision.

*State ex rel. Old Dominion Freight Line, Inc. v. Indus. Comm.,* 2019-Ohio-4948

Tenth District Court of Appeals affirmed magistrate's decision that there were no new and changed circumstances sufficient to exercise continuing jurisdiction. At the time of a PTD award to injured worker, the claim was allowed for psychological conditions as well as physical conditions. Employer had appealed the psychological allowance pursuant to 4123.512 and filed for summary judgment after the injured worker died, which was granted – denying the psychological condition in the claim. Employer then sought to vacate the PTD award based upon the denial of the psychological condition. Court held that the medical evidence cited in the IC order supported PTD based upon the physical conditions alone so there were insufficient "changed circumstances" to exercise continuing jurisdiction.

<u>Permanent Total Disability</u>:

*State ex rel. Digiacinto v. Indus. Comm*., 159 Ohio St.3d 346 (2020-Ohio-707)

In 2003, a SSA ALJ found injured worker severely impaired and disabled under SS Act but that he retained the capacity to perform the exertional demands of no more than sedentary work. Injured worker filed PTD application in 2006 which was denied with a

finding that he could return to his former position of employment which was medium level work and/or that he could be retrained to perform entry-level unskilled and semi-skilled sedentary and light jobs.

In 2013 injured worker filed second PTD application which was denied with a finding that he could perform sedentary work. In 2014 psychological conditions were added to the claim and injured worker filed third PTD application. BWC argued that injured worker had voluntarily abandoned his employment because he had not sought work or participated in vocational rehab since December 2003. Injured worker submitted a copy of the ALJ decision to provide an excuse as to why he had not searched for work. IC denied PTD application. It noted the prior PTD decisions found injured worker capable of medium duty and sedentary work and thus injured worker voluntarily abandoned the workforce by not seeking employment or participating in voc rehab. The appellate court granted a limited writ because the IC decision did not mention the ALJ's decision in its order.

Ohio Supreme Court reversed, holding that the IC was not required to discuss the ALJ decision in the order denying PTD, restating that the IC is not required to list evidence it does not rely upon. The presumption of regularity gives rise to the presumption that the IC considered all of the evidence before it. Since the IC order did not list the evidence considered, it was not required to refer specifically to the ALJ decision. Further, the Court rejected injured worker's assertion that he did not *voluntarily* abandon the workplace because he claims the ALJ told him he could not work. The Court stated that the ALJ's decision was incapable of supporting a conclusion that injured worker left the workforce because of his industrial injury because, contrary to his assertion, the ALJ did not tell him he was incapable of work but stated he was capable of sedentary work. Thus, the ALJ decision was consistent with the findings in the 2007 and 2013 orders denying PTD. Those orders were cited by the IC to support its conclusion that he voluntarily abandoned his employment. The ALJ decision could not have influenced the outcome of the third PTD application.

*State ex rel. Seibert v. Richard Cyr, Inc.*, 157 Ohio St.3d 266 (2019-Ohio-3341)

Injured worker was granted PTD in 2007. Following an investigation, the BWC determined that he was performing services for horse owners at a raceway in exchange for horse stall rentals and horse feed. He was working six days a week performing various activities such as cleaning stalls, washed, fed, jogged and harnessed horses. He did not report this activity to the BWC and indicated he was not working when providing information to BWC. Although the magistrate recommended issuing a writ of mandamus regarding the finding of fraud, the Supreme Court found there was enough evidence to support that injured worker was aware that the services he was performing would have required payment if someone else had performed those activities and he was aware that he was receiving "compensation" in the form of reduced rentals, etc. Court found that the activity was also sustained based upon the consistency of his performance of those activities. A limited writ was issued requiring the IC to determine a correct date for the overpayment of PTD benefits.

VSSR:

*State, ex rel. Zarbana Industries, Inc. v. Hayes,* 2020-Ohio-5200

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.

*State ex rel. Newark Group, Inc. v. Admin., Bur. Of Worker's Comp.,* 2021-Ohio-1939

SI employer participated in and paid in to the "Sysco Fund." Injured worker filed for VSSR award which was granted. Ultimately that decision was overturned by the Ohio Supreme Court. Employer sought and obtained reimbursement from the Sysco Fund for payments made while the initial VSSR order was in force. BWC SI Review Panel determined that the reimbursement was issued in error and ordered the employer to repay the funds which the employer did. The employer did, however, file a mandamus action. The magistrate determined that a VSSR award is "compensation" paid to an injured worker and that once the VSSR award was vacated, the employer was entitled to full reimbursement. The 10th District Court agreed, holding that even though a VSSR award may serve a punitive or prophylactic purpose it is, in fact, compensation and thus reimbursable from the surplus fund.

Intentional Tort:

*Estate of Mennett v. Stauffer Site Servs., L.L.C,* 2020-Ohio-4355

Failure to provide safety protection or to adhere to OSHA regulations does not create a genuine issue of fact as to whether employer committed an intentional tort absent proof of a deliberate conscious attempt to injure. Lack of safety measures and training or even citations and violations also do not raise genuine issues of material facts. During a construction project employer had a trench dug. One of the owners arrived on the scene, assessed the trench and noticed that water has begun to seep into the trench and one side seemed unstable. A stop work ordered was issued and the owner and another employee left the site to locate trench boxes to help secure the sides of the trench. Decedent had returned to the trench and ultimately died when the trench collapsed. Multiple employees testified that the stop work order had been issued and that the owner had left to secure trench boxes. The 12th District Court of Appeals upheld the trial court's grant of summary judgment.

*Renforth v. Staff Right Personnel Servs, L.L.C.,* 2021-Ohio-2335

Injured worker was a minor working with two adult employees using a gas powered log splitter. Injured worker's left index finger was partially amputated when one employee apparently hit the press too soon. Injured workers' primary allegation was that just days before the incident the employer had advised the situs employer that minors were not permitted to operate log splitters because it would violate state and federal child labor laws. Injured worker, however, testified that he was comfortable using the log splitter and that he did not think the employer intended to injure him. There was no evidence of alteration of the log splitter or removal of any safety guard. Court rejected argument that the intentional tort standard should be modified to state that minors should be owed a higher standard of duty. Court of Appeals affirmed the award of summary judgment.

Miscellaneous:

*King v. Republic Steel,* 2021-Ohio-861

King filed a FROI-1 on 12-17-2017 for "pain in left hand" without further diagnosis. In January 2018 the FROI-1 was withdrawn without prejudice. On 12-22-2017 King filed an application for "pain in the left hand/carpal tunnel" with an injury date listed as May 1, 2016. There was no diagnosis and the self-insured employer rejected the claim stating there was no medical to support the condition. The claim was referred to the IC for hearing and injured worker did not appear for the hearing. Injured worker claimed he did not know he was required to attend apparently based upon the fact that there was a prior claim in 2006 at which his attendance was not required because the employer accepted the claim. The DHO denied the claim stated there was "insufficient probative medical evidence to substantiate the alleged conditions…" The FROI-1 had been signed and contained a diagnosis provided by the physician of record but no other medical evidence was submitted. Injured worker did not appeal this decision.

In October 2018 injured worker re-filed his application which was given a new claim number and a different injury date. The description was "numbness and tingling in left hand and mass left wrist." Medical records were submitted by the physician of record. The DHO allowed the claim, rejecting the employer's argument that the matter was res judicata. The SHO reversed, finding that both claims were asserted for carpal tunnel syndrome and ganglion cyst left volar wrist and that the date of injury was the date of the first date of service with the physician of record. Accordingly, the new date of diagnosis would have been appropriate in either claim.

Injured worker filed appeal to common pleas court and the trial court granted employer's motion for summary judgment, finding that the matter was res judicata. The Fifth District Court ruled that the decision of the Industrial Commission was not an adjudication on the merits. The Court cited *Greene v. Conrad,* (August 21, 1997), 10th Dist. Franklin No. 96APE12-1780, 1997 WL 176703 in which the Tenth District Court ruled that when the BWC denies a claim for insufficient information to establish the claim, res judicata does not bar a second claim. The court refused to distinguish between rulings of the BWC and

the IC order, claiming that because the employer was self-insured and thus there was no BWC investigation or ruling. Court relied upon the language of IC Resolution 98-1-02 which finds that the matter should be adjudicated if the BWC refers the second claim application to the IC as a contested claim matter.

*State ex rel. Toledo City School Dist. Bd. of Edn. v. Indus. Comm.,* 2021-Ohio-2782

Injured worker filed a claim alleging injuries to her right elbow and shoulder arising out of an altercation with a student. The IC denied the application, finding that the prior injuries to those areas had not been substantially aggravated. Injured worker filed a 512 appeal. Injured worker then filed a motion for allowance of CRPS under the same claim number alleging direct causation of that condition. BWC denied the motion on the basis that the claim had been denied. DHO dismissed injured worker's appeal of the BWC order. Injured worker filed a request for reconsideration and SHO stated there was no jurisdiction to address the additional allowance because the claim was disallowed. IC granted reconsideration because the request was a new condition which had not been adjudicated. At hearing, IC found it had jurisdiction to consider the CRPS claim, citing *Ward v. Kroger* that the grant or denial of the right to participate for one injury or condition does not preclude a subsequent claim based upon another injury or condition arising out of the same industrial accident. Ultimately the IC denied the condition of CRPS because it determined it was a flow through condition from the previously disallowed conditions. IW then filed a separate 512 appeal on the CRPS. Employer filed mandamus action arguing that the IC did not have jurisdiction to reconsider another condition in a claim that had been denied. Mandamus denied by Tenth District Court, finding that a separate condition can be considered in a previously denied claim.

*State, ex rel. Cribbs v. Indus. Comm.,* 2019-Ohio-2883

Injured worker requested additional allowance of his claim for psychological conditions. The employer scheduled him for an exam. He attended but refused to do the mental/behavioral testing. The employer's expert issued a report stating that the conditions were not related to the allowed conditions. DHO allowed the psychological conditions. SHO vacated and suspended the claim due to injured worker's refusal to "fully participate in the examination." Injured worker filed mandamus action which both the magistrate and Tenth District Court denied. Injured worker ruled he had the right to decline testing based upon IC Medical Examination Manual which stated that injured workers may decline testing and the IC examiner was to note the refusal and base the opinion on available data. Court found that this IC manual is not directed toward examinations performed by an employer's expert and has no bearing on the right of an employer to have an injured worker examined.

## LEGISLATIVE UPDATE:

HB 81 – effective 9-15-2020

1. Statute of limitations for VSSR – changed to 1 year from date of injury or death
2. Nullified the doctrine of voluntary abandonment: inability to work must be the direct result of an impairment arising for the injury or OD
3. Employers cannot withdraw from a settlement if the claim is out of their experience and no longer works for the employer
4. Continuing jurisdiction is now 5 years after the date of the medical service rather than the date of payment for medical services
5. Funeral expenses increased to $7500 from $5000
6. Extends coverage for post-exposure testing to detention officers

## CIVIL RULE AMENDMENT:

Civil Rule 36:

1. Requires Initial Disclosures by all parties no later than first pretrial or case management order:
    a. Identification of individuals likely to have discoverable information and the subject of that information
    b. Copy of all documents and electronically stored information it may use to support its claims or defenses
    c. Computation of damages
    d. Any insurance agreements
2. Disclosure of expert witnesses and exchange of reports with limitations on depositions
3. Discovery conference no later than 21 days before a scheduling conference is to be held
    a. Deadlines for discovery
    b. Subjects on which discovery is needed
    c. Disclosure and exchange of documents obtain through public records requests
    d. Claims of privilege or of protection as trial preparation materials