

**OHIO WORKERS' COMPENSATION**  
**Basic Concepts and Recent Developments**

**Donald G. Drinko**  
**ddrinko@gallaghersharp.com**

**I. INTRODUCTION: What is Workers' Compensation?**

**A. 1912 - Ohio General Assembly Amended the Ohio Constitution by Authorizing Enactment of Workers' Compensation Legislation.**

1. Previously, workers seeking compensation for work-related injuries were forced to bring civil claims against their employer directly. These claims were often delayed, and rarely resulted in compensation for lost time and ongoing treatment.
2. Legislation is subsequently passed establishing the Ohio Bureau of Workers' Compensation (BWC), and creating a state-run system of occupational accident insurance funded entirely by employers through premiums.
3. BWC is vested with the power to enact laws, establish a "state fund," and to formulate procedures for administering claims arising from work-related injuries, illnesses and deaths.

**B. "The Workers' Compensation Bargain": In Exchange for Relinquishing Common Law Causes of Action, Employees Gain a "No Fault" System.**

1. Legislation eliminates negligence and degree of fault as bases for loss allocation.
2. Formulation of types of compensation and how they are calculated.
3. "Social Bargain" – Benefits employees by eliminating need for litigation and resulting delays, and shields employers from lawsuits by virtue of statutory immunity. System also encourages reporting and furthers goal of eliminating workplace dangers.

4. Employees receive immediate health care for work-related injuries, even where defenses exist, because providers are an integrated part of system.

**C. Statutory Structure - Ohio Rev. Code Chapter 4123**

1. Defines injuries, occupational diseases, types of compensation available.
2. Grants immunity to employers for most work-related injuries, and also precludes law suits against fellow employees in most situations.
3. Requires employers with employees working in Ohio to maintain coverage, and establishes penalties and procedures for those who fail to do so.
4. Ohio employees working out of state are covered by Ohio workers' compensation coverage. Employees from outside of Ohio may "opt out" of the system in Ohio by executing a knowing waiver of coverage (Form C-112).

**D. How it Works – Essentially Creates an Insurance System for Employers and Employees.**

1. Ohio law requires all employers with one or more employees working in Ohio to carry workers' compensation coverage. Employers domiciled outside of Ohio who maintain employees who work, in whole or in part, in Ohio may have their employees "opt out" if coverage exists in another state.
2. Independent contractors and subcontractors must also obtain coverage for their employees.
3. Issue of whether person is an employee or independent contractor is governed by "right to control the manner and means" of performing work. *Pusey v. Bator*, 94 Ohio St.3d 275, 278-79, 2002-Ohio-795.
4. Exceptions to the requirement that workers' compensation coverage must be obtained include sole proprietors, ordained ministers or religious organizations, family farm corporate officers, and individuals incorporated as a corporation. These entities are encouraged to apply for coverage, or for supplemental coverage.
5. Premium paid by employer – Benefits Paid by BWC

- a. Private employers pay a premium based on the July 1 to June 30 rating period. The system is organized so that employers pay the entire cost of coverage.
  - b. Employers report payroll to BWC twice a year – including job classification and loss history. Premiums are calculated using this data. Employers with substantial loss histories can also be assessed a “penalty” rating, resulting in larger premiums.
  - c. Employers are permitted, and in some cases strongly encouraged, to join “group rating programs” to reduce costs and increase efficiency.
  - d. A failure to pay premiums will result in lapsed coverage. The BWC will still pay benefits, but these benefits will be charged against the employer on a “dollar-for-dollar” basis. “Non-complying” employers are also subject to additional penalties, interest, and will be unable to take advantage of statutory immunity from suit.
4. Self-Insurance – The system also provides that larger entities may “opt out” of the state fund, and establish a “self-insured” program in accordance with strict guidelines established by the BWC. To even consider establishing a self-insured program, an employer must be able to demonstrate the following:
- a. Minimum 500 employees
  - b. At least two years claims experience verifiable by the BWC.
  - c. The candidate must be able to demonstrate an ability to manage claims, internally or through a third-party administrator.
  - d. The candidate must also maintain a payroll account with a financial institution in Ohio, and demonstrate “strong financial stability.”
  - e. Self-insured claims are managed by the BWC in an identical manner, but employer retains control. Audits and penalties for failure to maintain “minimum standards” are written into legislation.
5. Contrast with Tort Claims.
- a. Philosophy is different – “right a wrong” v. “social protection.”
  - b. Only work-related physical injuries which produce disability and/or diminish earning capacity are allowed – no purely psychological

injuries that do not arise from a physical injury. (*See, McCrone v. Bank One*, 107 Ohio St.3d 272, 2005-Ohio-6505).

- c. No punitive damages.
- d. No compensation for “pain and suffering.”
- e. No “wrongful death” or “loss of consortium” claims, but minimal death benefits are available to surviving spouse and dependents.

## **E. Administrative Proceedings - Two Parts**

1. Bureau of Workers’ Compensation – manages claims.
  - a. Claims are filed with the BWC by the employer, employee, or medical provider using a standard form (FROI-1). Employer is then given an opportunity to accept (“certify”) or refuse to certify claim.
  - b. If claim is certified, an “allowed condition or conditions” are established, medical bills are paid, and compensation is considered by motion. Treatment going forward is normally considered on a piecemeal basis. The vast majority of claims proceed in this fashion.
  - c. If claim is not certified by the employer, if sufficient medical evidence is not submitted, or if the employer fails to act, claim is referred for hearing.
  - d. Managed Care Organization (MCO) – selected by employer to “medically manage” claims.
  - e. “Safety and Hygiene” Division – a division of BWC dedicated to improving safety on the job.
2. Industrial Commission of Ohio – Adjudicator of disputed claims or issues.
  - a. Claims are referred to a local Industrial Commission of Ohio (ICO) office for hearing, normally based on where claimant resides or where injury occurred.
  - b. District Hearing Officer (DHO) – First level of hearing process. Testimony is given, medical records are submitted. Evidentiary rules are normally relaxed, and governed by ICO regulations. Decisions (Record of Proceedings) are issued within 5 days. Lawyers are often

present, but are not required. (See *Cleveland Bar Assn. V. Comp Mgmt.*, 104 Ohio St.3d 168, 2004-Ohio-6506).

- c. Staff Hearing Officer (SHO) – Second level, accessed by appeal from either party within 14 days of receipt of Record of Proceedings. SHO proceedings are similar, but more of a focus on disputed issues only.
  - d. Full Commission Review – Jurisdiction must be granted by the ICO if either party files an appeal of the SHO order. Acceptance of appeals is very rare, roughly akin to the Supreme Court of Ohio’s acceptance of jurisdiction.
3. Ohio Rev. Code § 4123.512 – Appeal of Right to Court of Common Pleas Issues.
- a. “Right to Participate” – Appealable issues only involve “allowance” of claim or additional conditions. “Extent of disability” issues, such as amount of benefits or payment for medical bills, must be pursued through writ of *mandamus* action.
  - b. No Damages – Only issue considered by jury is whether claimant is “entitled to participate” for requested condition.
  - c. Cases are administrative appeals by statute, and therefore are on “accelerated docket” in Common Pleas Court.

## II. GLOSSARY OF TERMS

### A. The Injury

1. “In the Course of and Arising from Employment” – Consists of two separate, but related, concepts.
  - a. “In the course of” – Essentially refers to whether the injury occurred while the injured worker was working.
  - b. “Arising from” – that the injury occurred as a result of some activity which is peculiar to a given job. Injuries which occur at work, but have no relationship to activities of the job, are not compensable.
  - c. “Coming and Going” Rule – *Ruckman v. Libby Drilling*, 81 Ohio St.3d 117 (1998). “Fixed site” employees are not eligible for benefits for accidents which occur while coming to or leaving the

workplace. Employees injured while traveling and who are not scheduled to work at a “fixed site,” are injured “in the course of” employment.

- d. “Allowed condition”: A condition recognized as a direct result of an industrial injury or occupational disease. Claimant can always seek to have additional conditions added to a claim, either through motion or by agreement. “Flow through” conditions are those that arise due to the alleged injury.
2. “Injury” - The injury must be a medical condition affecting a specific body part.
    - a. “Psychological Injuries” - are allowable and permitted so long as they arise from a claim with a physical injury.
    - b. *See McCrone, supra.*
  3. “Occupational Disease” – A disease contracted in the course of employment.
  4. “Medical Only” Claim – A claim filed when an employee loses 7 or fewer calendar days from his or her job due to an industrial injury or occupational disease.
  5. “Lost Time” Claim – A claim filed when an employee loses 8 or more calendar days from his or her job will normally result in reserve being set by the BWC, which increases cost of claim.

## **B. Medical Benefits and Compensation**

1. “Medical Benefits” – Fees paid for medical services arising from an allowed work-related injury or occupational disease.
  - a. Must be directly related to incident.
  - b. No dollar limit – but must be approved by MCO and/or the employer.
  - c. “Usual, customary and reasonable fees for geographical area” – Many physicians will not operate or provide more expensive treatments without prior approval.

- d. “Rehabilitation Services” – Services that include a variety of vocational services to help the injured worker regain the capacity to work.
2. “Temporary Total Disability” – Roughly equivalent to “lost time” from work. Typically first form of compensation sought by a worker who is seriously injured. Only available where injury temporarily prevents an employee from returning to his or her former position, and “light duty” is not offered.
    - a. Employee is not eligible until she/he misses eight (8) or more consecutive days of work.
    - b. Must be requested by physician of record. Standard form is used in most cases (C-84).
    - c. First 12 Weeks – Payable at 72% of full weekly wage (FWW), subject to state maximum.
    - d. After 12 Weeks – 66.67% of average weekly wage (AWW) subject to state maximum.
    - e. Not subject to attorneys fee by statute – but employee cannot be employed in any capacity during period of temporary total disability.
    - f. If period is granted, but subsequently overturned after it is paid, an overpayment is declared and amounts are recouped from future awards, if any.
  3. Permanent Partial Disability – Roughly equivalent to “pain and suffering” component of personal injury actions. It attempts to compensate employees for ongoing “impairment.” Also encompasses “scheduled losses” for loss of a body part (i.e., a lost finger).
    - a. Claimant may not seek until 40 weeks after injury or last payment of temporary total disability compensation, if any.
  4. Permanent Total Disability – Compensation provided when the ICO declares an employee permanently and totally disabled, or incapable of any “sustained remunerative employment,” involves a significant amount of evaluation. Extremely difficult to achieve in this day and age.
- C. “Wage Loss” – Available if New Position Due to Injury Pays Loss From Former Position, or Cannot Find Work Within Restrictions.**

1. Payable at 66 2/3 percent of difference between present earnings and earnings at the time of injury.
- D. “VSSR” – “Violation of Specific Safety Requirement” – Can Result in an Injured Worker Receiving an Additional Award, Ranging From 15% to 50% of Total Compensation Paid Over and Above Normal Workers’ Compensation Benefits Where Employee Can Demonstrate That a Safety Requirement Listed in the Ohio Administrative Code (OAC) Has Been Violated. This is the Workers’ Compensation Equivalent of OSHA.**
1. Administered by BWC Division of Safety and Hygiene.
  2. Additional award is seen as “penalty” to employer.
  3. Often accompanies an intentional tort claim.
- E. Fraud Protection – BWC Maintains a Fraudulent Unit Which Investigates Claims of Fraud, From Injured Workers Going Back to Work While Receiving Benefits, Doctors Billing for Services They Do Not Provide, or Employers’ Under-Reporting Payroll.**

### **III. PROCEDURAL ISSUES**

- A. Statute of Limitations – 2 Years After the Date of Injury or Death.**
1. Can be satisfied if employer acknowledges, in writing or by action, that claimant was injured in the course of and arising from employment.
  2. If Self-Insured, payment of medical bills by employer may result in claim being allowed for diagnosed conditions. (“Buying” the conditions.) Care must be taken in what bills are being paid.
- B. Subrogation – Process by Which the BWC Collects Medical and Compensation Costs Paid on Behalf of Injured Workers When a Third Party Causes the Workers’ Compensation Injury. For Subrogation to Occur, the Injured Worker Must Collect a Judgment or Settlement From a Third Party.**
1. April 9, 2003 – Effective date of Ohio Rev. Code § 4123.93 and § 4123.931. Only applies to injuries arising after that date. Previous versions of statute were deemed to be unconstitutional for failing to treat settlements and verdicts the same way.

2. Statute gives right of subrogation to BWC, self-insured employer or employer who has agreed to direct payment for medical services, pursuant to Ohio Rev. Code § 4123.44(L).
3. Referrals to subrogation section may be made by claimant, employer, third party, MCO, attorneys, or an insurance company.
4. Formula is in place to calculate subrogation interest, so that settlements are treated in the same way as jury verdicts.
5. Subrogation amounts are subject to negotiation.

**C. Time Frames for Self- Insured Employers – Time Frames for Responding to Filing and Providing Information are set by the BWC. "Minimal Levels of Performance" are set Forth in the Ohio Administrative Code Section, Ohio Admin. Code 4123:19-03. These are the Minimum Time Frames for Actions in the Administration of Claims. Failure to Comply Will Result in an S-I Complaint, and May Jeopardize Status.**

1. The employer shall promptly pay the fees of outside medical specialists to whom the Commission or Bureau shall refer claimants for examination or where the Commission or Bureau refers the claim file for review and opinion by such specialist except as provided by law in cases where the claim was subsequently disallowed.
2. Every employer shall keep a record of all injuries and occupational diseases resulting in more than seven days of total disability or death as well as all contested or denied claims and shall report them to the Bureau, and to the employee or the claimant's surviving dependents in accordance with Ohio Admin. Code 4123:3-03.
3. The employer shall provide to the claimant and upon request, shall file with the Bureau or the Commission, medical reports relating thereto and received by it from the treating physician and physicians who have seen the claimant in consultation for the allowed injury or occupational disease, or any injury or occupational disease for which a claim has been filed. The claimant shall provide to the employer and, upon request, shall file with the Bureau or the Commission, medical reports relating thereto and received from the treating physician and physicians who have seen the claimant in consultation for the allowed injury or occupational disease or any injury or occupational disease for which a claim has been filed. The claimant shall honor the employer's request for appropriate written authorization to obtain medical reports to the extent that such reports pertain to the claim.

4. Within thirty days after receipt of a hospital, medical, nursing or medication bill duly incurred by the claimant, the employer shall either pay such bill, or if the employer contests any of such matters, shall notify the provider, the employee, and, only upon request, the Bureau or Commission in writing. Such written notice shall specifically state the reason for nonpayment. The employer's notification to the employee shall indicate that the employee has the right to request a hearing before the Industrial Commission. If the matter is heard by the Industrial Commission, the employer shall pay compensation and benefits due and payable under an order as provided by Ohio Rev. Code § 4123.511. If the self-insuring employer allows a claim for benefits or compensation without a hearing, the employer shall pay such benefits or compensation no later than twenty-one days from acquiring knowledge of the claim or the claimant's filing of the C-84 form, whichever is later. The employer shall approve a written request for a change of physicians within seven days of receipt of such request that includes the name of the physician and proposed treatment. The employer shall approve or deny a written request for treatment within ten days of the receipt of the request. If the employer fails to respond to the request, the authorization for treatment shall be deemed granted and payment shall be made within thirty days of receipt of the bill.
5. The employer shall make its records and facilities available to the employees of the Bureau at all reasonable times during regular business hours. A public employer shall make the reports required by Ohio Rev. Code § 4123.353 available for inspection by the administrator of workers' compensation and any other person at all reasonable times during regular business hours.
6. The employer shall pay all compensation as required by the workers' compensation laws of the state of Ohio. By becoming self-insuring, the employer agrees to abide by the rules and regulations of the Bureau and Commission and further agrees to pay compensation and benefits subject to the provisions of these rules. The self-insuring employer shall proceed to make payment of compensation or medical benefits without any previous order from the Bureau or Commission and shall start such payments as required under the Workers' Compensation Act, unless it contests the claim.
7. The employer may notify the medical section and the claimant at least sixty days prior to the completion of the payment of two hundred weeks of compensation for temporary total disability with the request that the claimant be scheduled for examination by the medical section. Payment of temporary total disability compensation after two hundred weeks shall continue uninterrupted until further order of the Commission up to the maximum required by law, unless the claimant has returned to work, or the treating physician has made a written statement that the claimant is capable of

returning to his former position of employment or has reached maximum medical improvement or that the disability has become permanent, or, after hearing, an order is issued approving the termination of temporary total disability compensation.

8. Upon written request by the claimant or claimant's representative, the employer shall make available for review all the employer's records pertaining to the claim. Such review is to be made at a reasonable time (not to exceed seventy-two hours) and place. The claimant, upon written request, shall provide the employer or its representative with an appropriate written authorization to obtain medical reports and records pertaining to the claim.

## **VI. CURRENT ISSUES AND TRENDS**

### **A. Termination of Temporary Total Disability – Essentially, There are Three Ways to Accomplish this:**

1. Offer of “light duty” employment, which is either accepted by the claimant (and thus returns to work) or rejected, constituting a resignation or “abandonment” of employment. Very strict requirements concerning content of offer.
2. Determination by treating physician, or by ICO after a hearing upon a motion filed on behalf of the BWC or employer, that condition has reached “maximum medical improvement” for allowed condition. Not cured, only that treatment has reached a “plateau.”
3. Termination for non-injury related grounds.
4. *Coolidge v. Riverdale Local School District*, 100 Ohio St. 3d 141, 2203-Ohio-5357.

### **B. Drug Testing – Under Certain Circumstances an Employer May Seek Disallowance of a Worker’s Compensation Claim, Based Upon an Employee Testing Positive for Alcohol or One of Nine Specified Controlled Substances.**

1. “Rebuttable Presumption” – Burden of proof shifts to the employee to prove alcohol or drugs were not the proximate cause of a work-place injury.
2. Can also apply to a refusal to take a properly noticed and authorized test.

**C. Psychological Injuries – Not Recognized by the BWC as an “Injury” for Purposes of Workers’ Compensation.**

1. *McCrone v. Bank One Corporation*, 107 Ohio St.3d 272, 2005-Ohio-6505 – Held that purely psychological or psychiatric conditions that do not arise from a compensable physical injury or disease are excluded from the definition of injury under Ohio Rev. Code § 4123.01(C)(1), and therefore are excluded from workers compensation coverage. The Court also found that this distinction does not violate the Equal Protection Clauses of the U.S. and Ohio Constitutions. The Court found a "rational basis" in the interest of the Bureau in protecting the limited resources of the Workers Compensation Fund, as well as the difficulty of proving the existence and cause of mental injuries. The Court also referred to a previous decision, *Bailey v. Republic Engineered Steels, Inc.*, 91 Ohio St.3d 38 (2001), as an "aberration," [co-worker who suffered psychiatric injuries arising from witnessing death of co-worker] but declined to overrule it. Finally, the Court referred to its previous decision in *Bunger v. Lawson Co.*, 82 Ohio St.3d 463, (1998), in stating that employees who suffer purely psychological injuries may pursue negligence claims against their employers for these injuries, as the statutory grant of immunity does not apply.

**D. Representation at Hearings - *Cleveland Bar Assoc. v. Comp. Mgmt., Inc.*, 104 Ohio St.3d 168, 2004-Ohio-6506.**